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Published under the auspices of the

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A HISTORY
OF
FRENCH PRIVATE LAW

BY
Baptiste
JEAN BRISSAUD

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OF TOULOUSE

TRANSLATED FROM THE SECOND FRENCH EDITION

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I might instance in other professions the obligation men lie under of applying themselves to certain parts of History; and I can hardly forbear doing it in that of the Law, — in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more (I speak of ninety-nine in a hundred at least), to use some of Tully's words, "nisi leguleius quidem cautus, et acutus praeco actionum, cantor formularum, auceps syllabarum." But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground (so my Lord Bacon calls it) of Science, instead of grovelling all their lives below, in a mean but gainful application of all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions. And whenever it happens, one of the vantage grounds to which men must climb, is Metaphysical, and the other, Historical Knowledge. HENRY ST. JOHN, Viscount BOLINGBROKE, *Letters on the Study of History* (1739).

Whoever brings a fruitful idea to any branch of knowledge, or rends the veil that seems to sever one portion from another, his name is written in the Book among the builders of the Temple. For an English lawyer it is hardly too much to say that the methods which Oxford invited Sir Henry Maine to demonstrate, in this chair of Historical and Comparative Jurisprudence, have revolutionised our legal history and largely transformed our current text-books. — Sir FREDERICK POLLOCK, Bart., *The History of Comparative Jurisprudence* (Farewell Lecture at the University of Oxford, 1903).

No piece of History is true when set apart to itself, divorced and isolated. It is part of an intricately pieced whole, and must needs be put in its place in the netted scheme of events, to receive its true color and estimation. We are all partners in a common undertaking, — the illumination of the thoughts and actions of men as associated in society, the life of the human spirit in this familiar theatre of coöperative effort in which we play, so changed from age to age, and yet so much the same throughout the hurrying centuries. The day for synthesis has come. No one of us can safely go forward without it. — WOODROW WILSON, *The Variety and Unity of History* (Address at the World's Congress of Arts and Science, St. Louis, 1904).

CONTINENTAL LEGAL HISTORY SERIES

GENERAL INTRODUCTION TO THE SERIES

"ALL history," said the lamented master Maitland, in a memorable epigram, "is but a seamless web; and he who endeavors to tell but a piece of it must feel that his first sentence tears the fabric."

This seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe. Our main interest must naturally center on deciphering the pattern which lies directly before us, — that of the Anglo-American law. But in tracing the warp and woof of its structure we are brought inevitably into a larger field of vision. The story of Western Continental Law is made up, in the last analysis, of two great movements, racial and intellectual. One is the Germanic migrations, planting a solid growth of Germanic custom everywhere, from Danzig to Sicily, from London to Vienna. The other is the posthumous power of Roman law, forever resisting, struggling, and coalescing with the other. A thousand detailed combinations, of varied types, are developed, and a dozen distinct systems now survive in independence. But the result is that no one of them can be fully understood without surveying and tracing the whole.

Even insular England cannot escape from the web. For, in the first place, all its racial threads — Saxons, Danes, Normans — were but extensions of the same Germanic warp and woof that was making the law in France, Germany, Scandinavia, Netherlands, Austria, Switzerland, Northern Italy, and Spain. And, in the next place, its legal culture was never without some of the same intellectual influence of Roman law which was so thoroughly overspreading the Continental peoples. There is thus, on the one hand, scarcely a doctrine or rule in our own system which cannot be definitely and profitably traced back, in comparison, till we come to the point of divergence, where we once shared it in common with them. And, on the other hand, there is, during all the intervening centuries, a more or less constant juristic sociability (if it may be so called) between Anglo-American and Con-

tinental Law; and its reciprocal influences make the story one and inseparable. In short, there is a tangled common ancestry, racial or intellectual, for the law of all Western Europe and ourselves.

For the sake of legal science, this story should now become a familiar one to all who are studious to know the history of our own law. The time is ripe. During the last thirty years European scholars have placed the history of their law on the footing of modern critical and philosophical research. And to-day, among ourselves, we find a marked widening of view and a vigorous interest in the comparison of other peoples' legal institutions. To the satisfying of that interest in the present field, the only obstacle is the lack of adequate materials in the English language.

That the spirit of the times encourages and demands the study of Continental Legal History and all useful aids to it was pointed out in a memorial presented at the annual meeting of the Association of American Law Schools in August, 1909:

"The recent spread of interest in Comparative Law in general is notable. The Comparative Law Bureau of the American Bar Association; the Pan-American Scientific Congress; the American Institute of Criminal Law and Criminology; the Civic Federation Conference on Uniform Legislation; the International Congress of History; the libraries' accessions in foreign law, — the work of these and other movements touches at various points the bodies of Continental law. Such activities serve to remind us constantly that we have in English no histories of Continental law. To pay any attention at all to Continental law means that its history must be more or less considered. Each of these countries has its own legal system and its own legal history. Yet the law of the Continent was never so foreign to English as the English law was foreign to Continental jurisprudence. It is merely maintaining the best traditions of our own legal literature if we plead for a continued study of Continental legal history.

"We believe that a better acquaintance with the results of modern scholarship in that field will bring out new points of contact and throw new light upon the development of our own law. Moreover, the present-day movements for codification, and for the reconstruction of many departments of the law, make it highly desirable that our profession should be well informed as to the history of the nineteenth century on the Continent in its great measures of law reform and codification.

"For these reasons we believe that the thoughtful American lawyers and students should have at their disposal translations of some of the best works in Continental legal history."

And the following resolution was then adopted unanimously by the Association:

"That a committee of five be appointed, on Translations of Continental Legal History, with authority to arrange for the translation and publication of suitable works."

The Editorial Committee, then appointed, spent two years in studying the field, making selections, and arranging for translations. It resolved to treat the undertaking as a whole; and to co-ordinate the series as to (1) periods, (2) countries, and (3) topics, so as to give the most adequate survey within the space-limits available.

(1) As to *periods*, the Committee resolved to include modern times, as well as early and mediæval periods; for in usefulness and importance they were not less imperative in their claim upon our attention. Each volume, then, was not to be merely a valuable torso, lacking important epochs of development; but was to exhibit the history from early to modern times.

(2) As to *countries*, the Committee fixed upon France, Germany, and Italy as the central fields, leaving the history in other countries to be touched so far as might be incidentally possible. Spain would have been included as a fourth; but no suitable book was in existence; the unanimous opinion of competent scholars is that a suitable history of Spanish law has not yet been written.

(3) As to *topics*, the Committee accepted the usual Continental divisions of Civil (or Private), Commercial, Criminal, Procedural, and Public Law, and endeavored to include all five. But to represent these five fields under each principal country would not only exceed the inevitable space-limits, but would also duplicate much common ground. Hence, the grouping of the individual volumes was arranged partly by topics and partly by countries, as follows:

Commercial Law, Criminal Law, Civil Procedure, and Criminal Procedure, were allotted each a volume; in this volume the basis was to be the general European history of early and mediæval times, with special reference to one chief country (France or Germany) for the later periods, and with an excursus on another chief country. Then the Civil (or Private) Law of France and of Germany was given a volume each. To Italy was then given a volume covering all five parts of the field. For Public Law (the subject least related in history to our own), a volume was given to France, where the common starting point with England, and the later divergences, have unusual importance for the history of our courts and legal methods. Finally, two volumes were allotted to general surveys indispensable for viewing the connec-

tion of parts. Of these, an introductory volume deals with Sources, Literature, and General Movements, — in short, the external history of the law, as the Continentals call it (corresponding to the aspects covered by Book I of Sir F. Pollock and Professor F. W. Maitland's "History of the English Law before Edward I"); and a final volume analyzes the specific features, in the evolution of doctrine, common to all the modern systems.

Needless to say, a Series thus co-ordinated, and precisely suited for our own needs, was not easy to construct out of materials written by Continental scholars for Continental needs. The Committee hopes that due allowance will be made for the difficulties here encountered. But it is convinced that the ideal of a co-ordinated Series, which should collate and fairly cover the various fields as a connected whole, is a correct one; and the endeavor to achieve it will sufficiently explain the choice of the particular materials that have been used.

It remains to acknowledge the Committee's indebtedness to all those who have made this Series possible.

To numerous scholarly advisers in many European universities the Committee is indebted for valuable suggestions towards choice of the works to be translated. Fortified by this advice, the Committee is confident that the authors of these volumes represent the highest scholarship, the latest research, and the widest repute, among European legal historians. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

To the authors the Committee is grateful for their willing co-operation in allowing this use of their works. Without exception, their consent has been cheerfully accorded in the interest of legal science.

To the publishers the Committee expresses its appreciation for the cordial interest shown in a class of literature so important to the higher interests of the profession.

To the translators, the Committee acknowledges a particular gratitude. The accomplishments, legal and linguistic, needed for a task of this sort are indeed exacting; and suitable translators are here no less needful and no more numerous than suitable authors. The Committee, on behalf of our profession, acknowl-

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edges to them a special debt for their cordial services on behalf of legal science, and commends them to the readers of these volumes with the reminder that without their labors this Series would have been a fruitless dream.

So the Committee, satisfied with the privilege of having introduced these authors and their translators to the public, retires from the scene, bespeaking for the Series the interest of lawyers and historians alike.

THE EDITORIAL COMMITTEE.

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EDITORIAL PREFATORY NOTE

By JOHN H. WIGMORE¹

A NARROW ridge of upland in southern Switzerland forces apart two streamlets, which afterwards wander away for a thousand miles and emerge as the Rhine and the Danube amidst different races on opposite sides of Europe. But no story of an intellectual separation, entrained by physical facts, is so interesting as that which was effected by the forty-mile Channel between France and England. Eight centuries ago it was possible to expect that there might be a political union and a common growth; the Franks, the Normans, and the Saxons shared a common stock of Germanic law; France did not exist; Paris was not yet a real capital; the Loire was still a symbolic boundary between two types of civilization more different than Saxons and Franks; and northern France was capable of a congenial union with the Norman kingdom. Five centuries ago this had ceased forever to be possible; the persistent barrier of the Channel had done its work. Northern France had knit rather with Southern France; and French law was never to be the same as English law.

Yet at the outset of the intervening period the family traits possessed in common were striking. They attract us with the interest which we should have for brothers of the same family who are forced apart by circumstances and grow into totally different careers. Norman barons and clerks filled the judicial benches in England. French was the language of the forum. Numerous surviving legal terms — "mortgage," "nuisance," "attorney," "tort," "plea," "demur," and the rest — show us how thoroughly French lawyers influenced English law.² In England, the Norman conquerors, few in number, did not and could not wholly displace the content of the institutions which they found; but at least they supplied form and method, and much more. On the French side, the Normans never acquired

¹ Professor of Law in Northwestern University, and chairman of the Editorial Committee for this Series.

² "It would hardly be too much to say that at the present day almost all our words that have a definite legal import are in a certain sense French words." *Pollock and Mailland's "History,"* I, 58.

legislative domination; but the legal ideas which they knew and brought over were shared in the main features with northern France. The early records of legal custom — such as the “*Etablissements*” attributed to Louis IX, Beaumanoir’s “*Coutumes de Beauvoisis*,” and Bouteiller’s “*Somme Rurale*” — are still good sources for throwing light on English law. Houard made a collection entitled “*Anciennes lois des François, conservées dans les coutumes Angloises*,” which contains the text of Littleton, composed in the 1400s.

Political union of North and South France led after several centuries to formal legal unity, under the Code of Napoleon. Yet even here, in spite of the overspreading influence of Roman law and its jurists, the ancient influence of the North persisted; and Napoleon’s Code has been called a Germanic rather than a Roman document. Law changes slowly, and only by organic growth, not by instant decrees of a legislator, like erasures from an inscribed slate. Modern French law never had a break in its growth. Everything stimulates us to follow back and compare its history with our own — both originating from our common ancestors, both administered once in a common language, and both developing slowly apart in the hundreds of principles which govern mankind’s common stock of transactions. It matters not what part of the law we take, — wills, estates, torts, pleading, courts, jury, criminal practice, mortgages, or the rest, — our profession can never fail to be fascinated with watching the fate of our own familiar terms and ideas, amidst unfamiliar surroundings, in their steady growth further and further away from the common primal stages down into their alien modern forms.

For this purpose no volume could be better suited than that of Professor Brissaud. French scholarship, to be sure, is ample in its array of works marked by the highest standards of modern research. It is indeed to be regretted that in this, as in other fields, the repute of German studies in the past generation has caused many of us to forget the at least equal merits of French scholarship; not less thorough in standards nor less broad in scope, it is generally more compact in method and more clear in style. In the field of legal history the names of Beaune, Esmein, Caillemer, Flach, Fournier, Fustel, Glasson, Huvelin, Tardif, Viollet, and others, are eminent in the present generation. But the work of Brissaud is peculiarly suited for our own profit. For,

while writing always a history of French law, the author's eye is kept upon the English sources at the common starting-points. Copious citations of them serve constantly to remind us of the earlier propinquities, and to assist us in our own comparisons of the later divergences.

Looking at random, we find (for example) in Chapter II, in his account of the distinction between immovables and movables, Note 3 expounding the English distinction between real and personal property; Note 4 telling us that "Pollock and Maitland rightly point out that the formula '*vis mobillium possessio*' has been mistakenly exaggerated"; Note 10 citing Blackstone; Note 11 comparing "chattels" and the French "*cheptel*," and citing Glanville to elucidate our phrase "goods and chattels"; Note 18, citing Blackstone, to show that English "incorporeal hereditaments" are French "incorporeal immovables"; Note 21, citing Littleton, for the analogy of "chattels real." This feature is continued at every fruitful occasion. And it is unique among treatises on general legal history, — not alone French, but also of other authorship. Its value for the student of Anglo-American law cannot be overstated.

In breadth of learning, Brissaud is typical of modern French scholarship, in the catholic and cosmopolitan use of every source of authority wherever found. There was a day when a French scholar would not deign to cite a German one, as there were (and occasionally are still) German scholars who ignore French learning. But that day has passed. In Brissaud's field especially is this fortunate. Early Northern French law is a Germanic stock; and its study requires a broad comparative survey. Brissaud forages freely among the Dutch, German, Swiss, Italian, and Spanish records to complete his reconstruction of the primitive institutions; and his citations of foreign savants include Brunner, Heusler, Kohler, Grimm, Pertile, Salvioi, and a varied list of others. The large canvas thus used by Brissaud enables him to depict constantly the broad background of European legal life, in which France and England are seen to be the important foreground but never the whole of the picture. In this respect, we are reminded of Maitland's largeness of view. It may be said that no master-work of modern times, except Maitland's, contains so emphatically as Brissaud's this spirit of cosmopolitanism in its treatment of the history of a single country's law.

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Another consequence of this wonderful breadth of research is that it enables him to see and to show us the inter-relations of the individual principles. Everything is explained as a growth. Nothing appears as a merely arbitrary fact of law. It is the very antipodes of the formal lifeless treatment of the legal historians of fifty years ago. In the philosophic study of causes and conditions, Brissaud exhibits the best type of the modern legal historian. The origin and operation, for example, of the great distinction between hereditary and acquired immovables is explained by considering its relation to the family life of the times; the curious changes in the law for a purchaser's title to goods sold by a thief are examined in the light of feudal custom, Roman theory, and mercantile progress; and so on through all the details of principle. Law is expounded, not mechanically, but (in Mr. Justice Holmes' phrase) as "a felt necessity of the times."

In the arrangement of his materials, the author has vindicated, we believe, the essential correctness of the topical plan for this purpose. The historian of a European country's law must choose between two plans: either to divide it into three or four periods, and then within each period to treat the several topics contemporarily, resuming them all again within each successive period; or, to divide it into topics, and to trace each topic connectedly throughout the several periods from early to modern times. The great Brunner chose the former plan, for his history of Germanic Law; Brissaud chose the latter plan. Each plan inevitably sacrifices something which the other gains. But it is possible to weigh the net balance of advantages; and we do not hesitate to assert that, for the clear understanding of legal institutions, Brissaud has demonstrated the superiority — at least, in the hands of a master — of the method of exposition selected by him.

Finally, the author's extraordinary historical sense is seen in his preliminary excursus upon primitive institutions. No history begins; it is always a continuation. And he felt that to plunge abruptly into the detailed story at no matter what historical period was to lose a full understanding of the growth of the law from earlier beginnings; hence his brief but masterly account of pre-historic primitive institutions, — an account which enables the reader at once to perceive tendencies and directions, and to enter into the true historical spirit.

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An eminent German legal historian, Professor Rudolf Hübner, has thus recorded his judgment on Brissaud's great treatise:¹

"It is a work which amazes us with its richness of material. It testifies to an iron-hearted industry and an enviable breadth of historical knowledge. . . . Its scope is by no means confined to strictly French law; the mediæval Roman law, the Germanic law, the English law, receive also consideration; thus throwing sidelights on the development of the French legal ideas, from Italy, England and Germany Brissaud possessed a virtually inexhaustible familiarity with this enormous mass of literature, — an accomplishment far surpassing in this respect anything found in German works on legal history."

And may we not venture to believe that the lamented Maitland, had he been spared to us, would now have welcomed Brissaud's masterpiece, put into English, as a useful contribution to the spread of that knowledge so earnestly commended by him? For he says:²

"One of our hopes has been that we might take some part in the work of bringing the English law of the thirteenth century into line with the French and German law of that age. . . . We have often had before our minds the question why it is that systems which in the thirteenth century were so near of kin had such different fates before them. . . . Englishmen should abandon their traditional belief that from all time the Continental nations have been ruled by the 'civil law.' They should learn . . . how exceedingly like our common law once was to a French coutume. This will give them an intenser interest in their own history. What is more, in the works of French and German mediævalists they will nowadays find many an invaluable hint for the solution of specifically English problems."¹

Henri Brissaud died on August 13, 1904, at the age of fifty years, just as the second edition of the first volume of his great work was coming from the press. The first edition had appeared in parts between 1898 and 1900; volume I covered Public Law (and will appear later in this Series); volume II covered Private Law. The second edition was published in 1904-08. Brissaud had been professor of law at Bern and at Montpellier, and at the time of his death occupied the chair of general history of law at Toulouse.

¹ "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte," 1906, XXVII, 337 (Germ. Abth.). Professor Hübner is the author of the "History of Germanic Private Law" in the present Series.

² Introduction to Sir F. Pollock and F. W. Maitland's "History of English Law before the Time of Edward I," I, p. xxxvi. It is interesting to compare the same line of thought in Brissaud's own review of the Pollock and Maitland "History" (Nouv. Revue hist. de dr. fr. et étr., XXI, 828).

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His scientific work included (besides numerous articles and essays) the translation of portions of the monumental work of Mommsen, Marquardt, and Krüger, "Manual of Roman Antiquities," and a memoir on "Claude Joly, a Liberal of the Seventeenth century." But his main task, fortunately achieved before his labors were cut off, was the present *magnum opus*.

Needless to say, the task of translating such a work is an exacting one, and calls for an unusual equipment of skill. The translator, Mr. Rapelje Howell, has had an ideal preparation for this work. A native of New York City, he continued his education in France, at the Lycée Carnot, in Paris, and afterwards sojourned frequently in that country. Entering Trinity College, Cambridge, England, he received there the B.A. degree in 1902. On his return to New York, he spent some years in business and in journalism, and then entered the Law School of Columbia University, from which he received the degree of LL.B. in 1909. While there, he became interested in the history of Norman law, and undertook the translation of the "Très Ancien Coutume." The Committee's call interrupted that task; and for more than a year past he has devoted his time almost exclusively to the present work. The Committee considers itself fortunate in having secured one of Mr. Howell's zeal and accomplishments for the execution of an undertaking so laborious, so difficult, and so useful to legal science.

INTRODUCTION

BY WILLIAM SEARLE HOLDSWORTH¹

THIS work on the history of French Private law is, in the original, a part of a larger whole. The complete work consists of three parts. The first part deals with the sources of French law; the second with the history of public law; and the third with the history of private law. The first two parts treat the subject chronologically. Thus those who have read the whole book have, by the time that they have reached the part dealing with private law, gained a clear idea of the history both of the literature and of the development of French institutions and French law. The third part abandons the chronological arrangement, and treats of the development of the leading doctrines of private law under a few comprehensive headings. In our opinion this is the only method by which a clear account of the evolution of the doctrines of private law can be given; and we think that this opinion will be shared by all who read this translation.

Those who study both this Volume, and Volumes I and IX of this Series, which contains the translation of the part of M. Brisaud's book dealing with sources and public law, will possess an entirely adequate account of the development of French law. The Editors have however realized that there may be some students who will wish to begin their study of the history of French law in this volume, and that they will need something in the way of a general introduction to the subject. There is therefore prefixed to this volume the introductory chapter on Primitive Law, which, in the original, is prefixed to the part which deals with public law. It seems to us that the position of this introduction comes more naturally in the place thus allotted to it in the translation than in the place allotted to it in the original.

"History," as Maitland said, "involves comparison." — The writer who would tell the tale of the legal development of any of the States of Western Europe must be able to compare and to

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contrast. But this faculty is especially necessary to the historian of French law. Many elements and many influences have gone to the making of the French nation and of French law; and there is a great equality in their relative importance. In order to give a true account and a correct estimate of these various elements and influences — Celtic, Roman, and Germanic — the historian of French law must often look abroad and observe legal systems in which the element or influence he is describing can be observed in greater isolation. It is because M. Brissaud can illustrate and explain many of the various rules which prevailed in different parts of France by apt comparisons and contrasts drawn from English, German, Italian, and Spanish law, that his history gives us an account of the development of French law at once concise and exhaustive, detailed and illuminating.

We could have no better illustration of the breadth of M. Brissaud's learning than the Introduction to which we have already referred. It deals with the origins of the Family, of Property, and of the State, and it would serve admirably as a general introduction to a history of the law of the States of Western Europe. The origins of many of the institutions, the beliefs, and the laws of these States are illustrated by parallels drawn from the institutions, the beliefs, and the laws of the Hebrews, the Greeks, the Romans, and many savage tribes. All who have any acquaintance with the acute controversies which have been waged, and wild conjectures which have been made, upon many of the topics dealt with in that Introduction will admire both the extent of M. Brissaud's learning, and the sanity of his judgment. And the promise of the Introduction is maintained throughout the book. More especially the English lawyer will admire the manner in which M. Brissaud has used doctrines of English law to illustrate the development of the law of his own country. He can, for instance, describe some of the technical doctrines of the law of real property — the most technical part of English law — with substantial accuracy; and he can thereby give to English lawyers an idea of the place which the sources of some of their peculiar rules of private law hold in relation to the sources of the rules of private law on similar subjects in other parts of Europe.

The English lawyer who reads these pages will naturally find himself comparing the practical results which have followed at different periods from the very different courses which the development of private law has pursued in France and in England; and

it is possible that he will sometimes be led to conclusions which will surprise him. We are accustomed to regard France as a country in which, in the Middle Ages, the independence of the great feudatories led to the formation of what were almost separate States, while we know that in England the days of true feudal independence were over by the reign of Edward I. Then, from the sixteenth century to the Revolution we think of France as the country in which absolute monarchy attained its zenith; and we contrast, with patriotic pride, the continued existence in England of representative institutions, which succeeded in subjecting the power of the king to the law, won for themselves the most authoritative place in the government of the country, and preserved for Europe a model of constitutional rule. Again, when we think of French law, we are apt to think of it as that of a country in which Roman law held a large sway; to infer that this influence of Roman law had something to do with the establishment of absolute monarchy in the sixteenth and seventeenth centuries; and to conclude that the cessation of the direct influence of the Roman law on the common law at the end of the thirteenth century was a wholly unmixed blessing.

But these familiar comparisons are all made from the point of view of public law. When we turn to private law we see the picture from quite another point of view. If we look at feudalism, not from the point of view of public law as a system of government, but from the point of view of private law as a system of land tenure, we see that the influence of feudalism was more far-reaching and more permanent in England than in France. French law knew of land that was owned; but from the time of the Conqueror English law only knows of land that is held. In the French law of to-day the principle of tenure has been eliminated. In England it is still the basis of our land law. The period of the absolute monarchy in France was a period of active legislation upon many subjects of private law. English law in the seventeenth and eighteenth centuries can show nothing to match some of those comprehensive *Ordonnances* which, by reducing to order and system many branches of French law, have made the French nation pioneers in the work of codification. The events of the seventeenth century, which made our public law an example to Europe, cramped the development of our private law. Similarly the results of the cessation of the influence of Roman law, though it may have had beneficial effects on the development of our public

law, has had by no means equally beneficial effects on the development of our private law. The common law became a hard, rigid, and technical system at too early a date. It could give no legal expression to the new ideas and the new activities produced by a changing civilization. These new ideas and activities were obliged to find a space outside its sphere; and, in consequence, English private law long suffered from the inconvenience of consisting of rival and of sometimes contradictory bodies of rules. Even these rivals of the common law did not completely fill the gap. Our family law, for instance, is meagre compared with that of France. Upon such topics as guardianship, adoption, the treatment of prodigals, we have something to learn from the manner in which foreign nations have adapted the *Corpus Juris Civilis* to the needs of the modern state.

It is good that a complacent, and, may we add, an uninformed belief, in the excellencies of our own private law should be shaken; for that is the first step to the acquisition of better information and, sometimes it may be, to the making of practical reforms. At the same time we do not wish to contend that there are not some respects in which our English private law may emerge triumphantly from such a comparison. We have often arrived at the same goal by different roads; and sometimes our road has been the shorter and the results better. Sometimes, it may be, there is little to choose between the methods and the results achieved. Let us take one or two examples.

In the first place we have our Trusts. But of their peculiar service to English law we need say little since the publication of Maitland's "*Collected Papers*" (1911). The readers of some of these papers will learn what these Trusts have done for our public law. As to their influence on our private law we can only say that they are all-pervading. They have given to owners of all kinds of property unique powers and modes of disposing of that property. They permeate our law as to the administration of the assets. They go a long way to fill up those large gaps in our family law which were caused by the summary rejection of Roman rules.

Then, we have evolved for ourselves a unique law of contract founded upon the doctrine of consideration. The road which our private law has travelled to attain this result is very different from the Roman road; but the results, M. Brissaud thinks (§ 377), are not dissimilar. At any rate we may claim for our own doctrine that it is at least as intelligible and quite as convenient as its rival.

Similarly we have worked out for ourselves some detailed rules as to the incidents of particular contracts. Our Sale of Goods Act need not fear the results of a comparison with the title of the Digest De Contrahenda Emptione, or with the modern systems which have been based upon it. Our theory of possession and ownership is far removed from the Roman theory. Whether it is better to maintain that these two allied conceptions have nothing in common, or to give to the possessor the rights of an owner as against all who cannot prove a better title, is a fit subject for philosophers to debate, for it hardly admits of a conclusive solution. On the other hand, no one can doubt that our private law has suffered much in many departments from the arbitrary divorce between possession and seisin, between realty and personalty. Nor again can we doubt that it has also suffered from its ignorance of Roman rules as to mortgage and pledge, and that it has only partially mended matters by the help of the elaborate law of mortgage created by the court of Chancery, and by detailed statutes on the subject of Bills of Sale. We do not mean to imply that the history of the French law of mortgage has been wholly clear and rational. Indeed, there are some passages in the history of this branch of the law which illustrate the truth, which is writ large upon the face of our law of real property, that landowners cannot have their cake in the shape of secret dealings with their land, and eat it in the shape of cheap and simple forms of transfer and of certainty of title.

Both the countries of the written law and the countries of the Customs have been for many centuries drawing upon the wealth of principles to be found in Roman law. They have used them to supplement and adapt old customary rules. They were, therefore, if we may use the expression, far fuller bodies of law than the English common law, which, from the end of the thirteenth century, had drawn its inspiration almost entirely from the cases which arose for decision in its courts. The peculiarities of the constitutional history of England had made its development extraordinarily precocious. But English judges and English lawyers, though learned in the common law, and endowed for the most part with sound common sense, had come to be very ignorant of any system of law except their own. This combination of precocity and ignorance often made its solution of complex problems extremely hasty and extremely arbitrary. In fact, just as a premature codification of a body of customary law which is being

gradually developed by the writings of the jurists or the work of the courts, destroys much of its adaptability to altering facts and needs; so, the premature hardening of the common law, drew sharp, clear lines across complicated facts and hazy collections of customary rules, and thus prevented natural developments which the indefiniteness of the older rules permitted. We can see from the history of French private law that these characteristics have influenced our law both for good and for evil. When we read the complex history of the various "retraits" which were long possible under French law we are inclined to bless the memory of Bracton and those of his companions who argued successfully for freedom of alienation. On the other hand, when we consider the history of the proprietary and contractual capacity of the married woman in our law, we cannot admire the hasty conclusion, at which our common lawyers arrived, that marriage was a gift of all the wife's chattels to her husband, and that, having no property, she could in general make no contract on her own behalf. How complicated the problem was, how numerous the various competing solutions the student will learn from the study of M. Brissaud's fifth chapter — an extraordinarily able account of one of the most complex subjects in legal history.

In truth the detailed account of advantage and disadvantage between the English and the French systems of private law would be long and complicated. We can make no attempt to state it here. But the readers of this Series of translations will have before them the material from which they can make such a statement in respect of the particular branch of the law which they may be studying. It seems to us that the power to do this will be valuable not only to those who are interested in the history of the law, but also to those who are interested in its modern working. No doubt the mediæval history of the law will appeal especially to the historian, and its development during the last century to the practical lawyer. The intermediate stage, from the sixteenth to the eighteenth century, to both alike — to the historian because he will see the results of the mediæval history, to the practical lawyer because he will see the growth of the modern rules.

That this study of comparative legal history will be profitable to the students both of the history and of the modern theory of our law will, we think, be obvious to all who read this book. But we may perhaps be permitted to indicate very briefly the kind of

profit which different classes of students may be expected to derive from it.

Even a slight acquaintance with mediæval history is sufficient to show that the student of the mediæval history of our law will derive great and immediate profit from the study of the mediæval law of another State. Right down to the sixteenth century Western Europe was for many purposes one State. No doubt institutions and legal rules differed, and differed considerably, in detail. But men's legal ideas were cast in a similar mould. The political theories and speculations and the rules of law evolved by the canonists and civilians were, more or less, a part of the intellectual atmosphere of publicists and lawyers in many different countries. The feudal conception of tenure, and the consequences of the feudal bond between lord and man, dominated the law as to the ownership of land; and the political influence of these feudal conceptions was so deep-rooted that, right down to the latter part of the sixteenth century, it was a weapon in the hands of those who wished to assert themselves against the nascent state. Beneath the feudal pyramid we can everywhere see older communities of cultivators of the soil, held together by customary rules which preserve traces of ideas, and survivals of practices belonging to a remote past. Thus the student of our mediæval history will find in M. Brissaud's book resemblances in the origin and in the development of legal rules which will help him to understand much that is obscure in the development of his own law. We would recommend to his notice such subjects as M. Brissaud's account of the history of the remedies for the protection of the possession and ownership of chattels; of the *actio spoli* and its influence on the protection of seisin; of the legal results which might flow from possession for a year and a day; of the primitive forms of liability and their later development; of the institution of dower; of the history of the assignment of choses in action and negotiability.

And these are but a few out of many instances in which the resemblances between the English and the French rules shed light upon each other. The contrasts are no less instructive, because from them we can get a just estimate of the far-reaching results which have sometimes flowed from a course of policy or a piece of legislation. Suppose our common law had been developed by lawyers of the type of Bracton — we can find a good deal to help us to an understanding of the different course which its history

would have taken in the history of the law in the "pays du droit coutumier." Our reversions and remainders would have been substitutions in trust; our estates for life would have been usufructs; our law of inheritance would have lost many of its mediæval traits; our law of contract would have owed much to Roman law; and, in the sixteenth century, our common law would have been far more deeply affected by the Reception. Suppose that Council, and Chancery, and common law courts had not worked together in the sixteenth century to effect an equitable settlement of the position of the copyholder — we may remember that it was the wrongs of a class that once resembled our copyholders which was one of the important causes of the French Revolution.

From the sixteenth century onwards Europe is divided into separate, self-sufficing territorial States. It would be probably true to say that the nations of Europe were more separate from one another in the period from the seventeenth to the first quarter of the nineteenth century, than at any other period in their history. Perhaps during this period it is the contrast between the English and the continental public law, and between the agencies by which the law is developed, which is the most fruitful subject of comparison. But it is a period in which a comparison between the development of the rules of English and French private law is also very instructive. We see rules once similar taking a wholly different form. We see the beginnings of the rules and the technical language of the modern law.

During the last half of the last century physical science has done much to unite the communities which wars of religion and the growth of the sovereign state had separated. Similar problems — social, industrial, and religious — remain to be solved both by the public and by the private law of the principal states of Western Europe. We have only to think of such matter as Corporations and other Group Persons, the limits of the right of Combination, Strikes and Lock-outs, the relations of Church and State, Divorce, Land Transfer, Codification. The solution of such problems as these taxes to the utmost the resources of all legal systems. If the lawyer or the statesman can understand, not merely the technical rules of his own system, but also the technical rules of other systems, he will be able the more easily to emancipate his mind from the texts of his own law, to discover the principles underlying the various legal solutions of these problems, and to weigh their merits. It is only a comparative

INTRODUCTION TO THIS VOLUME

study of legal history which can give this power. Therefore we claim that in these modern days this study is of the first importance to all lawyers and statesmen who wish to criticise intelligently their own legal system, or to reform it wisely. That there should be in the State men thus equipped is the greatest of all safeguards both to the State and to the Law. To the State, because they will know how, by the adjustment of old rules to new needs, to maintain the authority of the law, and to ensure thereby the peaceful and orderly development of the State. As the Year Book truly says, "the Law is the highest inheritance which the king has; for by the Law he and all his subjects are ruled, and if there was no Law, there would be no king and no inheritance." To the Law itself, because a peaceful and orderly development of the State is its very life. Unintelligent criticism and wild reform can in a short time reduce to chaos the labours of generations of jurists. When continuity fails, law as a science ceases to exist.

We hope great things from the comparative study of the history of the legal systems of Western Europe. The cosmopolitan character of French law makes its study an excellent starting point; and M. Brissaud is an ideal guide to its doctrines and its literature. But it is time that the reader ceased the perusal of this hearsay evidence as to the merits of M. Brissaud's book and the advantages to be derived from its study, and began to acquire some more direct evidence upon these matters from the perusal of the book itself. We hope that he will admit that, though hearsay is no evidence, it may sometimes contain a substantial modicum of the truth.

OXFORD, ENGLAND, October 17, 1911.

TRANSLATOR'S REMARKS

IN the translation of a work of this kind there will necessarily be found a number of words having a technical meaning which have no literal English equivalents, as the systems of English and Continental law differ so greatly on many points. Therefore the nearest English word, or a term coined for the purpose, must be used. Examples of such words are: "hypothèque," "nantissement," "retrait," "délit," etc. In the work of finding suitable equivalents for such words the translator has been very greatly assisted by the Chairman of the Editorial Committee and wishes to take this opportunity of acknowledging the indebtedness and expressing his sincere thanks and appreciation.

The question of the notes has been a very difficult one to deal with. In the original French they are not any too clear; rendering them into English cannot do much towards overcoming this. This obscurity consists in a lavish use of abbreviations, not all of which are explained by the author in the Table of Abbreviations, and in the fact that a recurring word is very often abbreviated in different ways. Another difficulty is the string of numbers following citations; it is sometimes difficult to know what they indicate. To be sure, a partial explanation is given in one of the notes, but it is inadequate. Besides all this there are a goodly number of proof-reader's errors throughout the notes in the original French. To have verified every citation would have been impracticable, especially as many of the works cited probably exist only in the archives of the French Government.

In this translation Brissaud's original headings have been preserved with one most important exception. The original work is in two volumes, and is divided into three general Parts, — those of "Sources of French Law," "Public Law," and "Private Law." This volume purports to be a translation of Part III, on "Private Law," but it has been thought advisable by the Committee to add to it, as a first chapter and by way of introduction, the Introductory Chapter which in the French original is printed at the beginning of Part II, on "Public Law"; this chapter is

TRANSLATOR'S REMARKS

called "Origin of the Family, of Ownership, and of the State." It will undoubtedly be of material assistance in understanding the chapters which were included under Part III, on "Private Law," in the original. The remainder of Part II, on "Public Law," will form another of the volumes of the present Series, and extracts from Part I, on "Sources," have been used in conjunction with other authors in the "Historic Survey," the introductory volume of this Series. The author's Introduction to his first volume will be printed in the last volume of this Series, under the title "Philosophy of the Evolution of Law."

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HISTORY OF FRENCH LAW. — *Laferrière*, "Histoire du Droit Français," 1845-58. *Warnkoenig and Stein*, "Französische Staats- und Rechtsgeschichte," 1846-48. *Schaeffner*, "Geschichte der Rechtsverfassung Frankreichs," 1849-50, 2d ed., 1859. *Koenigswarter*, "Sources et Monuments du Droit Français antérieurs au Quinzième Siècle," 1853. *Gasquet*, "Précis des Institutions politiques et sociales de l'ancienne France," 1885. *Ginoulhac*, "Cours élémentaire d'Histoire générale du Droit Français, public et privé," 1st ed., 1884; 2d ed., 1890. *Viollet*, "Précis de l'Histoire du Droit Français," 1884-86. The 2d ed. is entitled "Histoire du Droit Civil Français," 1893. *Glasson*, "Histoire du Droit et des Institutions de la France," I to VII (incomplete), 1887-96. *Esmein*, "Cours élémentaire d'Histoire du Droit Français," 1892, 2d ed., 1895. *Fustel de Coulanges*, "Histoire des Institutions politiques de l'ancienne France," 1882-92 (ed. *Julian*). *Flach*, "Les Origines de l'ancienne France," 1886-93. *Luchaire*, "Manuel des Institutions Françaises," 1892. *Chéruel*, "Dictionnaire historique des Institutions, Mœurs et Coutumes de la France" 1st ed., 1855.

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HISTORY OF SWISS LAW. — *V. Orelli*, "Vorlesungen über schweitzer. Rechtsgeschichte," 2d ed., 1884.

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HISTORY OF ITALIAN LAW. — *Sclopis*, "Storia della Legislazione Italiana," 1833 (French translation, 1861). *Pertile*, "Storia del Diritto Italiano," 1st ed., 1871; 2d ed. *La Mantia*, "Storia della Legislazione Italiana," 1884. *Salvioli*, "Manuale di Storia del Diritto Italiano," 1890. *Calisse*, "Storia del Diritto Italiano," 1891. *Schupfer*, "Manuale di Storia del Diritto Italiano, Le Fonti," 1892.

TABLE OF ABBREVIATIONS MOST FREQUENTLY USED

- "A. C." = "Ancienne Coutume."
 "Archiv. Parl." = *Medival and Laurent*, "Archives Parlementaires," 1867 *et seq.* (The "Cahiers" of the States General will also be found included within them.)
 "Ac. Sc. Morales" = "Comptes Rendus de l'Académie des Sciences morales et politiques," 1840 *et seq.*
 "Ac. Inscr." = "Académie des Inscriptions et Belles-Lettres," 1717 *et seq.*
 "Ac. Législ." = "Recueil de l'Académie de Législation de Toulouse," 1851 *et seq.*
 "Atti Modena," "Parma," etc. = "Atti e Memorie delle Deputazioni di Storia Patri di Modena," "Parma," "Bologna," etc.
D. Bouquet = *Dom Bouquet*, "Recueil des Historiens des Gaules et de la France," 1738-1876.
B. de R. = *Bourdot de Richebourg*, "Nouveau Coutumier Général," 1724.
 "Bourg." = "Coutume de Bourgogne."
 "B. Chartes" = "Bibliothèque de l'Ecole des Chartes," 1835 *et seq.*
 "B. Comité hist." = Bulletin du Comité des Travaux historiques," 1882 *et seq.*
 "Bull. crit." = "Bulletin critique," 188 *et seq.*
 "B. Hist. France" = "Bulletin de la Société pour l'Histoire de France," 1834 *et seq.*
 "B. Hist. Prot." = "Bulletin de la Société pour l'Histoire du Protestantisme," 1852 *et seq.*
 "B. Lég. comparée" = "Bulletin de la Société de Législation comparée," 1869.
 "B. Antiquaires de France" = "Bulletin de la Société des Antiquaires de France."
 "Cap." = *Capitularia Regum Francorum*, ed. *Boretius and Krause*, 1881.
 "C. Th." or "Cod. Theod." = "Code Theodosien," ed. *Haenel*, 1842.
 "C. J." or "Cod. Just." = "Code Justinien," ed. *Krüger*, 1877.
 "C. J. C." = "Corpus Juris Civilis," ed. *Mommsen and Krüger*, 1866-77-95.
 "C. J. Can." = "Corpus Juris Canonici," ed., *Friedberg*, 1878-80.
 "Conc." = "Concilia."
 "D. Grég." = "Décrétales de Grégoire IX" or "Extra.," ed. *Friedberg*, 1878-80.
Daremb. = *Daremborg and Saglio*, "dictionnaire des Antiquites," 1873.
 "D." or "Dig." = "Digeste," ed. *Mommsen*, 1866-70.
 "Dipl." = see *Pardessus*.
 "Forschungen" = "Forschungen zur deutschen Geschichte," 1860.
 "G. Chr." = "Gallia Christiana" 1715-1865.
 "Gr. Cout." = "Grand Coutumier."
Guyot, "Rép." = *Guyot*, "Répertoire de Jurisprudence," 1775-86.
Huber = *E. Huber*, "System und Geschichte des schweitzerischen Privatrechts."
Isambert = "Recueil des Anciennes Lois Françaises de 420 à 1789," by *Jourdan*, *Decrusy* and *Isambert*, 1822-27.
 "J. Savants" = "Journal des Savants," 1665 *et seq.*
 "L. Sal.," "L. Rib.," "L. Bai.," etc., or "Sal.," "Rib.," "Bai.," etc. = "Lex Salica," "Lex Ribuarua," "Lex Baiuvariorum," etc., etc.
Loysel 100 = *Loysel* "Institutes Coutumières," Rule 100 of the *Dupin* and *Laboulaye* edition.

TABLE OF ABBREVIATIONS

- Leber* = *Leber*, "Collection des meilleurs Dissertations, Notices et Traités particuliers relatifs à l'Histoire de France," 1826-42.
- "L. L." = *Leges*.
- "M. Antiquaires de France" = "Mémoires de la Société des Antiquaires de France."
- "Mém. Paris" = "Mémoires de la Société de l'Histoire de Paris," 1874 *et seq.*
- "M. Boica" = "Monumenta Boica," 1769.
- "M. G. H." = "Monumenta Germaniæ Historica," 1826.
- "M. H. Portug." = "Portugalliæ Monumenta Historica," 1870-73.
- "M. H. Patr." = "Historiæ Patriæ Monumenta, Chartæ," Turin, 1836, etc.
- "N. C." = "Nouvelle Coutume."
- "N. R. H." = "Nouvelle Revue Historique de Droit Français et Etranger."
- "Ord." = "Ordonnances des Rois de France de la Troisième Race," 1723-1849 (collection of the Louvre).
- Pard.* or *Pardessus*, "Dipl." = *Pardessus*, "Diplomata, Chartæ et Instrumenta Ætatis Merovingicæ," 1841-49.
- "Paris" = "Coutume de Paris," and so generally names of places cited alone followed by numbers indicate the Custom of that place; *e. g.*, "Toulouse" = "Coutume de Toulouse," etc.
- Pérard* = *Pérard*, "Pièces curieuses servant à l'Histoire de Bourgogne," 1654.
- "R. A." = *Grimm*, "Rechtsalterthümer." 1828, 3d ed., 1881.
- "R. Brit. Scriptores" = "Rerum Britannicarum Medii Ævi Scriptores," 1858 *et seq.*
- "R. Quest. hist." = "Revue des Questions historiques," 1866 *et seq.*
- "R. H." = "Revue historique," *G. Monod*, 1876 *et seq.*
- "R. crit. d'Hist." = "Revue critique d'Histoire et de Littérature."
- "R. H. D." = "Revue Historique de Droit Français et Etranger," 1855-69.
- "R. L." = "Revue de Législation ancienne et moderne," 1870-77.
- "R. G." = "Revue générale du Droit," 1877.
- Schmidt*, "Ang." = *Schmidt*, "Gesetze der Angelsachsen," 2d ed., 1858.
- Schoepflin* = *Schoepflin*, "Alsatia diplomatica," 1772-75.
- Sagnac* = *Sagnac*, "La Législation Civile de la Révolution Française," 1898.
- "T. A. C." = "Trés Ancienne Coutume."
- D. Vaissette* = "Histoire générale de Languedoc," by *Dom Cl. Devic* and *D. Vaissette*, ed. *Privat*, 1874.
- Varin* = *Varin*, "Archives législatives de la Ville de Reims," 1840.
- "V. G." = *Waitz*, "Deutsche Verfassungsgeschichte," I and III, 3d ed., 1880-82; III-VI, 2d ed., 1883-96; VII-VIII, 1st ed., 1878.
- "Z. R. G." = "Zeitschrift für geschichtliche Rechtswissenschaft," 1815 to 1850; "Zeitschrift für Rechtsgeschichte," 1862-78.
- "Z. S. S." = "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte," from 1880.
- "Z. V. R." = "Zeitschrift für vergleichende Rechtswissenschaft," 1882.

Treatises such as those by *Stobbe*, *Pertile*, *Glasson*, *Pollock* and *Maitland*, etc., which are given in the General Reference List, *ante*, p. xlv, are cited by the names of their authors, followed by numerals. For example, *Stobbe*; *Pertile*; etc.

The Roman numerals following the citation generally indicate the volume, the Arabic the page. This is not invariable, however, as *Loysel* 100 means rule 100 of *Loysel's* "Institutes Coutumières," and "Paris, A. C.," 100, means article 100 of the "Ancienne Coutume de Paris," and in the Customs the Arabic numeral always refers to the article. By referring to the works cited or the Reference List this distinction as to the numerals may readily be ascertained.

HISTORY OF FRENCH PRIVATE LAW

INTRODUCTION TO PRIVATE LAW

TOPIC 1. ORIGIN OF THE FAMILY

TOPIC 2. ORIGIN OF OWNERSHIP

TOPIC 3. ORIGIN OF THE STATE

TOPIC 1. ORIGIN OF THE FAMILY

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§ 1. **In General.** — Origin of the family, of ownership, of the State, — obscure questions of the most obscure, — good questions for the framers of hypotheses! The facts upon which their reasoning must be based, which are often very vague, are attested by credulous historians or travelers little worthy of belief; they are to be accounted for in three or four ways; the various systems adopt them, and systems abound. On going through the hastily erected

structures, built on the sand, we experience an impression of insecurity and discouragement. All generalizations are as yet vain; we are only at the period of observation and search for details. Only one thing is certain, and that is that human societies have come into existence slowly; the family, ownership, and the State, which we are accustomed to look upon as unchanging institutions, have had humble beginnings and have undergone numerous variations before arriving at their present form. These variations are proved; it remains to establish the law which governs them. It is impossible to maintain that this evolution has been the same everywhere. There is something very unstable about the ties which there has been an attempt to establish between the economic state, the psychological state, and the social state. The three stages through which the various peoples seem to have passed in their economic life, — hunting and fishing, the pastoral life, and agriculture, — do not furnish us with any natural boundaries for the principal institutions, whatever the socialist Engels may have said on this subject. Under such conditions as these one will ask if the outline that follows, which is necessarily only superficial and incomplete, and wherein everything, or almost everything, is liable to be contested both in its ensemble and as to its details, will not do more harm than good. We have not thought so. It has seemed to us to be indispensable to give a brief statement of the subject and the problems to which it gives rise. One will find herein in their natural surroundings general ideas which it would have been difficult to set forth or to make comprehensible in what follows. Furthermore, it is impossible not to make some mention of primitive institutions when we come to study the Celtic,¹ Germanic² and Roman institutions that are at the base of our public and private law.

¹ SOURCES. — *Cæsar*, "Commentarii de Bello Gallico," ed. *Holder*, 1882. Did *Cæsar* copy *Posidonius*, who wrote about the year 100 B. C., and who had visited Gaul? Did *Cæsar* use him in his Book VI, and were his assertions controlled by him? Cf. *Mommsen*, "Hist. Rom.," *Alexandre's* translation, VII, app. B, p. 338; *Cæsar*, ed. *Krahner*, p. 30. — *Pliny*, *Pomponius Mela*, *Ammian. Marcell.*, etc. — "Extraits des Auteurs Grecs Concern. la Géogr. et l'Hist. des Gaules," *Cougny's* translation, 1878 ("Soc. p. l'Hist. de France"). These sources, which are very insufficient, can be completed only with extreme reserve with the aid of documents of a very much later period which we have, and which refer to the Celts of Great Britain and Ireland. No one any longer thinks of finding the law of the Gauls in the "Très Ancienne Coutume de Bretagne."

² SOURCES. — *Cæsar*, "De Bello Gallico," IV, 1 *et seq.*; VI, 21 *et seq.* (middle of the first century B. C.). — *Tacitus*, "Germania," ed. *Halm* (end of the first century A. D.). — *Strabo*, *Pliny*, *Dion Cassius*, *Ammian. Marcell.*, etc.

§ 2. **Theories of the Evolutionists.** — It is not so very long since it was thought that the monogamous family, with the father as its head and the wife and children under his power, was as old as humanity itself. This was almost an article of belief. Outside of Abraham and the patriarchs of the Bible there was nothing but corruption and decadence. Two learned men, — Bachofen, a professor at Bâle, and the Scotchman, M'Lennan, introduced almost simultaneously the transformist idea in the problem dealing with the origin of the family; they were led to do this in the most diametrically opposite ways, — the former by the study of the ancient myths, the latter by ethnography. Since the time of their work the patriarchate is looked upon rather as a perfected form of the family which was arrived at when promiscuity was abandoned and after the matriarchate or maternal family had been passed through. There are, however, many learned men — for example, Sumner Maine — who look upon evolution quite differently and give as the origin of the family a rough sort of patriarchate which became altered or perfected in passing through various periods. The tablets of clay found at Tell-Sifr about forty years ago proved that the patriarchate family existed in Chaldea about twenty-two centuries before our era.

§ 3. **First Stage. Promiscuity or States bordering upon it.** — Among the first groups of human beings did men and women live in a confused state of promiscuity? Why not? We must not look for any great delicacy of feeling among cannibals, such as the Scotch were, according to the testimony of writers of ancient times, and as several savage tribes still are. Promiscuity is attested ¹ — at least, assuming it not to have been a general fact — during certain periods and among certain peoples: at the present time among the inhabitants of the mountains in India, among the Tasmanians and among the natives of Lower California; formerly among the Massagetes and the Garamantes, and a short time ago among the Zaporogue Cossacks, where the women had a separate encampment and belonged to all the men of the horde; and, finally, according to old traditions, in China,

One can also, but only to a limited extent, make use of the writers after the invasions, of barbarian laws, of Scandinavian laws and sagas, and of the old German Customs: *Fustel de Coulanges*, "L'Invasion Germanique," 1891, p. 226; *Müllenhoff*, "Germania antiqua," 1873, gives the old texts. *Bibl. in Glasson*, "Hist. du Dr. de la France," II, and in *Brunner*, "D. Rechtsg."

¹ To the contrary, *Westermarck*, *Starcke* and other recent writers.

in Egypt, and in Greece, where marriage is an invention of legendary personages such as Fo-Hi, Menes, and Cecrops.

Even where it has disappeared promiscuity has left its traces: incestuous unions, sacred prostitution, hospitable hetærisms. The Arabs, says Strabo, even have intercourse with their mothers. Unions between parents and children, between brothers and sisters, are frequent among the Indians of Brazil, among the Chippewas, and among the Karens (India). They are also indulged in among the Aleuts; one of them who was being reproached with this fact justified himself by replying: The otters do this thing! There are countries where the husband leases, sells, and barter his wife according to the caprice of the moment. The Esquimaux look upon it as a duty to lend their wives to guests whom they receive under their roof. Finally, Herodotus tells us that it was an act of piety for the women of Babylon to prostitute themselves at certain periods in the Temple of Mylitta.

Divorces without motive, trial marriages, marriages for a time, partial marriages, — these are all things which differ very little from promiscuity.¹ In Scotland until the time of the Reformation a young man and a young woman spent a year together, after which they either married or separated, according as they were or were not satisfied with this trial. "Marriage for a term, 'mota,' was customary among the Arabs before the time of Mahomet; it is still frequent in Persia, where a woman may be married for a term which varies from one hour to ninety years." Marriage for a year was customary among the pagan Irish: "The terms were fixed in the same way as for a lease; the union terminated on the first of May or the first of November of each year."

§ 4. **The Consequences of Promiscuity.** — Great mortality among the children; the mother could not raise them by herself and abandoned or else killed them. Relatives whom chance has united and an accident separated will scarcely give each other the support and assistance which are necessary in case of illness or when old age comes on. There is no such thing as relationship, properly speaking; people are not grouped in families, but classed by generations; one would say, for example, that he was the son of all the mature men of the tribe, the grandson of all the old men,

¹ Is not the right of the lord which exists in various societies for the benefit of the political chiefs or priests a survival of the right which belonged formerly to the community over all the women?

and the father of all the children of the tribe, as he was the husband of all the women. This system of **relationship by classes** (the word relationship is very inappropriate) is found among the Malays, the Turanians and the Redskins; it is contrasted with the **descriptive system** of the Aryans and the Semites, that is to say, a system which we make use of and which is based upon a recognition of individual relationship.

According to Morgan, this relationship dates from a period when there was neither marriage nor family. To each method of the constitution of the family there corresponds a different system of relationship. But the constitution of the family becomes modified more rapidly than the nomenclature of relationship; for a language always lags behind with regard to institutions. The nomenclature of relatives may thenceforth show us the existence of a form of family which has long since disappeared: this is so with regard to the system of relationship in force in the Hawaiian Islands. It does not correspond to the modern Hawaiian family; the same remark applies to the system of relationship in use among the Redskins; but, owing to a very curious peculiarity, the nomenclature of relatives used among the Redskins corresponds with the constitution of the modern Hawaiian family. Morgan deduces from this clever discovery the successive existence among the Redskins of three forms of family: 1st. The old Hawaiian family, or, rather, absence of family, with relationship by classes; this state of things has left traces in Hawaii, but not among the Redskins. 2d. The modern Hawaiian family represented among the Redskins, — not in their law, but in their language; it is only found in the nomenclature of relatives. 3d. The modern Redskin family to which the system of relationship still preserved in their existing language no longer corresponds.¹

§ 5. **Second Stage. Matriarchate. — Evolution towards the Maternal Family.** — In a promiscuous society the mother and her descendants have a tendency to form a natural group, an association for purposes of attack and defense, and production in common. The father, assuming that he be known,² does not form a

¹ There are sceptics who account for this in other ways, — for example, by seeing in it a mere consequence of poverty of ideas and poverty of language, and the peculiarities of the systems of relationship in use among primitive peoples. Cf. "Année sociolog.," I, 311.

² Let us here recall the notion which was widespread among the Egyptians and the Greeks according to which the father is alone creator of the child, the mother only nourishing it.

part of this group; he is connected with the family of his own mother. At the same time that the maternal family is being formed promiscuity is being restricted. Marriage is prohibited within the group between relatives descended from a common mother. Incest is forbidden. From what motive? Morgan sees in this one of the finest applications of the law of natural selection. Unions between near relatives result only in children inferior to those born from marriages between strangers; the latter became more numerous; they came to prohibit the former under the most severe penalties.¹

§ 6. **The Prohibition of Incest**, which was at first probably very restricted, became extended and led to the marriage by groups, to polyandry, and to the practice of exogamy.²

According to Morgan, in the old society of Hawaii marriage was prohibited only between one class of relatives and another, between ascendants (actual or fictitious) and descendants. In the modern Hawaiian family marriage is forbidden even between brothers and sisters of the same mother and between cousins descended from the same mother.

§ 7. **Marriage by Groups** was practised in Australia. Among the Negroes of Mount Gambier the tribe is divided into two clans, Krokis and Kumites; every man who is a Kroki is the husband by birth of every woman who is a Kumite, and vice versa. This is a case of promiscuity, but of limited promiscuity, because it is not possible for a union to exist between two members of the Kroki group or between two members of the Kumite group. We must assume that all the Krokis are relatives descended from a common mother, and that it is the same with regard to the Kumites. The existence of marriage by groups has been revealed to us by an English missionary, the Rev. Mr. Fison, who has passed

¹ The popular notion according to which children born of unions between near relatives are often affected by serious infirmities (deaf mutes, blind, etc.) is rather well founded; assuming that a husband and wife are perfectly healthy, their children will resemble them and will be well formed, whether their father and mother be relatives or not; but this assumption is defective in its basis; a perfect state of health is rare; each one has his weak point; as this weak point will be the same in the husband and in the wife when the latter are near relatives, it will often happen that something that was only a slight imperfection in their case will be a very serious defect in the case of their children. Conversely, the crossing of two pure races will give a mixed race that is superior to each of the former, for it will have at one and the same time qualities of both, or, at least, it will not be open to that aggravation, to that increase as the square, if one may say so, of the causes of weakness in the parents.

² Unless it be the reverse, and the prohibition of incest be, as *Durkheim* pretends, a vestige of exogamy.

many years in Australia. Another missionary, the Rev. Mr. Mathew, who has passed just as long a time in that country, assures us that nothing of this kind ever existed, and that the Negroes of the country marry one another just as do the white people of our own country. Which are we to believe?

§ 8. **Polyandry** is a marriage by groups on a small scale: each woman has several husbands, but they are not all the men of a tribe; they are only a few of them, — ten or twelve, for example. Furthermore, polyandry and polygamy may exist at one and the same time; one husband has at the same time several wives; this comes pretty near to being promiscuity. We will give as an example the Nairs of Malabar (who are comparatively civilized): “The spouses have a perfect understanding as to the method of the enjoyment of what they are indeed compelled to call the common ownership. The first husband lives with his wife for ten days, after which he gives up his place to another.” As he is at the same time the husband of several other women, when he leaves one it is not to go and live alone; he goes to the others successively. Here the woman must necessarily be the center of the family, and relationship through the woman is the only kind that is recognized.

From polyandry thus understood we must distinguish fraternal polyandry, which is only one of the forms of the patriarchal family with relationship through the men and the authority of a chief over the wife and children. Brothers living together take only one wife, sometimes from motives of economy, because they are poor and the purchase of a wife for each one of them is a luxury beyond their means (Sparta); at other times, if they are rich, in order that they may not become poor by splitting up the patrimony of their family (Ceylon). It is especially in Asia that this form of polyandry is met with; it is practised in Thibet, among the Todas in India; and it was formerly practised in Arabia and Persia, and Cæsar attested that in his time it was in use among the Bretons, V, 14: “*Uxores habent deni duodenique inter se communes, maxime fratres cum fratribus parentesque cum liberis; sed si qui sunt ex his nati eorum habentur liberi quo primum virgo quæque ducta est.*” The eldest brother chooses the common wife, for he is the first one to arrive at the age of puberty; as soon as his brothers attain manhood they become the husbands of their sister-in-law, but they are under the authority of their eldest brother; the children are looked upon as being his.

§ 9. "**Among the Reddies** (India) a young girl of from sixteen to twenty marries a boy who is scarce five or six years old, and sometimes even younger. After the celebration of the marriage the wife goes to live with some relative of her husband, often even with his own father. The latter enjoys all the conjugal rights, and if children are born of this union they are legitimate and are looked upon as being those of the husband, whatever his age may be. When this husband comes to the time of the real marriage he naturally finds his wife too old, and he takes another one under the very conditions which he had to undergo himself." This custom makes us think of the levirate law, of the substitution of a ward, by which the Roman "paterfamilias" made sure of having heirs for the one who had not attained puberty by making a will for him. In this case he provides children for him.

§ 10. **Exogamy** is marriage outside of the group to which a person belongs; and endogamy, or marriage within the group, is much more readily accounted for. But exogamy seems to be more widespread, and a thing which is still more singular is that it is prescribed under the most severe penalties: death among the Algonquins and Hottentots and in the New Hebrides.

M'Lennan has seen in this custom a consequence of the **infanticide of girls**, which was very frequent in former times. It was absolutely necessary, where women were lacking, to take them away from other tribes. The extreme poverty of certain groups of people accounts for the murder of girls as soon as they were born. Thus among the Arabs before the time of Mahomet they were looked upon as useless mouths to feed and were buried alive; the Koran prohibited this practice (6, 17, 81). An old Toda used to say: "We cannot support our children; to-day each one of us possesses a cloak; formerly we had only one for the whole family, and the one who had to go out took the cloak; the others stayed naked in the house." The Khonds of India had made a religious precept of the infanticide of girls. In the Fiji Islands they were killed because they could not fight. The Association of the Areoi in the Society Islands practised both abortion and infanticide.

The murder of new-born girls, however widespread one may suppose it to be, can never have been a general custom; often, on the contrary, girls were looked upon as objects of great value, because it was permissible to sell them and they brought a very high price. M'Lennan's remark, moreover, would explain why

exogamy was a necessity for certain tribes, but not why these same tribes so strictly prohibited endogamy when the girls had escaped from the infanticide which was habitually practised.

According to Lubbock, among tribes where promiscuity was practised a man could keep for himself alone the woman whom he had captured in war. Unions of this nature had the double advantage of being permanent and of giving birth to a mixed race and, consequently, one which was superior. Individual marriage by this means was substituted for community of wives, just as, perhaps, individual ownership was substituted for collective ownership. When customs became less harsh women were purchased from their relatives; actual carrying off ceased to be necessary; its place was taken by the symbolical abduction. Under this name it always formed a part of the marriage ceremony, in order that it might be perfectly understood that the woman became the exclusive property of one man. This system assumes a direct passing from promiscuity to the patriarchy, and makes the matriarchy an anomaly which it is difficult to account for. It conflicts with the fact that the capture of women was carried out nine times out of ten by a troop, and not by an individual; and monogamy could hardly result from this. Furthermore, how are we to account for the very great horror which was felt for endogamy? One can readily understand that exogamy should have been preferred, but not that marriage within the group should have been prohibited as a crime under pretext that it amounted to a robbing of the community.

Morgan's theory rests upon an observation which is perfectly correct: It is not the tribe, as is said only too often, which is exogamous; it is the clans of which the tribe is composed; the tribe itself is endogamous; people marry from one clan into another. A prohibition against marrying within one's own clan is equivalent to a prohibition against marrying one's relatives, because the clan is a group of relatives, — at least, fictitious ones. Thus is to be accounted for the severe disapproval with which endogamy is looked upon; and thus also is to be accounted for the practice of exogamy among the clans of a maternal family, for it exists therein and is not met with merely among clans of a patriarchal family, as would be required according to Lubbock's system.¹

¹ *Durkheim* has recently suggested another explanation for exogamy. The members of each clan consider themselves as one flesh and one blood, — the flesh and the blood of the mystical being from whom they all descended ("totem"). If they wish to adopt a stranger, a few drops of the family blood

§ 11. **Organization of the Maternal Family. Relationship through the Same Mother.** — Exogamy, polyandry, marriage by groups, prohibition of incest, — such are the institutions by means of which promiscuity was discarded. The maternal family or matriarchate was the logical consequence of these; it is more frequent in proportion as the societies among which it is found are more rudimentary. It only includes relatives in the female line.¹ Under this system a child takes the name of its mother and belongs exclusively to the family of the latter; its father forms part of another group, the group consisting of his own maternal relatives. The Lycians, Herodotus tells us, take their mother's name; they leave their inheritance to their daughters and not to their sons. Among the Iberians, according to Strabo,² daughters inherit from their relatives and give a marriage portion to their brothers. It was the same among the Nairs in India, and elsewhere.³ The head of the maternal family is the eldest brother of the mother, and if he is not living the nearest maternal relative. The mother has only a nominal authority; the alleged domination of women, the "gynæocracy" devised by certain advanced minds, is incomprehensible at a period of violence, a continual struggle, such as the early times were.⁴ The peculiar position of the maternal uncle, the rights of inheritance of women in preference to men, are met with for the first time among the Alemanni at the time of Tacitus, "Germ.," 20; the others, in cer-

are injected into his veins. It is in this blood that this being resides who is at once the god and the ancestor of the clan. Everything he touches is sacred, "tabu." From this arises the religious respect which the men have for the women of their own clan after they attain puberty. Sexual relations are only possible between one clan and another, because each has a different god. *Durkheim*, by means of these ideas and the habits that they have given rise to, accounts for everything, even to our modern customs. The hypothesis is ingenious, but contrary to all probability and not proved ("Cessante causa, cessat . . .").

¹ There has been an attempt to account for relationship through women by seeing in it a means of distinguishing between the children of various wives in the polygamous family.

² III, 165; *Cordier*, "La Famille chez les Basques" ("R. h. Dr.," XIV); Etruscans ("Perrica gnatus"), Locrians; *Polybius*, XII, 5; *Mary Kingsley*, "Travels in Western Africa," 1897; "N. R. H.," 1891, 302 (Celts); "N. R. H.," 1891, 301.

³ *Laflitau*, "Mœurs des Sauvages Améric." I, 69 (1721): neither the husband nor the wife leaves the family in order to found a separate family and cabin; each one remains at home; the children belong to their mother and are looked upon as belonging to the family and the cabin of the mother (and not to that of the father). In the cabin of the wife the daughters are heiresses in preference to the males, who are given only their sustenance.

⁴ Among the Natchez, however, the sun-woman had a right of life and death over the children (eighteenth century).

tain manuscripts of the Salic Law which called the mother and the mother's sister to the succession, Title 59. The prohibition of adopting one's sister's son in India, the prohibition of marriage between brothers and sisters born of the same mother in the Athenian law are yet further traces of the matriarchate and bear witness, contrary to Sumner Maine's opinion, that the Aryans themselves have passed through this phase of evolution.

§ 12. **Third Stage. Patriarchate.** — Why and how is the transition made from the maternal family to the patriarchate, which gave authority to the husband over his wife and children, and which included agnatic relationship or relationship through the men only? ¹ The patriarchal family gave rise to permanent ties between the father and the mother and, consequently, to closer ones; this is an advantage for the couple themselves as well as for the children. The union between the man and the woman — which was temporary in the maternal family — is a source of trouble for the latter; the husband finds himself thrown into a conflict with the relatives of his wife with regard to her and his children. These inevitable dissensions were one reason for making this group an inferior one. It gave way to the patriarchate, which ancestor worship came to fortify by giving it a religious sanction. Looked upon from the point of view of the method in which it was formed and of its consequences, this form of the family appears as an application of the right of ownership. The head of the family has over his wife and children almost the same rights as a master over his slave, and like a master he is responsible for their acts.

§ 13. **Formation of Marriage.** — (I) *Abduction*, the carrying off of women, takes place sometimes in a body, like the legendary carrying off of the Sabine women (the Picts, ancient Scandinavians, Tribe of Benjamin, etc.) and is sometimes individual (Tasmania, Carribee Islands, etc.). The law of Manu makes abduction one of the eight forms of legal marriage. "On the western coast of Greenland," says Dr. Nansen, "the young man lies in wait for the young girl, takes her by surprise, seizes her by the

¹ The opposite transition from the patriarchate to the matriarchate is without an example (?) and would be difficult to account for. One might, however, see in it an extension of institutions which, like marriage "sine manu" at Rome, leave the wife under the authority of her parents; if the husband acquires no more rights over the children than over his wife's possessions this is sufficient to make it a form of purely patriarchal family. — *M'Lennan*, "Patriarchal Theory," 1885.

arm or the neck or the hair, and drags her towards his tent in spite of her cries and her struggles." The Australians proceed in as summary a manner; they carry off the young girl after having knocked her over with the blow of a club.¹

The **imitation of abduction**, which is so frequently found in marriage ceremonies, is a survival of the primitive law in which abductions are a reality (Sparta, Rome, etc.). Among the Tartars the young girl leaps upon a horse; the young man, who has already paid her relatives the earnest money for the bargain, rushes to pursue her; and if he does not please the betrothed the chase may be long and difficult. Among the Araucanians every young girl would feel herself dishonored if an energetic fight were not made to keep her in the family.

In contrast to these customs, among the Kaffirs, the Moquis in America, and the Garros in India, it is the girls who make proposals of marriage to the young men. "If the advances of the woman are too direct the frightened young man flees on horseback in order to give evidence of his resistance. He is at once pursued by the young girls, who bring him back a captive to the one whom he should marry."

§ 14. **The Same.** — (II) *Purchase.* — From abduction to purchase there is but a step. "Among the Bodos (India) the betrothed man carries off the young girl with every appearance of violence; then he tenders to her relatives a banquet and presents in conformity with his position, in order to disarm a pretended anger." This portrays what took place almost everywhere. When there was an abduction the relatives of the outraged woman sought to take vengeance for the injury which had been sustained; the abductor appeased them by offering them presents. Customary tariffs came to be established. The composition due by every abductor was paid in advance. Among a great number of peoples the father disposes of his daughters in the same way as a master disposes of his slaves, without consulting them. In India, in ancient Greece, and even in Rome, marriage by purchase ("coemptio") was known. Homer speaks of the "*παρθένου ἀλφεσίδουαι*," of young girls, who bring many oxen to their father because the betrothed pay the purchase price in cattle, the currency of that time. The variations in the price of this sort of

¹ Cf. *Tacitus*, "Ann.," I, 55 ("Arminius"). In Germany the custom of the "Brautlauf," "Brautfahrt," the conducting of the young girl by a numerous cortège to her husband, is a trace of the abduction. — Cf. as to the Jews, "Judges," xxi.

merchandise are very great. "A rich 'Baschkir' would take pride in giving 3000 roubles for a wife; his poor neighbor would obtain one for a load of wood or hay." The Papayos of New Mexico sell their daughters at auction. "The Damaras are very poor; a goat seems to them to be a very acceptable equivalent for one of their daughters." Wilson tells us that in Uganda a father offered him his daughter for a pair of shoes or an old coat; and even this was very dear, for the usual price is six needles and a box of percussion caps.¹

The marriage takes place ordinarily for cash, just like the contracts of primitive times; sometimes for credit, but, like a wise merchant, the father of the family takes precautions. He keeps certain rights over his daughter; the children remain his property until the complete payment of the stipulated price (Islands of the Soude, Makololo in Africa); in Unyoro the husband pays a cow at the birth of each child. In other respects he is compelled to live in the house of his father-in-law until he shall have entirely freed himself. If he has no money or cattle, the future husband exchanges his sister for the woman whom he desires, becomes the slave of his father-in-law or else hires out his services to him. Must one recall the history of Jacob and the fourteen years which he passed in the house of Laban in order to marry Leah and Rachel, the daughters of the latter? The Redskin each day gives, sometimes to the father and sometimes to the maternal uncle of his wife, a portion of his game or fish.

§ 15. **Marriage by Servitude** or by letting of services no doubt leads to customs such as those of Ireland or Sumatra ("ambelanak"), where it seems to be the wife who buys her husband; the husband, in fact, goes into the house of his wife, or, rather, of the

¹ According to the Icelandic law the future spouse pays the customary price, 1 mark in silver; the father of the girl, or, if he is not living, the nearest male relative, becomes a warrantor and declares that the girl has no hidden defect such as would set aside the sale of a slave; the bargain is then concluded by the blow with the palm of the hand ("Handsál"), without its being necessary to have the consent of the woman. The marriage is completed within a year by the handing over of the woman to her future husband: *Dareste*, p. 349. Cf. "The Anglo-Saxon Laws": "Æthelb.," 77, 31. — "The purchase of women disappeared at an early date in the Israelitish legislation. Two features of it, however, remained: the woman must be given by those who have authority over her; the man can complete the marriage by giving a sum of money to the woman, — the money being only a symbol. Ordinarily, the marriage is concluded by the conferring of a marriage portion that is given by the husband to the wife ('khetouba'); from that time on, the adultery of the woman is punished as though she were married." *Dareste*, "Etudes," p. 38; *Paturet*, "Condition de la Femme dans l'ancienne Egypte," 1886.

relatives of his wife, as a slave; he works for them and possesses nothing of his own, and he may be expelled.

§ 16. **Effects of Marriage. Status of the Wife.** — Whether she be carried off or bought, the wife is in a situation differing little from that of a slave. Body and possessions, she is subject to her husband; she is “in manu,” under his hand, according to the Roman expression. She cannot possess anything of her own; everything she acquires goes to her husband. He has over her the right of life and death, and after his death religion sometimes even makes it the duty of the widow to burn herself with the mortal remains of her husband so as still to render him beyond the tomb the services which she carried out on earth. Among the Afghans the widow goes to the heirs of the deceased; “she forms a portion of their inheritance, and if she remarries, her second husband is held bound to indemnify the family of the first husband for the loss which it has sustained.” “In Tasmania the wife is treated like a domestic animal, which one has a right to beat, to wound, to kill, and even to eat. In the Viti Islands a savage named Loti savagely devoured his wife, after having had her cooked on a fire which he had compelled her to light herself.” Under such conditions as these the right of divorce must of necessity have been reserved to the husband; he could repudiate his wife at his pleasure (excepting that he would incur the vengeance of her family, who might keenly resent this insult, or excepting that he might pay an indemnity in advance so as not to run this risk).

The patriarchy seems like a system which treats the wife with disfavor; in subjection to her father so long as she is a girl, to her husband during the marriage, and after his death to her children, she only changes masters; she is, to use the Roman term, in **perpetual guardianship**.¹ Religion and morals reacted against the severity of the ancient law; thus, according to the barbarian laws, the husband cannot kill his wife without good reason; he is only authorized to sell her by way of punishing her or in case of absolute necessity. The Gallic law even gives to the widow a survivor's portion.²

¹ *Kovalevsky* and other learned men do not believe that this subjection of the wife existed. But the facts that are not in accord with this state of inferiority are indications of a new law in process of formation or are vestiges of the matriarchy.

² **Matrimonial System of the Gauls.** — The right of life and death which *Cæsar* recognized the head of the Gallic family to have over his wife as well

At Rome the **religious marriage** of the patricians, which was characterized by the "confarreatio," an offering of wheat bread to Jupiter, and by the participation of the priests of the official religion of the State, places the wife "in manu," but makes of her the mistress of the house, the respected matron, who attains to the same dignity as her husband and shares in his honors.¹ In time marriage without "manus," a sort of formal union, without formalities, came to free the wife from the authority of her husband and completely emancipate her.

§ 17. **The Position of Children** is determined according to that of the mother; if they are born of a slave, they themselves are slaves. The paternal power is absolute, just as is the husband's

as his children (VI, 13, 19; cf. *Gaius*, "Comm.," I, 55, paternal power among the Galates) does not agree very well with the system of possessions between the spouses, which seems to place the husband and the wife upon almost an equal footing: *Cæsar*, VI, 19. The wife brings her husband by way of marriage portion "pecuniæ" (sums of money and other valuable movables, but not land; probably the land still belongs to the family; the woman has no right to it); the husband takes out of his own possessions other "pecuniæ" of equal value according to an appraisal (made by whom and how?). These "pecuniæ" — those of the husband and those of the wife — are mingled together in one mass; only one reckoning is made, and the profits are kept; the survivor has all of this, — that is, the capital contributed by himself and that contributed by his wife, together with the profits. Cf. *Rozière*, "Rev. de Lég.," 1874, p. 135. — This system has been likened to one of those that was known to the Irish law, and which is to be distinguished by the equality of the share contributed by each spouse; but in the Irish law the position of the spouses is equal; or, at least, the husband cannot make certain kinds of contracts without the consent of his wife, whereas in the Gallic law she is under the authority of her husband. Cf. *Collinet*, "R. Celtique," 1897, p. 322. There has been an attempt to construe this as the conjugal community of our Customs of the Middle Ages, but in this case there is no question of a true community because all the possessions forming a single mass are always conferred upon the survivor, and because in no case can the heirs of the predeceased spouse make any claim to them. If one wishes to understand this system one must assume two things that *Cæsar* does not tell us: 1st. The share contributed by the wife, and also that contributed by the husband, are rather small; the wife's because she has few rights over the possessions of her family, the husband's because it is no doubt the purchase price which he paid to the relatives of the wife that has been transformed into an antenuptial gift for the exclusive benefit of the latter. 2d. The profits realized during the marriage are added to the mass and go with it. The preservation of the issues in kind is physically impossible. Cf., on this point, *Humbert*, "Rev. hist. de Dr." IV, 517; D., "de pact. dotal.," 23, 4; 9, 3; D., "de j. dot.," 23, 3. The husband disposes of the interest on the price of the issues sold; he keeps this price. *D'Arbois de Jubainville*, "Rev. crit. d'Hist.," 1879, p. 2: the marriage portion consisted in herds, and the young were raised until they attained the age when they were most valuable for slaughtering purposes.

¹ To judge from the information which has been furnished by comparative jurisprudence, and according to the custom of betrothals ("sponsalia") and the "deductio mulieris in domum mariti" ("rapi simulatur virgo," says Festus), it is very unlikely that the "confarreatio" was the most ancient form of marriage at Rome. Cf., however, to the contrary, *Marquardt and Mommsen*, "Man. des Ant. Rom.," French translation XIV, 40, 76; *Girard*, "Man. de Dr. Rom.," p. 145; *Labbe*, "N. R. H.," 1887.

power. It is for their father to decide whether they shall be brought up or not; infanticide, or the exposure of new-born children, which is so frequent in the old traditions, is only the exercising of a right. The father may strike his children, sell them, or put them to death.¹ He gives his daughters in marriage upon receiving a sum of money; they are bought from him. Neither sons nor daughters have a right to have any belongings of their own; everything they acquire belongs to the father. At Rome the "*patria potestas*," which on principle lasted during the entire life of the father, was adhered to through the centuries with this barbarian harshness. However, as children were members of the State, at an age when they were capable of bearing arms they were emancipated, from the political point of view. In Germanian military coming of age perhaps meant both political and civil emancipation at one and the same time.

§ 18. **Levirate.** — All children born during the marriage came under this power; they belonged to the husband even though they were not his issue. This is shown us by the institutions of the "*Niyoga*" in India and the **Levirate** among the Hebrews. If a man dies without children his brother should "raise a posterity for him" and for this purpose should marry his widow; this brother who becomes a substitute for the husband is the levirate; a son of the levirate is legally the son of the deceased, because even after the latter's death his wife and children are still virtually under his power; he lives a hidden life beyond the tomb. The worship of ancestors causes the levirate to become a pious duty. It is indispensable that the dead should have descendants in order to receive the worship which is due him. The "*niyoga*" is only a levirate practised during the lifetime of the husband when he has no children. — "The law of Sparta allowed a husband who was impotent to give up his wife to a younger and stronger man." "At Athens, if the relative who was compelled by the law to marry the widow of his near relative was not capable of fulfilling the conjugal duties, she could demand to have another man of the family substituted for him."²

§ 19. **The Recognition of Paternity** did not present any difficulties in societies of the patriarchal type. The husband treats as his own all children born of his wife, just as the owner does

¹ *Tacitus*, "Ann.," IV, 72; "L. Baiuwar.," I, 10; *Capitulary*, I, 187, 1. In the old Hungarian law the wife and children could be sold for the crime of the husband and father.

² *M'Lennan* sees in this traces of polyandry.

with respect to the increase of his flocks. If he has any doubts as to their legitimacy he can expose them, kill them, or cause them to be sold as slaves. But in certain societies where maternal institutions obtained more of a foothold, the husband, in order thoroughly to establish his rights over his wife's child, has recourse to a fiction; he simulates a confinement, stays in bed, fasts, and receives the congratulations of his neighbors upon his happy delivery. This custom, the most extraordinary of all, bears the name of "**couvade**"; it has existed among the Iberians,¹ in Corsica, among the Tartars, in Brazil and elsewhere. Starcke sees in this only a magic proceeding in order to give the new-born the endurance and strength to withstand the fasting and abstinence which the father imposed upon himself; if this were the only reason for it, what would be the use of simulating a confinement?

§ 20. **Adultery.** — The punishment for the adultery of the wife is left to the discretion of the husband, because he has over her the right of life and death. It is at least expulsion from the conjugal domicile. It may be death, as among the Hebrews, where she was stoned. In ancient Egypt her nose was cut off. The Greeks tore off her ears. The Abyssinians were satisfied with shaving her head. In Thibet the matter was arranged by the payment of a fine, which was calmly divided among the various husbands of the wife. According to the Germanic custom,² the guilty wife, naked and with her hair shaved, was driven out of the house in the presence of the relatives by her husband, who pursued her through the village beating her. This penalty, which became the running of the gauntlet in the Customs of the Middle Ages, had not merely a disgraceful character; originally, it meant, no doubt, final expulsion from the house and from the village; this was really in the majority of cases the penalty of death or slavery, for once outside the circle of her natural protectors the woman lost her life or her liberty.

The infidelity of the husband is far from having similar consequences. The woman could not complain of it. We are not unaware of how free morals were in Greece. In Rome, Cato said: If you take your wife unawares in the flagrant offense of adultery you may kill her with impunity; if she takes you by surprise she would not even dare to raise a finger against you, and she has no

¹ *Strabo*, III, 165; *Cordier*, "La Famille chez les Basques," "R. h. Dr.," XIV; *Tylor*, "Primitive Culture," French translation, 1877.

² *Tacitus*, "Germ.," 19.

right to do so.¹ In certain localities they even say that women were punished for not having known how to please their husbands and keep them faithful.

§ 21. **Agnatic Relationship.** — In the matriarchate the only relationship that exists is that in the female line; in the patriarchate, that in the male line. The family constitutes a shut-in group under the power of a head such as the Roman “*paterfamilias*”; relationship is the bond which unites the members of the family with this head and with one another; it is the result less of community of blood than of the authority of the head, and, as the women are never at the head of the family, relationship never comes from them. Thus one is the agnate of the brother of one’s father, and not of the brother of one’s mother. Descent from the same father (agnation) is lost for anybody who goes out of the family; for example, for the daughter who in marrying passes under the “*manus*” of her husband and escapes the power of her father, or for the son given in adoption. One could not belong to two families at one and the same time any more than one could have two fatherlands. At the death of the head his children become “*sui juris*”; the one “*domus*” is replaced by several new ones. The change which then takes place does not break the agnation; it still exists between all those who have been under the same power, or would have been so if the “*paterfamilias*” had lived indefinitely.

At Rome this relationship in the family line was called **Agnation** (among the Slavs of the South it was called relationship by the main blood); this was contrasted with natural relationship, or **Cognition**² (relationship by the inferior blood among the Slavs of the South) which included the relatives in the female line as well as the relatives in the male line, and which is relationship as we understand it, derived from the fact of consanguinity. The Roman and unilateral relationship preceded the double relationship of modern law. The effects of relationship — which were mutual protection against attack and mutual defense, the duty of avenging offenses against a relative, impediments to marriage, rights of guardianship and succession, and the right to the name and to be worshiped — resulted only among agnates: thus the Ossetes allowed marriage with the mother’s

¹ *Aulus Gellius*, X, 23.

² However, the Roman law admits impediments to marriage between cognates.

sister and looked upon it as being disgraceful if it were with the father's sister.¹

§ 22. **Systems of Succession.** — One of the most important consequences of relationship is the conferring of rights of succession. Under the patriarchal system succession is organized in various ways. If the family community survives its head, the eldest male member of the community is chosen by the others to succeed; this would ordinarily be the eldest brother of the deceased or a near relative, because he is of suitable age and constitutes a military chief already appointed; he is already, during the lifetime of the head whose place he must take, the latter's natural assistant (**tanistry** in Ireland).² This seniority, however, made way for primogeniture, properly so called, or **right of primogeniture**, by virtue of which the eldest son of the deceased excludes both his brothers and his uncles. The struggle between the uncle and the nephew was, it would seem, keen and long. If the family should be dissolved and each one of its members should form a separate household, the right of primogeniture was also practised. But it was not a rare thing to find the youngest of the sons being favored and receiving the paternal house; this is the right of "**juveigneurie**" or of "**maîneté**" (minority),³ the very

¹ The Irish Laws, which recognize agnation or relationship only in the male line, distinguish between four groups of relatives in each one of which relationship ceases with the fourth generation (as in the Athenian law). These groups or "parenteles," which are analogous to those whose existence is ordinarily admitted in the Germanic law, form concentric circles, as is seen from the following table:

1. Great grandfather. — Relationship of the 3d phalanx ("indfine").	1. Father. — Relationship of the 1st phalanx ("derbhfine").
2. Great uncle.	2. Brother.
3. Great uncle's son.	3. Brother's son.
4. Great uncle's grandson.	4. Brother's grandson.
1. Grandfather. — Relationship of the 2d phalanx ("iarfine")	1. The deceased. — Relationship of the hand ("geilfine")
2. Uncle.	2. Son.
3. Uncle's son.	3. Grandson.
4. Uncle's grandson.	4. Great grandson.
	5. Great grandson's son.

The inheritance was conferred upon the first group of relatives of the deceased ("geilfine"); and if this group did not exist, then upon the three others in the following proportion: $\frac{3}{4}$ to the 2d; $\frac{3}{4}$ of $\frac{1}{4}$ to the 3d; $\frac{1}{4}$ of $\frac{1}{4}$ to the 4th.

² "Tanistry," an English word derived from the Irish word, "tanist," second in rank in the kingdom, the heir presumptive of the king. When a chief was elected there was joined with him as his eventual heir the eldest of his brothers; by this means the disadvantages resulting from a vacancy in the sovereign power or from the youth of the heir were avoided. Nephews found themselves excluded by their uncles; there was no partition; the "tanist" took everything: *De Valroger*, p. 537; *Sumner Maine*, "Instit. primit.," p. 230; "Etudes sur l'anc. Droit," p. 169.

³ The right of younger sons existed in the country of Wales; in England

opposite of the right of primogeniture.¹ Sometimes also an equal partition takes place between the sons, and when this is so it is similar to the old custom of Irish **gavelkind**:² when a man dies his inheritance is not divided among his sons, but the chief of the "seven," or clan, to which he belongs, takes the succession in order to make a new partition of all the lands belonging to the "seven," and gives a portion to each one according to his age. Whatever may have been the system of succession, the **exclusion of women** is one of its essential rules. The Salic Law in its most celebrated provisions confers the land upon the heirs of the male sex exclusively.

§ 23. **Ancestor Worship**, which is closely connected with the patriarchy, completed the organization of the family by making of its head a god after his death, just as he had been a master during his life. It is the duty of his descendants to render him funeral honors and the customary worship. And it is a great misfortune not to have any posterity. Celibacy is a crime, the repudiation of a barren wife a duty of conscience, adultery at the same time a sacrilege and a robbery, — a sacrilege because it creates a risk of introducing strangers into the family, and a robbery because the wife is almost a chattel of her husband. Adoption is looked upon by a pious man as a last resource whereby he may prevent the extinction of his family.³

§ 24. **Family Communities**. — The modern family is derived from the old patriarchal family; but the latter for a long time consisted of a large group of persons, whereas to-day the family is formed of one couple and the children who are their issue. Let us endeavor to get some idea of these family communities of

(borough English), and in Brittany, according to a few local Customs, such as the Custom of Rohan: *Bourdot de Richebourg*, IV, 408. It is also met with in many other places, — for example, in certain of the Swiss customs.

¹ As to the right of primogeniture *cf. infra*. According to *Maine* it was derived from the tanistry system.

² *Samner Maine*, "Études sur l'ancien Droit," p. 231; *De Valroger*, p. 527. Report of Sir John Davis, attorney-general at the beginning of the seventeenth century, on the Irish custom of gavelkind cited by *Laveleye*, "De la Propriété," 4th ed. p. 291. The gavelkind of the County of Kent, or equal partition between all the sons, seems to be connected with the Irish gavelkind.

³ In Ireland, among the Scandinavians, and among the Ossetes, it is customary for the father to have his son brought up in some family other than his own, or by some one other than himself. There exists between the child and the person bringing him up a tie of relationship ("Fosterage" in Ireland). In many places the formalities of adoption imitate birth. *Diodorus* tells us that Juno held Hercules against her breast and let him slide to the ground through her garments, "which is still done by the barbarians when they wish to adopt a child": *Michelet*, "Origines du Dr. Fr.," p. 10.

former times: "domus," fire, "maisonnée," "Hausgenossenschaft,"¹ joint-family, which must not be confused with the more extensive group of the "gens," clan, or "Sippe."

The ancient family communities were associations of relatives giving one another support and assistance under all circumstances, for attack and for defense, for military expeditions as well as for farming. They took the place of the State, carried out police duties within themselves, organized a guardianship for the weak, the women and orphans, were responsible for the acts of their members outside of the community, dispensed charity and managed the household affairs prudently. We must think of them as modeled after the Servian "**zadruga**"² to the number of twenty individuals, sometimes more, all relatives or else persons who had become members of the family by marriage or adoption, with a chosen head ("domacin," "gospodar") from among the oldest and the married people. His wife, the "domacica," directs the household. The chief is, outside of the community, the representative of the family; he negotiates with third parties, he takes part in the political assemblies (such as municipal councils), he is in touch with the religious and political authorities, and he is responsible for the payment of taxes. Within the community he exercises a disciplinary authority over the members of the family, he enjoys certain honors (they rise when he enters, he distributes to each one a share of the food), he manages the land belonging to the community, designates the work to be done by each one, keeps the funds, and provides for the needs of the community. The family assembly ("skuptschina"), where all the members have a vote, is consulted upon serious questions (borrowings, etc.), receives the accounts of the chief, decides upon marriages within the community, brings in new members and excludes others, discharges the chief and prescribes partition. The members of the community have a right to lodging, food and clothing; those who are males and have attained majority have a vote in the family council; they may forsake the community, but they must

¹ "Genealogia," "fara" among the Germans, "consorterieae" in Tuscany, "trev" in Gaul, "fine" in Ireland, and "verv" in Russia: *Kovalewsky*, "N. R. H." 1896.

² Described by *Bogisic* among the Slavs of the South. Cf. *Kovalewsky* with regard to the Ossetes of the Caucasus. In the sixteenth century *Guy Coquille* gives a similar table of the servile communities in Nivernais ("Quest. sur les Coutumes," no. 58); *Dareste*, p. 244. The "mazades" ("mansata," manse) which have been studied by M. Bauby in Languedoc, are only a variation of these ("Rec. de l'Acad. de Législ. de Toulouse," 1885, p. 69).

obtain the consent of the chief in order temporarily to absent themselves from it. The immovable belongings of the community are inalienable, indivisible and cannot be disposed of by will; the women can make no claim to them and have to content themselves with a marriage portion consisting of movables; the men have as their absolute property only a portion of their earnings ("peculium").

This primitive type of the family community has left traces everywhere. It is as a relic of the primitive community that the Roman law designates children as its heirs. The Cretan law of Gortyne declares that the father is master of the children and of the property, and that it rests with him as to how partition shall be made. This recalls the parable of the prodigal son: "And the youngest of the two children said to his father, 'My father, give me the share of the possessions which is mine'; and the father divided it with them." It is very evident that here we are not concerned with a share of an inheritance, but with a share of a community.¹

§ 25. **Dissolution of Family Communities. Evolution towards the Simple Family.** — How did the family composed of associates become dissolved to make way for the elementary family composed only of the father, the mother and the children? It was because, though a force, a defensive arrangement, which was necessary in those troublous times, it was also a hindrance and a tyranny for the individual, — a tyranny in every instance, an annoyance under all circumstances, the most hateful of servitudes; one only submitted to it very reluctantly because one could find no other means of obtaining the security which was indispensable. Just as soon as the State gained strength and its protection became sufficiently effective to enable one to dispense with the protection of the household the individual became detached from the group and formed an independent family.

§ 26. **Polygamy.** — The family has thus evolved from a community which became more and more extended towards a restricted group including only the father and mother with their descendants. Monogamy has been the last step of progress in this direction; but, even in our day, **polygamy** is still practised among many people. When a man procures wives by purchasing them

¹ After the death of the father the children sometimes remain in joint possession; "Rotharis," 167; Capitulary of 818-19, c. 6 (I, 282). On the right of inheritance *cf. infra*.

or carrying them off, if he has sufficient wealth and power, he will hardly limit himself to only one. The prejudices tend to foster polygamy (such as the one which compels a man to live apart from his wife as soon as pregnancy is disclosed, and even so long as the child has not been weaned; that is to say, often for three or four years); and motives of an economical nature have the same tendency; in women are seen above all, useful workers, workers who are all the more valuable because they receive no salaries. In Germania, according to what Tacitus tells us, the man fought, the woman worked. "If a Redskin succeeds in acquiring five or six wives his position becomes quite important, their work being profitable to the family in other ways than hunting, which is the only occupation which the husband will consent to indulge in."

The more numerous the wives, the less work does each one of them have to do. Therefore it is not a rare thing to find them quarreling with their husband in order to drive him to polygamy. "Livingstone related before the Makololo women that in England a man could marry only one wife, and that he was held bound to be absolutely faithful to her. The unanimous reply to this was that one was very unfortunate to live in such a country as that."

Other causes of polygamy are premature old age and barrenness of savage women as a result of excessive labor, privation and bad treatment. The chiefs have several wives so as to give more brilliancy to their suites, or in order to procure themselves alliances; so in the "Germania" of Tacitus, 18: "The African and the inhabitant of India are as proud of the number of their wives as we would be of the number of horses in our stables." Finally, if wars are continually carried on and all the men are fighting and many perish, — which is the case among primitive societies, — a polygamous tribe will prevail over a monogamous one because the number of births in the latter will be more numerous.

§ 27. **Evolution towards Monogamy.** — Whatever the reasons in favor of polygamy may be, it encounters an insurmountable obstacle: the number of women is quite perceptibly equal everywhere to the number of men; if one man has several wives, there will be others who have none at all; this will always prevent polygamy from becoming general. It is disappearing at the present time as a consequence of religion, morals, and the material difficulties of living. In India more than ninety-five per cent of the Mahometans are driven to monogamy by necessity. The Moors

and the Kabyles hardly ever have more than one wife. It is the same in Persia and in Egypt. One complaint is that the peace of the polygamous household must often be disturbed. The legislator finds himself compelled to regulate the rights and duties of husbands; according to the Koran, the Mahometan must regularly frequent the three or four wives which the law permits him to have. Often each wife has a separate house. In the absence of such precautions as these jealousy will result in its natural consequences: quarrels, struggles, bad treatment (in the Fiji Islands the rival wives eat each other's noses, *literally*, in order to disfigure one another). The rivalry between different wives becomes complicated by the rivalry between the children of various wives. In this way polygamy is found to be one of the causes of the downfall of the family.

§ 28. **Forms of Transition.** — 1st, Polygamy with prominence of one wife; 2d, Monogamy with concubinage; 3d, Monogamy together with the possession of women slaves. — In the polygamous family a hierarchy comes to be established among the wives; one of them occupies the highest place, either because of her fortune or else because she was united to her husband by the solemnities of a religious marriage. Among the Mormons only the first wife bore the husband's name. In Turkey the first wife in point of time is mistress of the house; the others must obey her; only her children inherit the position and possessions of the father. The second wife differs little from the concubine,¹ who is ordinarily of low extraction, is bought at a rather low price, and to whom one is united without any marriage ceremony.² The concubine in her turn is similar to the freed woman and the slave.

§ 29. **Monogamy** has thus prevailed among the superior races. It is beyond a doubt that it is much better than polygamy, even with those unfortunate correctives which form its accompaniment, — adultery, concubinage, and prostitution, — but which we must not forget are far from being unknown among people who practise polygamy. It better assures peace in the household, harmony of ideas, and unity of purpose. It avoids rivalries and quarrels, whether between the wives or between the

¹ On Roman concubinage cf. *P. F. Girard*, "Manuel de Dr. Rom.," p. 177.

² "According to the law of Jutland, I, 27, the concubine becomes a lawful wife when she has lived in the house for three winters." Cf. *Gaius*, I, 111: the Roman "manus" is acquired by cohabitation during a year (unless there has been an interruption of the "trinoctium"). — In China the lawful wife is by a legal fiction considered the mother of the children of the concubines or lesser wives.

children born of the various wives. If mortality among men is not too great, it is more fruitful than the polygamous family; for, although there may be fewer children born, fewer also die; they are more loved, better brought up. Monogamy alone protects the dignity of the woman, and, consequently, that of the man.

§ 30. **Evolution towards the Independence of Children.**—The domestic authority, which was at first only a form of the right of ownership, has gone on being differentiated and becoming weakened; to-day it is no longer anything but the shadow of itself. In Rome it meant the right of life and death and ended only with the decease of the "paterfamilias"; in Gaul among the Galates it presented the same characteristics. The Germanic "mundium,"¹ which it has been attempted to contrast with the Roman "potestas," did not originally differ perceptibly therefrom; it was not a sort of guardianship organized in the interest of the weak, but it became so. It has been wrongly maintained that the child who was politically emancipated by the taking up of arms in the popular assembly, "ipso facto" ceased to be under the paternal "mundium."² This is not so at all. In order that this might be so it was necessary for him to found a separate establishment or to pass under somebody else's authority, into another family; perhaps, however, he *did* thereby acquire the right to go away from the hearth of his father, should he wish to do so. In Ireland old age³ caused the father to lose his authority.⁴ The State thrust itself into the administration of the group that was formerly independent. It has controlled the exercise of the paternal power, repressed abuses, and transformed this power into one of protection in the interest of the children. The father was formerly a despot with respect to his children; he has become a guide and older brother who is respected (or whom one is sup-

¹ "Mundium," an expression made use of in the barbarian laws, comes from "munt," a literal equivalent of the Latin "manus." The holder of the "mundium" is called "munt," "muntporo," "mundoaldus," "foramundo." Cf. "Vormund," guardian in the existing German law.

² If the young man receives arms from anyone other than his father, — for example, from a chief, — he then enters that family's "clientele" (Brunner, I, 77; Heusler, "Instit.," II, 435) or becomes his adopted son: *Sohm*, "Procéd. de la L. Sal.," app. V.

³ Moreover, it is a duty for children to kill and eat their relatives who have become old and stricken down with infirmities.

⁴ *D'Arbois de Jubainville*, "La Puiss. pat. en Irlande" ("R. Celt.," 1891, VII, 241). Unless he is emancipated the son cannot contract without the consent of his father; but, if he has assumed the care of his old and invalid father, the disability ceases; when he refuses to take care of his father the latter may adopt a relative or a stranger ("mae gor") who succeeds him if the other relatives have approved of the adoption.

posed to respect) and scarcely more. On coming of age the child, whether a son or a daughter, is always emancipated, even if he continues to live with his parents. The right of correction still exists, but only to a very much lesser degree and under the surveillance of the public authorities. The possessions of a child who is a minor are taken care of by the father; he is sometimes allowed to have the enjoyment of them, but still with reservations, — so much so that for him it is rather a care than a benefit. In case he abuses his power the father is deprived of the paternal power. If the father dies, or in case of his absence or of some impediment, it is the mother who exercises this power.

§ 31. **Evolution towards the Emancipation of the Woman.** — From a slave, which she was first of all, woman has become almost the equal of man. The beginning of this evolution is to be found, according to an opinion that was formerly widespread, in the old Germanic customs. However, marriage among the Alemanni as it is described by Tacitus, 18, is only marriage by purchase: "The wife does not bring any marriage portion to the husband; it is the husband who settles a marriage portion on his wife. The parents and near relatives accept the presents, which are not those that one uses to please women or those with which a newly married woman decks herself, but oxen, a horse with his harness, a shield with a staff and sword." These objects were the currency of that period, and it is a question of a purchase price paid to the parents, and not to the woman herself, for Tacitus adds: "In exchange the husband receives the wife as his spouse"; from whom does he receive her if not from her parents? "The wife on her side offers a few arms to her husband"; "aliquid armorum," which can only be understood to apply to a share of little importance. Tacitus has seen in these objects symbols of the life in common which the spouses were about to lead; the wife will learn by this means that she will have to share the fatigues and dangers of her husband. But this symbolical interpretation of the Germanic marriage differs too much from the results furnished by a comparison of legislation and the later law¹ for us to be able to accept it. The high character of the conjugal union is scarcely compatible with the facility with which it can be repudiated on the part of the husband. If the adultery of the wife

¹ "L. Saxon," 49, 65: "uxorem emere," 43: "pretium emptionis"; *Richthofen*, "L. Sax.," 288, 291; "L. Burg.," 34, 42, 61: "puella emta." In the fifteenth century the purchase of women is still practised among the Dithmarches.

is rarely met with, — and the severity of the penalty which she incurs is not unconnected with this result, — the irregularities of the husband remain unpunished. In certain towns second marriages are unknown, “*unum corpus unaque vita*”; but this affects only women; the husband may contract a second marriage, and then the saying “*unum corpus*” is found to be false, especially if the husband is polygamous; the wife, according to the Germanic ideas, should die with her husband, rather after the manner of the suttee in India. The modern feeling of respect for women has nothing in common with that magical power which the Alemanni believed them to possess; had such feeling existed they would never have been subjected to the most arduous labor, while the men remained idle; they would not have been excluded from the paternal succession, and they would not have been under perpetual guardianship.¹

§ 32. **The Same.** — In reality the elevation of the condition of women had its origin in the Roman law, in the Christian ideas, and in the customs resulting therefrom. As a young girl or a widow, the woman has ceased to be under guardianship. She only lacks political rights, and, there are even countries where she enjoys these. Her parents do not marry her any more against her will; she marries herself. The power of the husband itself has been weakened. The husband is reduced to the supervision of the household, with a moral and sometimes a material responsibility which is very heavy. Formerly the husband alone had the right to repudiate his wife. In our day divorce is no longer a prerogative of the man's; the woman may demand it for the same causes, and even for incompatibility of disposition, or without any serious reason, according to the Swiss law.

The wife, who under the primitive patriarchal system was “*in manu mariti*,” and who for this reason could have nothing of her own, now possesses a fortune of her own. The purchase price paid by the husband to the relatives of the wife² is changed into

¹ *Tacitus*, “*Germ.*,” 18, 19. Cf. 15, 8; *Procopé*, “*De Bell. Goth.*,” II, 14 (Herules: the widow gives up her life on the tomb of her husband); *Michelet*, “*Origines*,” p. 54.

² In Ireland the wife's father receives the entire purchase price for the first marriage; for the second marriage the father receives two-thirds and the wife one-third; for the third marriage each one receives a half; at each new marriage the share given to the father decreases until the twenty-first marriage, when he receives nothing. If there is no father, then the brother who is the head of the family exercises these rights; but he gets only half of what the father would have received: *D'Arbois de Jubainville*, “*R. Celt.*,” III, 361.

a dower for the widow; the relatives have left only a fictitious price; for example, the "sou" and the "denier" of the Frankish Customs. Originally, the wife entered the husband's family without anything; she brought with her no property excepting a few small objects such as clothing, necklaces and the rough ornaments of primitive times, — the only possessions which she obtained from her father. But in time the reasons which had excluded her from this inheritance were weakened; the daughters inherited, at least if there were no brothers, and brought their husbands so important a marriage portion that it was the portion rather than the woman that one married.¹ This is just the opposite of what took place in the old times, and the contrast between these two systems had struck Tacitus: "Among the Alemanni," says he, "the wife brings no marriage portion to her husband; it is the husband who makes a settlement upon the wife." Ownership for the wife means emancipation. In proportion as she becomes more wealthy she becomes more independent of her husband. The portion of her fortune which she keeps for herself (paraphernalia) is often far greater than the marriage portion that she gives to her husband. Listen to the old Romans, such as Cato, becoming indignant at this subjection of the poor husband to the rich wife: "At the time of one's marriage," he used to say, "one's wife brought him a satisfactory marriage portion; since that time she has received considerable sums of money which she has not confided to the absolute power of her husband. This money she has lent to her husband for interest, and as soon as he gets in a bad humor we find her sending some paraphernalial slave to pursue and annoy the poor man."²

The Middle Ages contrasted **community of possessions** between spouses with the Roman **marriage portion system**. Although under this latter system the wife is no longer subject to the husband's power, still she has absolutely no share in the advan-

¹ As to the wife's property in India, cf. *Sumner Maine*, "Inst. primit.," p. 402.

² In the Irish law the position of the married woman depends upon her fortune; she is in a position which is sometimes inferior, sometimes equal, and sometimes superior to that of her husband (the same in Sumatra); the husband who is poor is only the servitor of his rich wife. Women who inherit the fortune of their relatives must bind themselves not to take the hereditary possessions into another family. The authority of the husband is broken when it comes in contact with the rights of the wife: *D'Arbois de Jubainville*, "R. Celt.," 1886, p. 267. Diodorus of Sicily tells us that among the Egyptians the woman could in her marriage contract reserve to herself authority over her husband, even though he were king.

tages realized by the husband in the administration of the property forming the marriage portion. The community still places the wife who has her own possessions under the authority of her husband; but the husband cannot have any disposal of the personal belongings or family possessions of his wife; and, as acquisitions made during the marriage belong to both spouses in common, she receives her share of them when the marriage is dissolved, — a thing which is perfectly equitable when her personal possessions or her labor has contributed, as happens more often than not, to the acquisition of these possessions by the community.

In England, where the community was never introduced, the evolution of the marriage contract was the same as at Rome. The "feme covert," who was absorbed in and annihilated by her husband, resembles the Roman wife "in manu mariti." But the civil law was often evaded, and the Law of 1882 (Married Woman's Property Act) sanctioning an emancipation which had already taken place in fact, has given her the free administration and the free disposal of her possessions; she is merely asked to contribute her share to the expenses of the marriage; she is in the same position as a silent partner.

Separate maintenance while waiting for the attainment of a judicial separation, say the pessimists. Can this really be the first step towards the disintegration of that partnership which better than any other has succeeded in assuring at one and the same time the preservation of the species and the well-being of individuals? Or, on the other hand, is it a means of still further purifying the ideal of the Christian family, that great school of devotion and self-denial? ¹

¹ *Laboulaye*, "Recherches sur la Condition civile et politique des Femmes," 1843; *P. Gide*, "Etude sur la Condition privée de la Femme," 2d ed., 1885 (added to by *Esméin*). — *Condorcet*, in his "Esquisse des Progrès de l'Esprit humain," already claimed equality of the sexes. The Code of the Convention did not contain any article relating to the husband's power. In our own century the emancipation of women has been sought for by the School of Saint-Simon: *J. Stuart Mill*, "Subjection of Women," French translation, 1874; *Bebel*, "Ueber die Gegenwärtige und Zukünftige Stellung der Frauen," 1878; *Bridel*, "La Puissance maritale," 1879; "Le Droit des Femmes et le Mariage," 1893.

TOPIC 2. ORIGIN OF OWNERSHIP

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| <p>§ 33. Ownership of Movables and Ownership of Land.</p> <p style="text-align: center;">A. COLLECTIVE OWNERSHIP</p> <p>§ 34. Collective Ownership of the Clan or the Tribe.</p> <p>§ 35. The Ownership of Land among the Alemanni.</p> <p>§ 36. Frankish Period.</p> <p>§§ 37, 38. The Germanic March.</p> <p>§ 39. The Marches disappear.</p> <p>§ 40. Anglo-American Townships.</p> <p>§ 41. The "Mir."</p> <p>§ 42. The Village Community in India.</p> <p>§ 43. The "Dessa" or Commune of Java.</p> <p>§ 44. The Abandonment of Collective Ownership.</p> <p style="text-align: center;">B. REMAINS OF COLLECTIVE OWNERSHIP</p> <p>§ 45. (I) The Manorial System.</p> <p>§§ 46, 47. (II) The Rights of Peremption and Repurchase.</p> <p>§ 48. (III) The "Flurzwang."</p> | <p>§ 49. (IV) The Rights of Commons.</p> <p>§ 50. "Allmends."</p> <p>§ 51. Feudalism and Rights of Commons.</p> <p>§ 52. Theory of the Feudists.</p> <p>§ 53. Theory of the Romanists.</p> <p>§ 54. The Revolutionary Law.</p> <p>§ 55. Partition of Rights of Commons.</p> <p style="text-align: center;">C. FAMILY JOINT OWNERSHIP</p> <p>§ 56. Family Joint Ownership.</p> <p style="text-align: center;">D. REMAINS OF FAMILY JOINT OWNERSHIP</p> <p>§ 57. (I) Rules of Successions.</p> <p>§ 58. (II) The Classification of Immovable Property into Personal Belongings and Acquests</p> <p>§ 59. Family Institutions in Our Period.</p> <p>§ 60. (III) Rules of Feudal Ownership.</p> <p>§ 61. (IV) The Process of Evolution towards Individual Ownership.</p> |
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§ 33. **Ownership of Movables and Ownership of Land.**—Ownership of movables, which was the first in point of time, was originally the ownership of animals. It was at first very much restricted. Men who lived by hunting and fishing possessed only a few arms, rough utensils, and skins of animals, which served them as clothing and a hut in which they sheltered themselves at night. Hunting and fishing were carried on in common: the big game and fish that were captured were the collective property of the group. There was no idea of any appropriation of the soil. The tribe believed itself to have exclusive rights only over its hunting grounds. It was the same when the pastoral system was substituted for hunting and fishing. The ownership of land made its appearance only with agriculture. According to an opinion which was very generally accepted a short time ago, but which to-day has many adversaries, the ownership of land must have originated in the tribe and the clan, and then have passed to the family, and finally to the individual. The disagree-

ment on this subject is as to whether the collective ownership of the tribe did or did not precede family joint ownership; but there can be no doubt that the first owner of the soil was not the individual. Jean-Jacques Rousseau could no longer write: "The first man who, having enclosed some land, thought of saying, this is mine, and found people simple enough to believe it, was the true founder of the civic society."

It is also noticeable that the right over land was not originally determined with the same exactness that it is in our day. It was not very clearly distinguished from the sovereignty which at the present time still belongs to the State. During the feudal period this distinction is not made very clearly. It is only in our day and during the Roman period that the right of the individual has been opposed to that of the State as being something which cannot be altered.

A. COLLECTIVE OWNERSHIP

§ 34. **Collective Ownership of the Clan or the Tribe.** — Agrarian communities are met with in countries of the most widely different character.¹ The "*Liber Hymnorum*," a manuscript of the eleventh or twelfth century, attests their existence in Ireland until the seventh century A. D.: "There was neither ditch nor fence nor stone wall around the land until the period of the sons of Aed Slane (658-694), but only the undivided fields. Because of the great number of families, in their period they introduced the division of land."² Among the Arabs of Algeria a distinc-

¹ Community of houses is also found; for example, among the Pueblo Indians. *Masselin*, in his "*Journal des Etats généraux de 1484*," speaks of a sort of phalanstery which existed in his time in the region of the Loire.

² The **Ownership of the Soil among the Gauls** in the time of Cæsar does not belong to the State, but probably to the family. Cæsar, comparing the customs of the Gauls with those of the Alemanni, points out the existence of collective ownership in Germany; he could not have failed to tell us of its existence in Gaul at the same time; his silence has probative force against those who, like D'Arbois de Jubainville, have maintained the contrary. This learned man, in his "*Recherches sur les Origines de la Propriété foncière et des Noms de Lieux habités en France*," 1890, remarks that the "fundus" or Roman domain was designated by the family name of its first owner with the termination "anus" in Italy and in the south of Gaul, and "acus" in the remainder of Gaul; for example, "fundus Sabiniacus," the domain of Sabinus, from which are derived the modern names of Savignac, Savigny, and Sévigné. This is the way in which most of the names of places in France originated. He concludes from this that private ownership in Gaul dates from the Roman conquest; at this time lands were baptized in the Roman fashion by giving them the name of their owner. This argument is not conclusive, for the Gallic language has perished and with it the names of the "fundi," if there

tion is made between "arch" lands, which are left to the collective enjoyment of the tribe, and "melk" lands, which are under the ownership of individuals. Among the Yolofo on the coast of Gorea the head man of the village, with the assistance of a council of the elders, makes an annual redivision of the lands to be cultivated. The best known forms of this system of ownership are the Germanic march, the English township, the Russian "mir," the village communities of India, and the Javanese "dessa."¹ Each one of them has its separate history and phases which will not allow of its being reduced to a common type, that of agrarian communism. 1st. Sometimes the tribe jointly cultivates the land, or, at least, each family occupies and clears the quantity of land that it needs until it is used up; this is only possible when a population is very sparse (Archangel, Cossacks of the Don, certain villages in Hungary in the eighteenth century). 2d. Sometimes periodic allotments take place, a thing which becomes necessary when population increases in order to prevent a few from taking possession of everything and leaving nothing for the rest. 3d. And, finally, sometimes the partition is absolute with regard to arable lands, and only waste lands, forests and pasturage are left in joint possession.

§ 35. **The Ownership of Land among the Alemanni** is described by Cæsar, "De Bello Gall.," VI, 22: "[The Alemanni]

were any; besides, private ownership may exist without the land bearing the name of its original owner: *Lécrivain*, "Ann. de la Fac. des Lettres de Bordeaux," 1889, no. 2. Cf. "N. R. H.," 1886, 478; 1887, 241.

¹ However obscure may be the history of the origin of **Ownership in Rome**, one can say that Rome knew family joint ownership ("dominium," from "domus, heredes sui," D., 28, 2, 11) and the collective ownership of the people, or, rather, of the "gens"; wealth consisted at first only in slaves ("familia") and in flocks ("pecunia"); the forms of mancipation, the primitive method of alienation and of the reclaiming, cannot very well be applied excepting to movables, which leads us to suppose that land was inalienable; each head of a family had as his own ("heredium") only two "arpents" of land ($\frac{1}{2}$ "hectare"), "a little enclosure analogous to that of the Russian peasant, which could not support him and his, and besides which there must have been not only public woods and pastures, but common arable lands." Lands taken by conquest which were the property of the State ("ager publicus") consisted of: 1st. Those granted as a gift or for a consideration to citizens and subject to an official limitation ("agri limitati"). 2d. Those left to be occupied by individuals, and therefore not officially limited. At the beginning of the Empire this second category of lands became the absolute property of its occupants; this made impossible the agrarian laws by which the people took back these lands from their occupants in order to grant them to others, which, strictly speaking, they had a right to do, but which brought about the ruin of a great number of people and disturbed the State. From that time on "the co-relation between limitation and private ownership ceased to exist." The family lands were thus changed into private ownership; the "ager publicus" had the same fate.

have little taste for agricultural labor; they live more on milk and meat than on wheat. None of them possesses any settled amount of land of his own; and none of them has any enclosed fields; but each year the chiefs and the magistrates distribute the land to the families and to the male relatives. . . . The following year they are compelled to change places."¹ This very clear text should serve to interpret² the much discussed passage from the "Germania" of Tacitus, 26, which deals with the same subject: "The land," says Tacitus, "is occupied 'en bloc' by the community;³ its extent is determined by the number of cultivators; it is repartitioned among them according to their social rank; each year they pass from one piece of arable ground to another;⁴ the repartition is very easy because the fields are very vast, and there are neither orchards nor pastures, — nothing but harvests."⁵ This certainly must be a system of collective ownership not by the family but by the village. The only thing that escapes from it is the house with a little plot of land surrounding

¹ Cf. IV, I: among the Suevi there was neither private ownership nor limited fields; no one was allowed to stay longer than a year in the same spot.

² Tacitus, "Germ.," 28: "summus auctorum divus Julius."

³ What are these "universi," these communities? A group of "gentes" and of "cognationes," corresponding perhaps to the military divisions, the hundred and the "millena."

⁴ Because the land which one occupied at first has become used up.

⁵ "Agri pro numero cultorum ab universis invicem (variants: in vices, per vices, vicis) occupantur quos mox inter se secundum dignationem partiuntur; facilitatem partiendi camporum spatia præstant. Arva per annos mutant et superest ager; nec enim cum amplitudine soli labore contendunt, ut pomaria conserant, et prata separent, et hortos rigent; sola terræ seges imperatur." Cf. Horace, "Odes," III, 18, 24. Meitzen, III, 586, looks upon "invicem" as a meaningless repetition of "universis" and strikes it out. According to Fustel de Coulanges, Tacitus was only speaking of a system of rotation of crops. Here is this learned man's translation: "The arable lands are cultivated as well as they can be considering the small number of hands there are to cultivate them; they are only made valuable in sections and alternately ('occupantur in vices'); this is done for greater convenience by all the cultivators together ('ab universis'); each one, moreover, has in it his share, which is proportional to his right ('secundum dignationem'). From time to time periodically they change the scene of their labors ('arva per annos mutant'). And then they go to another part, that their flocks have made fertile. Thus there are always more lands than they are cultivating." — Cf. "Germ.," 25, 16 ("suam quisque domum spatium circumdat"), 20, 32. There is a good deal of discussion among German authors on the subject of the method of temporary partition of the land. Cf. "Année sociol.," I, 375. The early form of agriculture could be reduced to burning off the underbrush and the trees and sowing upon the soil thus fertilized by the ashes ("écobuage"). Exhaustion soon takes place, and it is necessary to go to another piece of land. The triennial rotation of crops, practised already under Charlemagne, is a step in advance; the perpetual pasture is distinguished from the field which is cultivated, which is nearer the center; the latter is divided into three parts; two are sown alternately, — one with winter grain and the other with summer grain; the third is left fallow.

it. The existence of this agrarian community accounts in the most natural way for that of the march in the Middle Ages.¹

§ 36. **Frankish Period.** — There is some discussion on the point as to whether there were village communities during the Frankish period.² This was not the ordinary system applied to land, — at least in France. In view of the Roman form of ownership, which was coming to an end, and the feudal form, which was just beginning, the collective ownership of the Germans only appeared sporadically, especially in the North. The reasons put forward to prove its existence are the following: 1st. The Salic Law, Tit. 45, "De Migrantibus": "If a man establishes himself in a village, it is sufficient to have him expelled that one of the inhabitants of this village asks for it, unless he shall have lived there twelve months." The prior settler would not be authorized to bring about an expulsion of this kind if there were not a very close solidarity among the inhabitants of a village. It is difficult to believe that this solidarity does not imply a certain amount of agrarian land owned in common. The Capitulary of 819, c. 7, which modifies the Salic Law, would lead one to suppose that assent by the inhabitants of the village cannot shelter an occupant from the owner's right of reclaiming.³ 2d. The Edict of Chilperic, 561, 584, c. 3, abolishes the inheritance of the "vicini" or inhabitants of the village. 3d. According to the "Cap. Extravag." of the Salic Law, c. 9, there is among the inhabitants of villages a solidarity in criminal matters which seems to be less than that which exists among the members of a family; they are responsible for a murder of the inhabitant of one village by that of another when the guilty man is not known.⁴ 4th. There is sometimes a question, in deeds and in the laws, of a justice carried

¹ The fact that the gifts of the Germanic chiefs to their followers did not consist in land, and that the Alemanni did not make use of the will, does not necessarily imply the collective ownership of the tribe, but may be accounted for by means of family joint ownership.

² *Thévenin*, "Les Communia," 1886; *Fustel de Coulanges*, "L'Alleu et le Domaine rural," 1890; *Glasson*, "Les Communaux et le Domaine rural," 1890 (and authors cited); *Blumenstock*, "Entstehung d. Deutschen Immobiliareigenthums," 1894; *Daresté*, "J. des Sav.," 1890; "N. R. H.," 1890, p. 821; *Fournier*, "R. des Quest. hist.," 1886; *Lamprecht*, "Le M. Age," 1889.

³ The Capitulary of 819, which provided against the occupation of another's domain, "villa alterius," assumes a change in the system of ownership. "Villa" ordinarily means domain, but also by extension it can mean village, group of houses occupied by those who cultivate the domain, "ipsi qui in villa consistunt, vicini"; the employment of this last word ("vicini" from "vicus") is particularly significant: *Fustel de Coulanges*, "R. gén. de Droit," 1886, and "Nouv. Recherches," 1892; *Saleilles*, "Rev. bourguign.," 1895.

⁴ *Pardessus*, "L. Sal.," p. 332.

out by the "vicini" or "pagenses," just as later on there is a question with regard to justice carried out by the march or by the "colonge."¹

§ 37. **The Germanic March**² ("Dorfgenossenschaft," "Markgenossenschaft"),³ which is found in the North of France after the invasions of the barbarians, and which lasted in Germany throughout the entire Middle Ages, does not differ essentially from the agrarian communism described by Tacitus. It constituted an organization which was at the same time economical and political.

(I) Looked upon in the first aspect, the community, a legal person, is the owner of the march. The march consists of three parts: 1st. The village, — that is to say, the dwelling-houses, with the yards and gardens belonging to them. 2d. The arable land ("Feldflur"), which is divided into parcels and at this time subject, like the house with its yard and garden, to the system of private ownership. 3d. The rights of commons ("almeinde," "allmend"), which are left to the joint use of the inhabitants of the village. Each one of these categories of possessions forms a portion of the march, although it may seem that the first two classes, which are subject to private ownership, should for this reason be excluded. The "commarchani" need both equally: how is one to build his house without the wood which is furnished by the forests belonging to the community? how feed the cattle that work in the fields without the common pasture? Once the harvest has been gathered, the arable land is left, like the "allmend," to the enjoyment of all; it is necessary, in order that all may have the same rights, to regulate cultivation and fix the number and the rotation of crops and the period of the harvest. The right of the people collectively is still very extensive, even over the share of the individual.⁴ A day will come when the "allmend" will be an

¹ *Thévenin*, "Textes," p. 58 (Act of 871); "L. Bav.," 17, 2; "Burg.," 49, 3; "Form. Senon.," 38.

² "Marca," literally mark, means limit, and by extension land situated within the limits of a village, within the confines of a country. The common lands of the villages, being near the limits of the territory of the latter, and outside of the cultivated fields, were called Marches: "N. R. H.," 1892 ("Les marches séparantes d'Anjou").

³ The "Markgenossenschaft," or association of the march, is not absolutely identical with the "Dorfgenossenschaft," or village association; it may include several villages; for example, a metropolis village and colony villages ("Filiäldörfer"). The "colonges" ("colonica") of Alsace constitute communities analogous to the marches.

⁴ *Michelet*, "Orig.," p. 229. — *Loysel*, "Inst. Cout.," 257: "Le bois, acquiert le plain" ("Bourgogne," XIII, 1); the "socome" forest (that is to say,

accessory of private ownership of the house and the field; but this will be at the period of the decline of the march; the economical condition of which it is the expression will have changed. There is some discussion as to the rights of the "commarchani," members of the community, and the rights of the community itself. The controversy is based upon the fact that some of the documents affecting the march correspond to its decline and some to its zenith, so that it is impossible always to make the necessary distinctions. In proportion as the march disappears the rights of its members become detached and strengthened. But, if one places oneself at about the twelfth century in the very midst of feudalism and disregards local variations, the community, a legal person, is found to be the only owner, to the exclusion of the "commarchani." It alone has the right to dispose of all or a part of the lands; it alone regulates the method in which they shall be enjoyed; it alone can authorize the changing of the "allmend" into land to be cultivated by clearing it ("rodung"). The inhabitants of the village can only keep their shares by virtue of the statutes; their title is but the will of the march. Theoretically, the march would have a right to make a new repartition of all the arable land; it does not make use of this right as in the time of Tacitus, but the right still exists to all intents and purposes. The enjoyment of the lands owned in common is similar to that which exists in our day with relation to certain portions of the public domain (roads, rivers). It belongs to the inhabitants neither as joint owners with joint possession nor as persons having a right to servitudes, and this is shown by the fact that it depends upon the community to modify the exercise of it, and even to do away with it altogether, by alienating the "allmend"; the community could neither do away with a right of joint ownership nor a servitude. If there is an action between two marches with regard to a field that is cultivated by a member of one of them, this member is not a party to the action, as would be the case were it a question of private property; it is the two marches that plead against each other. In case of the march being alienated, or if it is encumbered with rents (for example, in 1172 the village of

where it is forbidden to take wood or pasture domestic animals) acquires for its owner the portions of the neighboring heritages over which it extends, — the extensions which have remained thirty years uncultivated. — In the same way in Germany any doubt is interpreted in favor of the "allmend"; the uncultivated land easily accrues to the march; *Chaisemartin*, "Proverbes du Dr. Germ.," p. 113 *et seq.* — *Loysel*, 248: all extensions are looked upon as common pastures on waste lands.

Bernheim was placed under the control of the Empire by the "villani"), the members of the march do not sign together, as they would do if they were owners with joint possession. Everything is done according to a decision arrived at by the community. This decision is binding upon all its members; one of them could not attack the deed under the plea that he did not approve of it. This would be quite different in case of joint possession. In case the "allmend" is alienated the enjoyment of the member of the community in it will cease. He cannot plead this right against a third party who acquires it; the most he would have would be a right to attack the conveyance had it been irregular. The debts of the march are, it is true, charged to the members of the community; but this is a consequence of the system of financial organization of that time, which was very rudimentary, — a consequence which corresponds with the Customs, such as those which made the citizens of a town responsible for each other's debts to strangers.

§ 38. **The Same.** — (II). The march with its assemblies and its representatives, forms a natural **political division**, and perhaps it is at first confused with the hundred. At any rate, during the feudal period, it is like a little State. It has its own administration, police, and justice; it provides for everything, and in this respect is connected with the public law. "The march was sovereign, even though it should pay a rent to a lord. Its members assembled together and deliberated upon its common interests; even though an administrative council had been appointed for its current business, the general assembly kept the right to the most important decisions; the admission of new members, sale, or partition of forests, ratification of judgments rendered in difficult cases, appointment and surveillance of the officers of the police and the law. The smallest details are regulated by tradition: the time and place of the meeting, the preparatory ceremonies, the condemnation to a fine of those who are absent, the form that the discussions take, the method of voting. The session is public, but only the members of the march can take part in it; the proceedings take place orally. Each march has its penal code." In the same way the Alsatian "colonges" have a tribunal appointed by all the members of the "colonge" (even though they may be serfs), or by twelve of them (Aldermen, "Schoeffen," "Heimbürger"), presided over by the "Schultheiss" ("Scultetus") or a seigniorial provost, charged, in

addition to his function as a judge, with collecting the rent due to the lord.

§ 39. **The Marches disappear** towards the fifteenth or sixteenth century; their rights of justice pass to the seigniorial or royal judges; individual ownership comes to be entirely substituted for community ownership of arable land; the cultivated field becomes the principal thing and the "allmend" an accessory. However, the agrarian system of the march has been preserved as a result of the nature of the land in some parts of Switzerland and Holland.¹

§ 40. **Anglo-American Townships.**²—Throughout England there seems to have existed in primitive times the township or commune with its common pasture and its arable lands subject to periodical repartition according to the "run-ring system" or system of successive partition of the land, of the passing from one lot to another in a continuous circle. The property owned in common was ruled over by the "mot," or assembly of the inhabitants, during the Anglo-Saxon period. This agrarian and political system was imported into America by the English colonists; even to-day the commune in the United States is called a township. It disappeared in Great Britain long since, excepting in a few portions of the lowlands of Scotland and the Hebrides, where one finds "crofters," small farmers who have received portions of land ("crofts") and who pay a quit-rent to the landlord. They meet together once a year in order to decide what portion of the land shall be placed under cultivation and to make a partition of the same among themselves; the shares are measured by the constable by means of the official rod, and then lots are drawn by the shepherd; sometimes private ownership begins to come into existence; the crofter has his own special piece of land to develop besides a portion of the arable land of the township.

§ 41. **The "Mir"** (people), or commune³ in greater Russia, is the

¹ *Heusler*, "Inst. d. Deutsch. Private.," I, 294.

² *Laveleye*, *op. cit.*, p. 258; *Seebohm*, "The English Village Community," 1890; *Seebohm* and *Joshua Williams*, "The Rights of Commons," 1892; *Sumner Maine*, "Village Communities," 1880; *Pollock and Maitland*, "Hist. of Engl. Law.," I, 550; *Maitland*, "Township and Borough," 1898; "Domesday Book and Beyond," 1897, p. 341; *Digby and Harrison*, "Introduction to the History of the Law of Real Property," 1897. — Town is equivalent to "villa": township means the community of inhabitants ("villata").

³ *Laveleye*, *op. cit.*, p. 10; *Haxthausen*, "Etudes sur l'Etat intérieur de la Russie," 1842-3; *A. Leroy-Beaulieu*, "L'Empire des Tsars," I, l. viii; "Revue des Deux Mondes," March 1, 1879; *Kovalewsky*, *op. cit.*, and "N. R. H.," 1891, p. 480.

owner of the soil; and because of this right it has to pay the taxes to the State and the rent to the lord. It is at one and the same time an agrarian and a political organization, just like the march; its self-government is as absolute as in the American township. The heads of the families, having met together in an assembly presided over by the "starosta," discuss the affairs of the community. Two-thirds of their votes are necessary in order to expel a member. In certain communes cultivation is carried on by all in common and the harvest is divided in proportion to the number of workers. In other communes the lands are periodically divided up, sometimes the individual and sometimes each household receiving a share. The commune sometimes keeps a certain amount of land in reserve; were it not for this, each person's share would decrease in proportion as the population increased. Formerly the partition took place every year or every three years; now it only takes place every nine years and on the occasion of each official census. The dwelling-house ("izba") and the garden surrounding it are the private property of the family; the head of the family cannot alienate it without the consent of the inhabitants of the village, and the latter have the right of pre-emption.

It was formerly thought that this form of ownership dated back to the very oldest times. Recent research has shown that it had not yet come into existence in the sixteenth century; at that time family joint ownership was the only form of ownership known. But when the family communities came to be dissolved their lands were partitioned, and each one of their members could alienate his entire share or a portion of it to strangers, who then took the place of relatives. Thenceforth the persons composing the community were no longer the same and the shares ceased to be equal. At the same time groups of farmers became detached from the family in order to make the waste lands of some value; the colony became reunited to the central settlement, which was another cause of inequality. When it became no longer possible to occupy new lands and the population increased, an equal partition among all the members of the community was demanded. From thence arose the system of periodical repartitions, which is not so very ancient as has been thought, but is relatively modern.

§ 42. **The Village Community in India** was not at first recognized by the English; taking as their basis the theory of the Ma-

hometans that the soil belongs to the sovereign, and that there is no such thing as private ownership of land, excepting by reason of his tolerance, they transported into Lower Bengal the English form of feudal ownership and looked upon the tax collectors as the great landowners; when it perceived the error that had been committed the government applied directly to the cultivators in order to obtain the tax, which resulted in the creation of a class of peasant landowners. The true organization of ownership was only understood by the English administrators after the conquest of the Punjab. It was then that the village community was discovered, with its arable lands divided into separate lots and cultivated according to traditional rules; with its pastures, the use of which is jointly possessed; and with its group of houses, each one of which is under the authority of the head of a family. In the central provinces (and in Afghanistan) lands under cultivation are still subject to periodical repartition; elsewhere they have ceased to be so, and each cultivator keeps his share individually (which allows his creditors to obtain possession of it should he not pay them, whereas they would not have dared to do this when this share was not distinct from the domain of the village). The subjection of the inhabitants of the village to the customary rules with regard to the cultivation of arable lands and the use of the common lands contrasts with their independence within their own house; in the latter we have a circle wherein the community loses every right; to the Hindu could be applied the English maxim: "The Englishman's house is his castle," . . . were there no English in India; for they indeed have failed to concede the absolute right of the master of the house. However, they have not succeeded in doing away with the mystery with which family life is surrounded, and which is concealed even in the most humble interiors. The slightest attempt on the part of the legislator to interfere with the domain reserved to the "paterfamilias" causes a very great scandal; for example, there is a complaint that the criminal law of the English deals with women and children in the same manner as with men. The group is all sufficient to itself; it has its religious organs (a Brahman and a dancing-girl), political (a council of the elders or a head, who is elected or inherits his position, and who administers justice and upholds the custom and a police) and economical (various artisans, traders, and a scribe, — all having their hereditary professions), which allow it to dispense with all aid from outside. Strangers are not admitted within the

village unless they purchase a share of one of the inhabitants and obtain the consent of the latter.¹

§ 43. **The "Dessa" or Commune of Java** is the owner of the land that is cultivated by its inhabitants. Its chief, who is elected for a year, repartitions among the various families the lands upon which rice is grown; he has a larger share, both he himself and the elders of the village who form his council. The form of cultivation which is practised has rendered necessary a development by all in common; that is to say, a general system of irrigation is required for the cultivation of rice. But this method of cultivation did not call for collective ownership; it could perfectly well have been combined with individual ownership or family ownership, for it is difficult to see why the inhabitants of the village must change their share every year.²

§ 44. **The Abandonment of Collective Ownership.** — Agrarian communities are not suitable either for concentrated cultivation or for varied cultivation. The cultivator does not become dependent upon the land, for he knows that it is going to be taken away from him at the end of a short time; for difficult work which does not give any immediate profit the stimulant of ownership or long enjoyment is necessary. The members of the commune, bound down by tradition, cannot indulge in various kinds of cultivation; the regulations kill any spirit of initiative; no one attempts any innovation because he cannot count on the benefit resulting from it. Everywhere that the individual has freedom to act as he will — in towns first of all, and afterwards in the country — a minority enriched by trade is formed, which monopolizes the land and is opposed to the periodical partition. The community, and the equality which is the result of it, only continue to exist in the case of people among whom the spirit of enterprise cannot be given a free rein. For the others, commerce, industry, the raising of cattle and the development of movable property give rise to helpful inequalities. It is the citizen of the town, the representative of economic progress, that has been the

¹ *Baden-Powell*, "Land Revenue in India," 1894, and "Land Systems of British India," 1892, considers these Hindu communities as of later formation and of a relatively recent date. Cf. *Laveleye*, 43, 294; *Trupper*, "Punjab's Customary Law," 1881; *Köhler*, "Z. f. vergl. Rechtsw.," 1887, 161; *Sumner Maine*, "Et. sur l'Hist. du Dr.," p. 137; *Jolly*, "Recht. u. Sitte," 1896 ("Gr. d. Indo-arisch. Philol."), "R. crit. de Litt.," 1887, p. 318.

² The repartition of the water necessary for the proper cultivation of the Plain of Valencia in Spain was made under the Moors by a collective administration without there being any common ownership.

ruin of collective ownership. The Russian peasant, jealous of the citizen's wealth, which he believes has only come from fraud and usury, calls him "the destroyer of 'mir.'"¹

The history of the colonists of the Island of Nantucket, in 1671, furnishes us a curious example of the transition from collective ownership to individual ownership. A group of dissenters, fleeing from the persecutions of the Puritans of Massachusetts, established itself in the island, as might have been done by one of the tribes which Tacitus speaks of. Each colonist received a share of the land for his house and his enclosure; the rest of the island was left undivided. The sandy soil being incapable of furnishing two harvests in succession, each year the cultivation was changed to another part of the island that had become enriched in its soil through the keeping of cattle, in such a way as to return at the end of seven years to the lands which had first been cultivated. The colonists only received a share of arable lands for a year. Little by little, the soil became more fertile; wealth in movables was the result of various causes, — fishing, maritime commerce. Inequality of fortune made its appearance, and with it private ownership, which was substituted for collective ownership.²

The abandonment of collective ownership has everywhere coincided with general progress. The modern phalansteries have not succeeded in restoring it to honor, and the recent experiments made in the Antipodes, in Southern Australia (Adelaide) with the object of returning to this archaic system, are not at all encouraging.³ Will another evolution in agriculture bring us back to it by substituting cultivation on a large scale with the aid of machinery for cultivation on a small scale, just as industry on a large scale is being substituted for industry on a small scale? Let the economists reply. But, whatever their reply may be, we

¹ *Kovalewsky* attributes the downfall of agrarian communities to political causes, but these causes themselves are dependent upon economic changes (for example, the part played by the middle classes). It is hard to deny without being paradoxical that the system of private ownership stimulates individual activity; with the old form of agriculture, which, so to speak, assumed that neither machines nor capital existed, the owner got more out of his field than the member of the community got out of the common field.

² *Belot*, "Nantucket" ("Ann. de la Fac. des Lois de Lyon," 1884); "Ac. Sciences Morales," 1885.

³ "Economiste Français," Dec. 28, 1895, p. 839 (Law of Dec. 23, 1893). *M. de Laveleye* attributes all sorts of virtues to collective ownership. It teaches us political life, gives us the spirit of preservation, does not allow of extreme poverty, and keeps the population in the country. He contrasts the English workman in his workhouse with the free Swiss commoner, with his "allmend." — We might as well ask for a return to the Golden Age. — Cf. *Dupuy*, "Le Communisme Chrétien," 1889.

must none the less believe it to be certain that in passing from this primitive stage the system of agriculture has been improved.

B. REMAINS OF COLLECTIVE OWNERSHIP

§ 45. (I) **The Manorial System.** The great domains of the Frankish period ("villa," "fiscus") were divided into farms, "manses" (from "manere").¹ The owner reserved a portion for himself, the "dominicum, mansus indominicatus," with the "casa" or "sala dominica," which recalls the Roman "prætorium."² The other "manses" were granted to cultivators (colonists, "lites" or slaves), and they were called tributaries, because the holders of them had to pay quit-rents to the master and performed various duty services (labors, "ragæ," "curvadæ"; carting, "carroperæ"; manual labor, "manuoperæ") upon the land which the latter reserved to himself. Outside of these manses (house, garden, arable land) the uncultivated lands, such as pastures, woods, and waste lands, were left for the use of all the cultivators of the great domain. Is this the agrarian community of primitive times, but subject to the lords and operating for their benefit (Kovalewsky) or a creation of feudalism (Seeböhm), or something derived from the Roman form of organization of ownership on a large scale (Fustel de Coulanges)?

§ 46. (II) **The Rights of Pre-emption and Repurchase** often existed for the benefit of the inhabitants of the village; if one of them wishes to alienate his land, the others have preference over grantees who are strangers, or, assuming a sale to have taken place, they can have themselves substituted for these strangers. The old law increases the number of these repurchases: there is one for the benefit of the fellow heirs, of joint owners with joint possession (the community repurchase and the repurchase of convenience), of neighbors who wish to get back a share which was formerly taken out of the inheritance (the repurchase of "esclèche," that is to say, eclipse, dismembering). In France this abuse is less than elsewhere; repurchases of this nature are an exception; in Germany and elsewhere they abound and render transactions in immovables almost impossible, for a man is hardly

¹ "Hobæ" ("Hof," court) "curtis," "curtilis" (court, enclosure, and by extension the manor, with and without the domain), "virgatæ" in England, hyde. "Mansus," "manoir," "mas," "meix."

² Salie land in the Alsatian "colonges," German "Fronhof," chief manor in England.

likely to buy when he has the prospect of having his bargain taken away from him by another, however small his profit may have been.¹

§ 47. **The Same.** — The formalities and publicity with which various legislations surround the alienation of land have also been looked upon as being derived from collective ownership. Thus in Sweden the alienation takes place before the "Thing" or popular assembly; the hundreder proclaims the sale and the investiture for the benefit of the grantee, excepting that the relatives have a right to petition for a repurchase within six weeks.²

§ 48. (III) **The "Flurzwang"** or rule of compulsory rotation of crops. With individual ownership each one cultivates his land as he pleases; under a community system certain methods of cultivation, certain rotations of crops are obligatory; regulations settle the period for agricultural labors (hay-making, harvest, vintage). The rights of permanent and rich pasture,³ of **commons**, and of **pasture on waste land**,⁴ which belonged to the members of the community and allowed them to drive their cattle upon one

¹ "Nachbarlosung," "Marklosung" in Germany; "chefaa" among the Arabs. The Code of Montenegro binds the owner who wishes to sell his land, 1st, to the members of the phratia ("brastvo") according to the order of their relationship; 2d, to the members of the tribe ("pleme") in the following order: adjacent owners, inhabitants of the same village, members of the tribe. — Cf. "Cod. Just.," "de contr. emt.," 4, 38, 14 (in 391); "N. R. H.," 1896, 648; "Cod. Just.," 11, 55 ("metrocomiæ"); Terrat, "Retraits en Dr. Fr.," 1872.

² Cf. "Genesis," xxiii (purchase of a piece of land by Abraham).

³ The right of permanent and rich pasturage is exercised over unoccupied meadow lands, pastures and woods in the acorn season; it only exists among the community inhabitants of the parish, whereas pasture on waste lands, which affects lands not enclosed within walls or hedges and stripped of their harvests, occurs within the parish or else outside of it between one parish and another. It is in this last case especially that it is rather qualified as rights of commons; *Ragueau and Laurière*, "Glossaire du Dr. Fr.," see "Pâturage"; *Ferrière*, "Dict. de Droit," see "Pâturage" (and authors there cited); *Loyzel*, "Inst. Cout.," no. 241 *et seq.*; *Denisart*, see "Pâturage"; *Guyot*, "Rép.," see "Pâturage" and "Vaine-Pâturage" ("Ord." of March 30, 1738); *Glasson*, "N. R. H.," 1891, p. 475; *Bluntschli*, "D. Privatrecht," § 88, 2; *Chaisemartin*, *op. cit.*, p. 173; *Heusler*, *op. cit.*, II, 53.

⁴ The provisions of the French Customs on the subject of rights of commons and of pasture on waste lands varied greatly: some showed themselves favorable and were thus connected with the old law, others yielded to more modern tendencies in admitting the right of enclosure and limiting pasture on waste lands to lands that were absolutely uncultivated and requiring some title, or possession, or only seeing in it a mere toleration: "Montargis," 4, 1; "Lorraine," 14, 23; "Sens," 146; "Auxerre," 260; "Mélun," 302; "Châlons," 267; "Bourgogne," 13, 4; "Bar," 205. As a general thing, some title was necessary in order to have the right of commons. Nor did the Customs agree upon the number of animals that could be sent to the pasture; sometimes there was no limit, sometimes the limit corresponded with the extent of the lands that a man possessed that were subject to waste land pasture.

another's lands,¹ could only be exercised under these conditions. In order to escape from these rights land was placed under a prohibition or enclosed as a warren; but the old French law only authorizes owners to place a portion of their lands under the prohibition, one-fifth, for example, according to the "Coutume du Boulonnais," Art. 131. The Law of September 28, 1791, releases all real property from this servitude, which is injurious to agriculture, by allowing all lands to be enclosed.²

§ 49. (IV) **The Rights of Commons** ("Gemeindegüter" in Germany, "Allmends" in Switzerland). — Following the barbarian invasions there is often some question in deeds registered in France of "communia, silvæ et pascua," property left to the common enjoyment of the inhabitants of the village.³ A domain is only granted with the rights of commons which are a necessary part of it. Sometimes the inhabitants are not bound to pay any quit-rents for wood ("lignaritia") and for pasture ("pastio"); in this case the rights of commons are obviously a trace of collective ownership, which has been restricted to certain kinds of property most like those which were first subjected to it. Sometimes, on the contrary, a quit-rent is due to the great landowner; the rights of commons are a portion of the "dominicum"; they are contrasted with the "foresta," the use of which he has reserved for himself.

§ 50. "**Allmends**," or Swiss rights of commons, are to a great extent the remains of the old agrarian system. In those towns

¹ *Laurière* justifies the right of pasture on waste lands by means of two motives in which the modern spirit makes its appearance: 1st. Without this right the cattle of those who have no land would perish, which would be a pernicious thing for the State. 2d. As soon as the products are removed the land, owing to a sort of "jus gentium," becomes common to all men, rich and poor; the right of pasture on waste lands cannot be granted, cannot be alienated, and cannot be lost by prescription, in the same way as the right of gathering acorns and of using the water of public rivers: *Loysel*, "Inst. Cout.," no. 242.

² Following the Edicts of July, 1768 (Franche-Comté), March, 1769 (Champagne), May, 1771 (Hainaut and Flanders), the Law of Sept. 28 to Oct. 6, 1791, 1, 4, allows every landowner to enclose his inheritance. Cf. Civil Code, Art. 647. This law only upholds pasture on waste land if it is based upon a title or upon immemorial possession, and the right of commons only if it is based upon a title or upon a possession authorized by laws and customs. The Law of July 9, 1889, abolished rights of commons (exercised without giving indemnity, except when they have been conferred for a consideration), and pasture on waste lands (except when its continuance was asked for within a year). Cf. the Enclosure Acts of 1801, 1845, and 1876 (39 and 40 Vict., c. 56).

³ These "communia" are not possessions jointly held (for example, as the result of an inheritance), were it not for which fact the "aprisio" would not be tolerated.

where some of these still exist, the citizens, to the exclusion of the "Beisassen," or mere inhabitants, have a right to them in their quality of descendants of families who have had the enjoyment of them from time immemorial. They have three things: the forests, the meadow-land or mountain sides, and the fields ("Wald," "Weide," "Feld"), that is to say, wood for burning and wood for building, the right to pasture their flocks upon the common pasture, and, finally, a certain quantity of arable land (a half "hectare" at Stanz). Sometimes these rights are no longer enjoyed; the common property is leased out and its products are distributed among the interested parties. In the partition of these products this principle is followed: to each one according to his needs, which is practical and just so long as the members of the community are equally poor; but as soon as there are rich ones they gain an advantage. In Uri the man who possesses big chalets receives wood for building and burning in large quantities; the commoner who lives with somebody else only has two saplings. The man who has no cattle cannot use the mountain side.

§ 51. **Feudalism and Rights of Commons.** — The lords could hardly fail to dispute with the inhabitants of the villages the ownership of their rights of commons. The German peasant complains: "The lords seize by force fields, rocks, waters, and forests; they would gladly take from us the air, — the air, which is common property; they would take the sun from us, — even the wind and the rain." In France the Ordinances of the sixteenth and the seventeenth centuries show us the lords using violence and inventing false titles in order to overcome the resistance of the communities. They pretend that the communities owe them debts in order to compel them to sell their property; sometimes the debts really exist. The alienations often took place at prices that were a mockery. The Ordinances prohibited them or required the authority of the king. At the same time the regulations affecting the rights of user which the communities formerly made freely, had to be ratified by the tribunals.¹ The

¹ The claims of the lords, according to our old authors, did not go further back than the reign of Francis I, a period when the nobility acquired habits of luxury. "Ord." of April, 1567; of Blois, 284; 1629, 206; Declaration of June 22, 1659; Edict of April, 1667 (*Isambert*, XVIII, 187); *Picot*, "Hist. des Etats Gén.," III, 329; V, 79. Rights of commons could not be distrained upon for the debts of the inhabitants: "Arr. de la Cour des Aides," April 23, 1651 ("J. des Audiences," I, vii, 1); *Denisart*, see "Communauté d'Habitants" (Edict of April, 1683). Adjudications with regard to leasing were made before the steward (1689; *Isambert*, XX, 77); *Houard*, "Dict. de Dr. Norm.," see "Commune."

intervention of the authority of the king did not prevent doctrinal discussions and lawsuits between lords and communities, — lawsuits and discussions which affected not only the rights of commons, properly so called, but rights over waste and unoccupied lands.

§ 52. **Theory of the Feudists.** — The feudists regarded the rights of commons as a creation of the lords. At the time of the establishment of feudalism the forests, marshes, and uncultivated lands could not belong to the inhabitants because the latter were for the most part in a state of serfdom; they were the property of the lords-justices, who must have granted the enjoyment of them to the inhabitants so as to enable them to feed their cattle and cultivate their holdings. There was no need to give them the ownership, and it was not done as a general thing. Thus the lords had the right of **division**; that to say, they could modify and make new regulations with regard to a right of user which had been granted; these regulations, which they made at a very early time, did not result in changing the inhabitants into owners. There was no special reason why these regulations should be opposed to the lords practising the right of **restriction**; that is to say, taking back for themselves two-thirds of the commons and, generally, only leaving one-third to the inhabitants; but this third the inhabitants held as owners. This was only done in the eighteenth century. By this means the lord escapes from joint possession, for the grant which he has made has not deprived him of the right of user; he exercises this right jointly with the inhabitants; as no one is bound to remain in a state of joint possession, he may demand partition, and then in his quality of owner he receives a larger share than the commoners; the latter gain in strength what they lose in extent; they were only users, but now they are owners. As to property of which he had abandoned the ownership and not the user to the inhabitants, a distinction was made: if this property were acquired for a consideration or on condition of the payment of a quit-rent, the lord could have no claim over it; had it been granted gratuitously, the lord was authorized to practise the "**triage**"; that is to say, to take one-third as owner, unless the two-thirds which remained were insufficient for the needs of the inhabitants. The grant was considered as being gratuitous whenever the inhabitants were not held bound to pay any rent and quit-rent. The Ordinances of August, 1669, 25, 4, affecting waters and forests, established this right of "triage," and for the

preservation of forests instituted the *fourth in reservation* in all rights of commons.¹

§ 53. **Theory of the Romanists.** — The Romanists, who were the supporters of royalty in its fight against the lords, maintained that the rights of commons existed previous to feudalism. The Roman laws made mention of them. They were presumed to belong to the king, and the lords were only supposed to have received their fiefs upon condition of preserving for the inhabitants the user of the rights of commons which appertained to the fiefs. They brought out the odious part played by the lords in repudiating grants that might have been believed to be absolute, all the more so as the fact that they were gratuitous had not been established, but was merely presumed; the lord had often been indemnified or else there had been a first restriction and the inhabitants had lost the documents which established these facts; advantage was taken of this to strip them. If one looked upon the rights of user as servitudes "*jura in re aliena*," the owner of the servient tenement had no right to free his piece of land by dispossessing the holder of the servitude.

§ 54. **The Revolutionary Law** put an end to the controversy by two radical provisions: the overthrow of the seigniorial rights and the abolition of the rights of commons. — The lords were forbidden to appropriate waste and unoccupied lands; the Old Régime saw in this right an indemnity for the maintenance of foundlings and the rendering of justice; now that these charges had become incumbent upon the State, the rights no longer had any basis. "Triage" was abolished in 1790. In 1792, communes showing themselves to be entitled by long possession were authorized to reclaim rights and property in spite of the adverse possession of their previous lord, unless the latter could prove that he had acquired this property by showing an authenticated deed. At the same time unoccupied lands were turned over to the communes; the lords could, however, establish that they had a right over them by means of title-deeds or by possession that had lasted forty years.²

¹ Over the other two thirds the lord kept the rights of justice; "triage" took place in court. The king and his assigns (mortgagors and younger branches of his house to whom he had made grants) could not demand this right (Edict of 1667).

² Declarations of April 13–20, 1791 (I, 7); March 15–28, 1790 (II, 30); Aug. 28 to Sept. 14, 1792. The Declaration of April 13–20, 1791, I, 7: "The right . . . of appropriating waste and abandoned or barren and devastated lands, uncultivated or unoccupied possessions, desert lands, common passage-

§ 55. **Partition of Rights of Commons.** — The Revolution did not deem it sufficient to sanction the theory of the Romanists; it must needs do away with the rights of commons themselves by changing them into private ownership by means of a partition among the inhabitants. Legally, this provision was unjustifiable, rights of commons being the property of the commune, not of its inhabitants; it was not jointly possessed property belonging to the latter as individuals and, consequently, subject to partition; it was the property of the legal person. But this operation, which could be legally contested, presented economical advantages; there was seen in it a means of giving some value to uncultivated lands; this was enough to make people believe that they were authorized to dispossess the commune in the interest of its inhabitants; the future generation, the only one which can complain, will find in the greater value put upon land an indemnity for what it has lost. Furthermore, the Old Régime had preceded the Revolution in this direction; from the eighteenth century partitions were numerous; they took place by households, and they were sometimes partitions of the right of enjoyment without any quit-rent to be paid to the commune and sometimes partitions of ownership with the obligation to pay a quit-rent to the commune.¹

The Law of August 14, 1792, being inspired by these economical ideas, and especially by political ideas, decreed that the partition of rights of commons (excepting in forests) was compulsory; it proposed to decrease the number of possessions in mortmain and to increase the number of owners who should be supporters of the new ideas.

The Law of June 10, 1793, made partitioning subject to a vote; one-third of the inhabitants of *both sexes* of the commune could

ways and waste lands for public pasture shall no longer exist for the benefit of the former lords." Our old authors distinguish in a rather vague way between rights of commons, which, properly speaking, were lands that were neither appropriated nor subject to the enjoyment in common, waste and unoccupied lands, and uncultivated lands (from the Greek, "ἐρημος"). They were ordinarily conferred as possessions without an owner upon the lord justice (*Loysel*, "Inst. Cout.," 277), unless the communities had a deed of grant, or even an immemorial possession; but there was a good deal of difficulty over this last point. Cf. *Isambert*, Table, see "Terres vaines"; *Glasson*, *op. cit.*, p. 472. In the existing law lands without an owner belong to the State; rights of commons have an owner, this being the Commune.

¹ Partitions authorized: Edict of June, 1762; Order of the Council, 1771, 1773, 1777 (Auch and Pau); Edict of Jan., 1774 (Burgundy); Order of the Council, Apr., 1774 (Alsace); "L. pat.," March 27, 1777 (Flanders); "L. pat.," Nov. 13, 1779, and Order of the Council, Feb. 25, 1779 (Artois).

claim it. In this case it did not take place by households but "per capita." The application of these provisions did away with the protests that had been made in various parts of France. This law was called an agrarian law. Pastures being a necessary part of the domain where the raising of cattle is an important industry, the owners were being ruined, they were being despoiled; it would have been almost the same thing to take away their domains from them. Pastures were being taken away from those who had cattle, to be given to those who had none; for example, to servants, or even to the proletariat, which was always formed by this minority of the third of the inhabitants that was necessary before a partition could take place. Another iniquity: landowners domiciled outside of the commune found themselves excluded from the partition. — In the face of these protests a halt was called; the ruin of communal ownership was not carried out; after the 9th Ventôse, year XII, partitions were no longer permitted. There still remained about four million "hectares" of community property.¹

C. FAMILY JOINT OWNERSHIP

§ 56. **Family Joint Ownership** (India, Greater Russia, Slavs of the South, Ossetes, Kabyles, etc., and formerly Greece and Rome).² The oldest man administers the common patrimony, distributes the work, sells the harvests, signs contracts, and represents the family outside, at law, or in its relations with the treasurer. He is only exempted in case of incapacity known to all (illness, old age). He has no right to alienate the lands of the family without the consent of its adult members, because the family is the true owner of this land. For the same reason the head of the family cannot dispose of his property by will. At his death no succession, properly speaking in the modern sense of the word, takes place; a new administrator takes the place of the

¹ Law of 21 Prair., year IV (June 9, 1796); Law of 2 Prair., year V; Law of 9 Vent., year XII; "Code Forestier," Art. 92; Law of July 18, 1837, and Opinion of the State Council, March 16, 1838. The Financial Law of April 28, 1816, ordered the giving back to the Commune of rights of commons not yet sold.

² Kovalewsky, "Le Régime économique de la Russie," 1898, p. 290 ("N. R. H.," 1890, 464). — "Le Jugement de Libussa" (Slav poem); *Sumner Maine*, "Et. sur l'Hist. du Droit," p. 473. — Among the Jews once in fifty years (Year of Jubilee) all alienations are revoked and each one takes back his own property; that is to say, the property comes back to the family, for it is rarely that the original seller is found to be alive. Cf. "Ruth," iv.

one who has gone; and it is ordinarily his oldest son or his brother. The domain is not partitioned; it is indivisible just as it is inalienable. When partition is allowed at the request of brothers or sons it is because the community is being disintegrated. The profits arising from some outside industry even belong on principle to the family; thus in India the family has a share in the profits which are obtained from the trade of dancing-girls, because the education of these girls has taken place at its expense. However, it is in this direction that individual ownership is seen to make its appearance; a portion of these profits remains the property of the man who has obtained them; in Montenegro booty obtained in war belongs to the soldier (*cf.* the "*peculium castrense*" in Rome). Woman, who is not strong enough to defend the family inheritance with arms, as is often necessary, is never the head of the family; she does not inherit the land. When she marries she receives a marriage portion, but this is very small and consists of a few movable objects. The disability under which a woman is placed with respect to possessions in land often survives the overthrow of family communities, and only becomes less, little by little, in the restricted group that succeeds these communities.

D. REMAINS OF FAMILY JOINT OWNERSHIP

§ 57. (I) **Rules of Successions.**—1st. Distinction between heirs and successors to property. There are no heirs excepting the relatives,—that is to say, the family; "*Deus solus heredes facere potest.*" The will can only appoint successors to property, their position being inferior to that of heirs.—2d. Disinheriting is not possible; this would be to deprive the heir of a right which belongs to him.—3d. Hereditary seisin. At the death of the deceased the heir is seised of the property left by him; that is to say, he is invested at one and the same time with the ownership and the possession without being obliged to take physical possession of it.—4th. Women are excluded from the succession for two reasons: because physically they are scarcely fit to be heads of families, and also because through their marriage the property might pass from one family to another.¹

¹ The Athenian or Hebraic custom of making girls heirs in default of males only makes an exception to this rule in order better to apply it; the girl thus made an heir only receives the inheritance that she may transfer it to the relative whose duty it is to marry her. *Cf.* "*Ruth*," iv.

§ 58. (II) **The Classification of Immovable Property into Personal Belongings and Acquests.** The rights of the family affect only personal belongings, and by these are understood possessions in land included in the succession of the relatives (in the direct or collateral line). There is a desire to keep these possessions in the family. The individual having had no part in the acquisition of these possessions by the family patrimony, it is perfectly natural that he should not have any right to dispose of them, as he would have of possessions which had been acquired through his efforts, his labor or his economy; it is only with regard to the latter that individual ownership comes into existence first of all. The system of personal belongings will be explained later on; it is well, however, to give an outline of it at this time.

1st. "**Paterna paternis, materna maternis.**" Personal belongings coming from the paternal line are to go to the paternal relatives, those from the maternal line to the maternal relatives, in such a way that in every succession a **split** has to take place and two shares of these possessions have to be made according to their origin. — 2d. **The will**, which was unknown in the old law, is in the end introduced into practice; but the testator is not free to dispose of all his personal belongings; there is a customary **reservation** of four-fifths for the benefit of the lineage; almost all of a man's own fortune is thus found to be incapable of being devised by will. As to acquests, the freedom of devising, which was absolute at first, in time came to be restricted through the admission of a legal share for the benefit of the nearest relatives; but it is a motive of humanity that justifies this, and not the old family joint ownership. — 3d. **Gifts "inter vivos"** were only allowed at first with the consent of the heirs presumptive; even when this rule was departed from, it was sought to prevent the donor from stripping his heirs by compelling him to strip himself during his own lifetime (**to give and to withhold is invalid**) and by requiring certain formalities, such as the drawing up of a notarial deed, in order to make gifts effective. — 4th. **Alienation for a consideration** was only tolerated in case of necessity (sworn poverty) and with the consent of the relatives. The vendor had to offer the property to his relatives (*pre-emption*), who had the right to buy it in preference to everybody else; unless this offer were made, the sale was invalid as against them. The sale came to be declared valid, but the relatives were allowed the right of exercising the **repurchase by a person of the same lineage**; that is to say, to buy

back for themselves the property which had been sold upon condition of indemnifying the original purchaser; if they remained silent for a year and a day the sale could not be contested.

§ 59. **Family Institutions in Our Period.** — Objectionable attempts are being made to restore family joint ownership, which has been eliminated from modern law. — 1st. Le Play's **stock family** would seem to be an intermediate type between the unstable modern family and the old family community. The freedom to bequeath by will that is granted to the head of the family should, according to the partisans of this reform, serve only as a realization of that type to whose creation our modern laws are opposed; the compulsory partition which these laws require disorganizes the family, takes the authority from its head, and splits up the inheritance. — 2d. The "**anerbe**" or privileged heir of the German law, who keeps the paternal house and domain by paying a rent to his fellow heirs, is, in a succession upon intestacy, in about the same situation as was the eldest son in our old law, and as the testamentary heir would be under Le Play's system. — 3d. The American **homestead** or portion of the domain which cannot be disposed of, and which cannot be distrained upon, recalls the ancient condition of the dwelling house and the enclosure that was connected with it.¹

§ 60. (III) **Rules of Feudal Ownership.** — Feudalism is not only a political system, it is also an agrarian system. It was superimposed upon private ownership and collective ownership. The rural commune, wherever it existed, was made subservient to this system. The free possessors of the soil became serfs; the lord took for himself a portion of the land. At the same time individual ownership disappeared or became an exception; it gave place to **tenure**. Each piece of land had two masters: 1st. The lord, who had the **eminent domain**, the **dominion**, and who could demand from the tenant services and quit-rent. 2d. The vassal or copyholder, the tenant, who had the **beneficial ownership**, — that is to say, the use, the enjoyment, and even, to an extent which varied according to different periods, the disposal of it. His right is hereditary, but the heir has to pay a transfer tax to the lord; his right may be sold, but the lord collects a toll as the price of

¹ On the family of the Melongas in the Lavedan cf. "Ouvriers Européen," I, 55; *Le Play*, "La Réforme sociale," I, 320, ed. 1881. Texas in 1839 was the first State to organize the homestead. Cf. Federal Act of 1862; "Stat. Vidal," "Ac. lég. Toulouse," 1887, p. 63, and the recent works of *Bureau*, *Corniquet* and *Vacher*.

giving his consent, unless he should prefer to take the bargain for himself by buying off the purchaser (*feudal repurchase*). The history of feudal ownership is that of the progressive enfranchisement of the soil; the tenant progresses little by little towards free ownership. In France the Revolution, by abolishing all feudal dues, made the peasant the only master of his own land.

§ 61. (IV) **The Process of Evolution towards Individual Ownership** only took place with difficulty, as we have seen, through a series of reactions against the commune, against the family, and against the lord. The principal cause of this change, which is of an economic nature, had to accommodate itself to circumstances, to agriculture, and to political and social conditions. Individual ownership is the best means of placing a value upon land, — let us add, in a society like ours. Occupation has only created this value as a great exception, for occupation is ordinarily collective (booty of war, the establishing of a colony); even when it is individual it assumes the consent of the community and only has a temporary effect; the cleared land is only acquired by the one who has brought it to life, according to the language of the Koran, until it is used up; then he retires and the new occupant is authorized to take possession of it. The progress made by agriculture tends towards absolute appropriation, just as it seems to exist in the charters of the Frankish period, where one becomes owner by taking possession (“*aprisio*,” “*porprisio*,” “*bifang*”), by clearing the land (“*Neubrucl*”), and especially by the customary mode of clearing, — uprooting the stumps (“*exartum*”). That which one has acquired by one’s labor (“*quod sudore acquisivi*”) is acquired on the common land; this mode of appropriation, which is supposed to be a very early one, is, moreover, rather rarely met with; feudalism only tolerates it with the consent of the lord, just as in the previous period it was only tolerated with the consent of the communities. Thus individual ownership is from the historical point of view derived from collective ownership, and the rights of the family no doubt contributed a great deal to strengthen those of the individual.

TOPIC 3. ORIGIN OF THE STATE

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I. GENERAL REMARKS

§ 62. **The Society and the State.** — In saying "society" we mean a group of men and the collective action of this group in a common interest. This co-operation may be temporary or lasting, voluntary or compulsory, imposed by a higher authority or spontaneous, or it may take place because of urgent necessity. In every case collaboration cannot exist without a certain amount of organization, however rudimentary it may be supposed to be; in order that people may act in concert it is indispensable that there should be an understanding and discipline, and that each one should adhere to his task and should be able to count upon the others carrying out theirs. Almost everywhere a coercive apparatus or a government has become established in order to make sure of a co-operative organization, for the advantages which it offers are so great that men have not thought that they were buying them too dearly by paying for them with their independence.

It is this coercive apparatus, this organ that carries out collective action, which is called the State or Government; but the function which this organ fulfills is also designated by the name of the State; in its secondary meaning the State is the society looked upon in its political function. This function cannot be

precisely defined, for it has varied and still varies according to the society and according to the period. The jurist may attempt to give us this definition at a certain time in order to build up a logical system of public law. The historian could not do so, because institutions are not seen by him in their fixed state, but in process of changing. The political function has its "processus" of evolution just as has the family or ownership. There are societies where collective action only takes place intermittently and can be reduced to almost nothing, — a struggle against the outside enemy and an internal organization (which is very crude) for purposes of attack and defense. The State in primitive societies is often entirely disconnected with justice and law; it is no more a reasoning being than were the primitive gods, brutal forces of nature; like the latter, it becomes one. Moreover, the action of the State is, on the other hand, very extensive; it regulates private life, directs industry, and presides over religion; it is at one and the same time a church and an industrial or agricultural undertaking. The political function of society has a marked tendency to develop; but at the same time the division of labor introduces into it departments which are distinct and almost independent of one another: the political apparatus, the religious apparatus, and the industrial apparatus become separated. The sovereignty or power of the political organ over the social body, the relations between the individual and the State, the forms of government and revolutions, — all these are questions which complicate the public law of societies that are fairly advanced.

§ 63. **Organic Theory of the State.** — There are not lacking systems by means of which the genesis of the State can be accounted for. The theory of divine right makes human authority to flow from divine authority; this is a theological postulate. The theory of the social contract is an ideal conception derived from the systems of natural law and opposed to historic truth: men only group themselves together and submit to be led because of some external necessity; there is no free covenant at the basis of society, but an external compulsion and a reaction which is a consequence of it; it is in order to offer resistance to outside forces that men associate themselves together.¹ The organic theory of

¹ *Fustel de Coulanges*: "Political institutions are not always the work of the will of one man. Even the will of an entire people is not sufficient to create them. The human conditions which give birth to them are not of those which the caprice of one generation can alter. People are not governed because it pleases them to be governed, but because all of their inter-

the State agrees better with the facts. Human societies, which are aggregates of individuals and of families, resemble living organisms, which are aggregates of cells. No doubt sociology is not biology, but they are similar, and there are analogies between social factors and biological phenomena. Why not point out and make use of the connecting links that one observes in order better to portray how societies become organized?¹ In human societies, just as in the living body, organization takes place by means of a division of labor in the direction of the localization of functions, of the formation of organs and apparatus better and better adapted to the functions which they fulfill, and of a greater and greater interdependence of the parts.

§ 64. **Localization of Functions.** — In inferior organisms (protozoa) each part is at the same time stomach, respiratory apparatus, and locomotive apparatus. Under the influence of its surroundings these functions become localized; the physiological division of work takes place; one part becomes the stomach and nothing more; another, the respiratory apparatus; and a third, the locomotive apparatus. Thus in primitive societies each individual hunts, fishes, makes war, builds his house and cooks his bread, whereas in more advanced society the population is divided into classes, or even into castes, — priests, warriors, and agriculturists; a division of social labor takes place. The man who is in the best situation or the most fit for it specializes in his function.

§ 65. **Changes in Structure.** — Once the need has created the organ, the latter adapts itself better and better to its function; in order to do this it changes its form. The various parts of the living body, which all began by being simple cells, end by differing from one another to such an extent as to make it impossible for them to replace one another in their respective functions; for example, the osseous tissue differs from the mucous, the nerves from the muscles. Changes in structure are less apparent in the case of the man, although there is some difference between a market porter and a member of the Institute of France. But they exist, nevertheless, and they make changes of profession and their profound convictions demand that they should be. . . ." — Let us add that there is nothing arbitrary about these convictions; they are a product, a result; institutions do not depend upon intentions, but upon circumstances.

¹ Upon condition that the establishment of a simple analogy shall not be taken for a demonstration. The social factors should be studied separately by themselves, and the laws which govern them directly established. — I shall not stop at the metaphysical objection that the individual is an end in himself, whereas the cell is not.

difficult or even impossible, as we see in the case of unemployed workmen following the invention of a machine.

§ 66. **Interdependence of the Parts.** — From the moment when the parts of a living organism differ among themselves and have each one its special function they can no longer live isolated from one another: cut a sponge in half, and each half will continue to live; a higher animal submitted to this treatment would die on the spot, and if you want another example, the old fable of the Belly and the Members is there to furnish it. The interdependence between individuals in our civilized societies is scarcely less than this. A strike of miners or bakers deprives us of fuel or bread; this becomes an affair of the State.

§ 67. **Organs and Apparatus.** — Once created, the organ evolves itself owing to the action of its environment and becomes an apparatus or an assembly of organs tending towards some one object. Thus the stomach becomes changed into a digestive tube; that which in the lower species is a mere sac becomes complicated in the higher animals and develops into a mouth to seize the food, a stomach to digest it, and an intestine to extract therefrom the nutritious juices. Society herself has her organs and her apparatus: 1st. *Productive apparatus* or nourishing apparatus; this is agriculture and industry; they are localized just like the functions in the living being, — for example, the salt industry and fisheries on the seacoast, the raising of cattle upon the plains, etc. — 2d. *Circulatory apparatus*; commerce transports from one place to another agricultural and industrial products, giving rise to more or less active currents, to a circulation which is slow or rapid, rather like the circulation of the blood in warm-blooded or cold-blooded animals. — 3d. *Directive apparatus*. The political system co-ordinates the action of social forces in the same manner as the nervous system does in the organism.

§ 68. **Political Forms.** — The political organs in a small society are three in number: the general assembly of all its members who decide questions of common interest (moving from one place to another, peace or war); a group that directs, which is composed of the oldest and the strongest; the assembly bases its decisions on the counsel of the latter; and a leader, who is more influential than the others, from whom the final resolution will be due, and who will carry it out. According as one or the other of these three forces prevail the government will be a democracy, an aristocracy, or a monarchy. Modern States have composite governments,

which cannot, properly speaking, be placed in any one of these three categories. But, whatever the system adopted may be, the political apparatus should only be the instrument by means of which the instinctive feelings of the people collectively should act; this feeling is what might be called public opinion, were not this expression ordinarily limited to the present, whereas we are here concerned with the interests of the future as well as with those of the past, with the wishes of existing generations and of those of the past. The personal government itself draws its strength from the harmony which exists between its action and the national conscience.

§ 69. **Personal Government.** — The idea of obeying a man seems ridiculous to people who have no chiefs, and there are societies of this nature (the Nicobar Islands, Todas, Papuans, Fuegians). There are others who only have chiefs in time of war (Caribbees, Bedouins, Chinooks, the Patagonians against the Spaniards and the Redskins against the English); thus Gaul appointed a dictator in the person of Vercingetorix, in order to oppose the Romans; and, finally, there are peoples, and these are the most numerous, who have chiefs in peace as well as in time of war; these permanent chiefs are even often hereditary. — The first man to be a king was a lucky soldier, Voltaire has said. In fact, it was personal qualities that gave their political power to the first chiefs: physical strength and courage (Bedouins and Boschimans; old age causes the loss of this power, as is proved by the example of Peleus and that of Laertes, who were dethroned by their sons; Nestor was an exception, but this was phenomenal); age and the experience which goes with it (Caribbees and Dyaks in Borneo); intelligence (the Snake Indians and the Ostiaks); religious power (the king is a priest or a sorcerer in Loango and among the Amazulus; his special function is to overthrow the enemy by means of exorcisms and witchcraft). The temporary head becomes permanent, even although this may only be due to continual wars and the necessity of being prepared for any unexpected attack. Through a new advance, dynasties come to be established; the office of chief constitutes a sort of family property; it is transmitted from father to son, from brother to brother, according to the various systems that are applied to the patrimony; heredity in the family calls for heredity in the State, to say nothing of the fact that this system avoids crises because the successor is appointed beforehand. Religion has given a consid-

erable balance to the monarchic power. It is not a rare thing for kings to be high priests, vicars of God, gods upon the earth; they deliver oracles, command the elements; their subjects worship them (Egypt, Peru, Roman Empire).

§ 70. **Social Distinctions. Classes and Castes.** — In inferior societies all are equal; no distinctions of class are recognized (Pueblos in North America, Bodos in India, Alfurus in New Guinea). Slavery, the result of war without or debts within, carries with it everywhere an important differentiation. The other political and social distinctions (patrician and plebeian, etc.) also have their origin in the same causes; the division of labor keeps them up and makes them more pronounced; sometimes even the food of the various classes is not the same, and this contributes to separate them (in the Fiji Islands human flesh was reserved for the chiefs; in the Hawaiian Islands the chiefs alone could eat meat, and so they were more vigorous than their subjects). Often the vanquished practice servile trades, hard professions like that of agriculture; whereas the conquerors are soldiers. Privileges and distinctions become hereditary under the influence of religion or as the consequence of a political system that makes use of them as a convenient administrative scheme. Classes become changed into castes (ancient Egypt, Japan, Bambaras, etc.). In India caste forms a professional and religious syndicate which gives its members the right to marry one another and eat together; neither Buddhism nor Jainism, with their equalizing dogmas, has succeeded in suppressing caste.¹ Our modern soci-

¹ *Sénart*, "Les Castes dans l'Inde" ("Revue des Deux Mondes," 1894;) "Gr. Encyclop.," see "Castes" (bibliog.). — India: Brahmins, Kshatriyas, Vaisyas, Sudras: priests, warriors, laborers and traders, servants. (Cf. Persia: magi, nobles, laborers, artisans.)

Caste may be recognized from a great number of external signs, — from the fashion and coloring of clothing, from the form of the jewelry, from special rites, from implements, flags, flowers, etc. Caste is thus a sort of freemasonry. It protects its members; upon an order issuing from it we have seen the merchants of an entire canton close their stalls, the laborers suspend their work, the artisans abandon their workshops, for a slight insult to one of their number. From the moment when it begins to defend its members the caste is compelled to make them submit to a certain amount of discipline. It is an internal police power and thus renders itself services which we are accustomed to expect from the State. Expulsion from the caste is a severe penalty, for the individual outside of his caste is a pariah; his presence is a contamination. The Hindu who comes to Europe is "ipso facto" excluded from his caste, but he may obtain reinstatement upon the payment of a fine following a sentence rendered by the tribunal of the caste. The Brahman religion has contributed towards the transformation of classes into castes; but the chief reason of this change was the lack of a strong political organization, caste taking the place of the State in its protection of the individual.

eties have taken the very opposite course to the Old World; they have proclaimed religious, civil, and political equality; only inequality of fortune is left.

§ 71. **How are Societies Formed, Developed, and Reproduced, and how do they Die?** — “In union there is strength,” says the proverb. However commonplace this may be, we must not seek any other cause for the formation of human societies (and animal societies). It is not certain that man was originally a sociable animal, as Aristotle has maintained, but it is certain that he has become such. The formation of groups has not taken place through any social contract; this chimerical pact has never existed. The grouping has been made under the force of necessity; it has been spontaneous and involuntary; it has been the instinctive reaction against external forces. Defense has been necessary against the enemy, wild beasts and other men; and it has been necessary to obtain food by hunting and fishing in common, which is far more productive than when carried on by the individual. Was the primitive group the horde, the amorphous tribe, which had organized itself as the result of some war within the family, clan, tribe, or town? Or, on the other hand, did they begin with the family to end, after passing through a series of groups, with the clan and the town? These are problems whose solution is connected with the obscure question of the origin of the family. One thing is certain, however, — that among the people of the Aryan race this last method is frequent; families unite to form clans, clans to form tribes or towns, and the latter to form the large States.

Once they have been formed, societies increase by means of alliances or conquests. (A) The **Alliance** includes various degrees: 1st. The **Personal union**: two States have one and the same chief, while at the same time with regard to others each keeps its full independence; for example, England and Hanover from 1714 to 1838. 2d. **Actual union**: two States form one with respect to other States and remain distinct within themselves; for example, Austria-Hungary. 3d. **Confederation of States** that are independent, each one keeping its diplomatic representation, but with an organ, — the diet, — which can take certain measures in the common interest; for example, the Germanic Confederation from 1815 to 1866. 4th. **Federal States** forming externally but one State and having internally a central power which only leaves the local authorities a portion of the sovereign power; for ex-

ample, Switzerland, the United States. — (B) **Conquest** sometimes results in the complete absorption of the conquered State by the conquering State. Sometimes its effects are less radical; the conquered lose a part of their independence and descend to the rank of semi-sovereign, protected, or vassal States.

The increase of a society is an advantage. By suppressing little States inevitable hostilities are avoided (thus incessant warfare desolated Gaul before the Roman conquest); forces that are employed in destroying one another turn towards social co-operation; the division of labor can be pushed further in a large country than in a town or a province.

A nation does not die. Exterminations are rare; but it may happen that one people is subjugated by another. Sometimes one nation, as a result of an unfortunate war, loses a portion of its territory and of its population; it is dismembered.

Dismemberment may also take place, like a fission among the animal species, spontaneously; but it is rarely met with under this form. Societies are reproduced especially by a swarming-time (the sacred springtime among the Italiotes); they found **colonies**, copies of the metropolis with which they remain connected (Australia) or from which they separate to live independently (The United States).

§ 72. **The Factors of Social Evolution** are: 1st. The physical environment (habitat, climate, economic conditions; for example, the geographical situation of England has counted for a great deal in its history) and the social environment (influence of neighboring societies, competition, imitation). A too rigorous climate (Esquimaux), the barrenness of the soil (deserts), and the difficulty of communication (Alps, Caucasus), are obstacles to the formation of large States. 2d. The past, which forms the race and which is at first never more than the result of the influence of former environments. From thence come habits of discipline and a certain homogeneity, relationship, language, and worship common to the members of a group. The principle of nationalities, which recalls that of the fixedness of species in natural history, is too exclusively connected with this action of the past. It has been able to create a common language, religion, and race, or, at least, a common existence and hope. It does not follow that this community must necessarily exist or last forever. The future may undo that which the past has accomplished.

§ 73. **Social Laws.** — Certain of the political laws apply to

societies. We have established this with regard to the **division of labor**. **Natural selection** eliminates inferior societies; they disappear before those that are better armed, more wealthy, more prosperous, and of a higher morality. The law of the **connection of characteristics** which allowed a Cuvier to reconstruct a species that had disappeared out of a few fossil remains is to be observed in society; if military institutions prevail therein one will find as logical consequences absolute power and the subordination of the individual to the State, and political theories in conformity therewith; free institutions will be met with in industrial and commercial societies. The law of **organic balance**, or the law of Geoffroy Saint-Hilaire, by virtue of which the exaggerated development of one organ tends to diminish the other organs (for example, the kangaroo, whose fore quarters are so very much reduced in size in proportion to his hind quarters), controls social development. The Romans were more able politicians, better soldiers, and better jurisconsults than the Greeks; and the Greeks surpassed the Romans in fine arts and letters.

II. ELEMENTARY AND COMPOSITE SOCIETIES

§ 74. **Primitive Societies.** — There are still a few of them in existence in our day. The Vedas in Ceylon, the Todas in India, the Papuans, the natives of Lower California, the Boschimans, the Fuegians, and the Esquimaux form a few groups without cohesion, of ten, twenty, or fifty persons; a chance brings them together and accident scatters them. These anarchists, without knowing it, have realized to the fullest extent the ideal of the school: independence of the individual, liberty, and equality — in poverty. What good is this independence that they cannot use because they are enslaved by the brutal forces of nature? In our societies what is lost in liberty is gained in power, wealth and contentment, — that is to say, in true liberty. The meanest serf of old France would not have exchanged his condition for that of the free Indian of the Sierra Nevadas, who only lives on roots and insects, or for that of the Bedouin of Sinai, who for three thousand years has wandered aimlessly. A tyrant would have rendered them inappreciable services; I do not mean a good tyrant who is pictured in the image of God, and whose one great fault is that it is impossible for him to exist; but I do mean the worst of despots. Baker, when leaving the tribes who had no government, barbari-

ans, who were scarcely clothed, was struck with the prosperity of the Unyoro, a country in which a monster reigned who for a mere nothing would put his subjects to death with the most frightful tortures. Tyranny, indeed, is a great step in advance! And, sad to relate, war also is a step in advance: thus tribes that have no leader are peaceful. War allows of an exercise of natural selection and the elimination of the weak. We owe our strong and vigorous races and our best organized societies to the necessities of the struggle for existence. This providential part played by war in the origin of societies has in it nothing mystical.

§ 75. **The Clan or the "Gens."** — Family communities are almost political societies; their organization is far more advanced than among the unsettled hordes with which we have just been dealing. The community of several families forms an association of the same type as the latter; just as the clan (Celts), the "Genos" (Greeks) or the "gens," the "seven" (Ireland), the "Sippe" (Alemani). Does this institution result from the natural development and the dismemberment of the family, or must we see in it an artificial creation,¹ families of diverse origin grouping themselves together and in the end, after several generations have passed, believing themselves to be the issue of a common ancestor? Both systems have their supporters, and perhaps in both of them there is a certain amount of truth. It has been possible for families of relatives to be united with families of strangers, or even for families of strangers to be united with one another, in such a way as to form a group that is as coherent as that of the family community; in order to do this the outline of the family community has been borrowed. — At any rate, the "gens" is on a large scale that which the family is on a small scale. Its members are united by a fictitious relationship or by a relationship which cannot be proved if it is a true one, and which is only expressed in the employment of a common name and the worship of a legendary ancestor.

§ 76. **The Maternal "Gens" among the Iroquois.** — The tribe of the Senecas has eight "gentes" bearing the names of animals: wolf, bear, tortoise, beaver, deer, woodcock, heron, and falcon. The animal which gives its name to the "gens" is an ancestor-god, a totem; all the members of the "gens" are regarded as having a common origin; they are all relatives, bearing the same "gens"

¹ In Daghestan the "gentes" bear the names of localities or of heroes and never that of an ancestor. The Kheosures (Caucasus) do not know any political institution excepting the "gens."

name, and have a common burying-ground; there is a prohibition against marrying within one's own "gens"; and, as relationship through a common mother is the only one taken into consideration, each "gens" is recruited exclusively from amongst the descendants of the women. The Council of the "gens," which is composed of all the adults, men and women, exercises the sovereign power and decides serious questions, such as the taking in of a new member or the carrying out of a vendetta; it elects and deposes the military commander and the sachem or chief in times of peace; the latter has only a power which is entirely paternal, without any means of coercion; he is at once the chief of the "gens" and the representative of the latter in the council of the tribe and in the federal council of the Iroquois. The son of the former sachem is never elected to fill his father's place, for he belongs to another "gens" because of the maternal right.

§ 77. **The Celtic Clan,**¹ such as it is represented to be in the Gallic Codes, is, on the contrary, a clan based on agnatic relationship; the woman, in spite of her marriage, remains a member of her father's clan (save in a few exceptional cases). At the head of the clan which is composed of the supposed descendants of a common ancestor, there is a chief whose office is not hereditary. He is assisted by a council of seven elders, by a representative of the clan who is charged with the administrative affairs and diplomatic negotiations, and, finally, by an avenger who punishes delinquents and is in command of the men in time of war. The mutual responsibility of the members of the clan is most minutely regulated; in case of a homicide the sum of money that is due by way of composition to the family and the clan of the victim is paid, one-third by the murderer and his household and two-thirds by his maternal clan and his paternal clan, the latter being held bound to pay twice as much as the former; the relatives and the clan of the victim have a right to receive the composition in the same proportion, but a preference is made to the extent of one-third for the benefit of the chief who has carried out the recovery.

§ 78. **The Roman "Gens"**² implies: 1st. A common name; its members bear the same "nomen gentilicium" (ending in "ius";

¹ Seebohm, "The Tribal System in Wales," 1895; Dareste, "J. des Sav.," 1898; Kovalevsky, "R. de Sociol.," 1894, 199; R. de Kérallain, "R. gén. de Dr.," 1890, p. 571.

² Cuq., "Instit. des Romains," 1891; Giraud, "R. de Lég.," 1846 ("De la Gentilité"); Lécrivain, "Dict. des Antiq.," see "Gens" (and bibl.). — Cicero, "Top.," 6 (according to *Mucius*).

for example, Tullius) and are distinguished from one another by the "prænomen" (Marcus) and the "cognomen" or soubriquet (Cicero). 2d. Common worship and a common tomb. 3d. Agriculture in common; the "gens" is the owner of the "ager gentilis"; the rights of succession, of guardianship and custody which existed among the "gentiles" at a comparatively recent period are remains of this joint ownership. 4th. Solidarity among "gentiles," whether it be for avenging offenses of which one of them has been a victim, or whether it be for paying the expenses incumbent upon one of them (ransom, fine, disbursements occasioned by the exercise of the public duties); or whether it be to aid one another at law, to serve one another as surety or to be witnesses for one another. The "gens" undoubtedly had a chief ("ἄρχων" in the Greek "γένος"),¹ the natural representative of the "gens" in the Senate, who was charged with the worship, with the administration of the property, and with the administration of justice in the "gens"; he was assisted in serious cases by a council of "patres," which pronounced decrees or regulations and punished with the "nota gentilitia," and probably with expulsion, its unworthy members. The "gens" included the lawful descendants in the male line from the common ancestor (actual or presumed) of the "gens," the adopted children or the women "in manu" of a "gentilis," without mentioning clients who were only an accessory part of it. One left the "gens" by being adopted, married or emancipated, or the "transitio ad plebem." The "gens" disappeared little by little, being eclipsed by the State, like a confederation whose elements would fuse together in order to form a single State. The general causes of the progress of the State resulted inevitably in the overthrow of the "gens." The population became divided into classes and the land into districts, both of which were quite foreign to the division into "gentes."

§ 79. **The "Clientele."**—The client ("cliens," who obeys) is a freedman, a member of a conquered people, or a man who has connected himself with some patron ("jus applicationis"). He bears the same "gens" name as his patron, takes part in the same worship, and owes him "obsequium, operæ, bona," — respect, services, property; that is to say: 1st, assistance in case of ransom, fines incurred, and the customary expenses and disbursements; 2d, his

¹ In Daghestan there is an elected chief whose authority is especially a moral one ("primus inter pares").

succession if he dies without descendants. In return his patron, under penalty of being devoted to the infernal gods ("sacer esto"), gives him protection before the courts and outside of them, treats him with justice in the family circle, and gives him help if need be (from this, perhaps, is derived the granting of property to be held at will, *Festus*, "Ep.," 247). The tie which binds the client to his patron is hereditary; the client cannot renounce his patron; the latter is himself undoubtedly not authorized to get rid of a client unless for some serious cause. The client has no rights in the State excepting through his patron. The decline of the "gentes" was the signal for the decline of the "clientele." The clients freed from patronage constituted the common people; they acquired the right of pleading in court and also political rights. Towards the end of the Republic the clientele is no longer an institution; it resembles the political clientele of our days.

§ 80. **The Germanic "Sippe"**¹ extends as far as the relationship ("Freundesblut wallt und wenn es auch nur ein Tropfen ist"). Although the Germanic law recognizes both relatives in the male line and relatives in the female line ("Gesippen," "Freunde," "Gätlinge," "Magen"), only the former, or relatives by the lance and by the sword, "Speermagen," "Schwertmagen," form part of the "Sippe"; the relatives by the distaff and the spindle, "Spillmagen," "Kunkelmagen," are not included in it. Strangers can enter the "Sippe" by becoming connected with the families that compose it; for example, by way of enfranchisement or of legitimization; on the other hand, one leaves the "Sippe" as a consequence of a placing outside of the law, or of a decision on the part of the "Sippe," or by voluntarily withdrawing with the customary formalities. The "Sippe" constitutes at one and the same time a political group, an agrarian community² and a military division. It protects its members before the law, exercises over them a police power, which is a very natural thing from the time when it becomes responsible for their acts, has guardianship over persons under a disability, women and minors, takes vengeance for the murder of one of its members, or receives the "Wergeld" or composition due from the murderer; and, on the other hand, it contributes to the payment of the "Wergeld" in case of a murder committed by one of its own members.

¹ *Brunner*, § 13.

² "L. Alam.," 87; *Meichelbeck*, "Hist. Fris.," I, 49 (in. 750): "fines genealogiarum"; *Rozière*, "Form.," 318. The word "fara" has the same meaning and is found in the names of places, — La Fère in Picardy, etc.

§ 81. **The Germanic Following** ("comitatus")¹ places the man at the service of a chief or of a nobleman, of a free man who is more powerful than he is, but without reducing him to the condition of a slave. This is an extra-legal institution, if one can use that term, which supplements the State in the protection of the weak. It differs from the Roman "clientele," and no doubt from the Gallic "clientele" ("ambacti"), about which little is known, but which meets the same wants. Tacitus describes it in about the following terms: "The follower is admitted into the family community of the chief; he lives under his roof and eats and drinks at his table; he swears to protect and defend him (as the vassal would swear fealty to his lord); in time of peace the followers form a personal escort; they are engaged in domestic employments; in war time they fight at his side; if he dies it is a shameful thing for them to survive him without having avenged him; they will give themselves up as prisoners in order to share his fate, and if need be will serve as hostages for him. If he is the conqueror the followers receive a portion of the booty, a staff, a warhorse, and other presents. The chief supports them, arms and equips, avenges and protects them. The bond between the chief and the follower is not indissoluble; if the latter wishes to withdraw, for example, to return to the house of his father, he may do so. It is a great honor for a chief to have a numerous following. All free men may have 'comites,' but all do not have them; for this assumes that a man has wealth, military glory, and an illustrious name. It is not a rare thing for nobles with their followers to make war on their own account."

§ 82. **The Tribe**, which is an aggregate of clans or "gentes," has

¹ Tacitus, "Germ.," 13. Cf. the poem of Beowulf, Icelandic Sagas. *Cæsar*, VI, 23, speaks of the heads of bands who can be likened to the "principes" with their "comitatus"; but the former only secure the attachment of volunteers for the duration of an expedition. The "comitatus" is not an exclusively military institution; the Germanic names that are given after the invasion to the "comites" clearly show this; they are servitors, "degen," companions, "gasindi," relatives, "gatlinge," "freunde"; cf., however, the "antrustions" of the Frankish king. The followers are not absolutely vassals, whatever *Montesquieu* may say in his "Esprit des Lois," 30, 33; but they are precursors of them. They form a part of the household (in the position of free servitors), whereas the vassals are outside of the house. Cf. *Bruner*, I, 137. The "following" and the "clientele" pave the way for the division of society into classes by the transformation of free men into servitors. There is a good deal of discussion, — wrongly, as it seems to me, — as to whether the right to have a "comitatus" was a privilege of the king, of the "dux," or of the "principes"; *Esmein*, p. 41 *et seq.* The "comitatus" was of too small a number of men for one to be able to see in it the origin of the expeditions which ruined the Roman Empire: *Kohler*, "Germania," 1868, 143.

no organization other than that of the communities which compose it; it only differs in its greater size, which is an advantage, and in the powerful political character which it assumes, whereas the clan and the "gens" are sometimes so much like the family as to be confused with it. Among the members of the tribe there is no question of relationship, even artificial; at the most, they are united by a common worship. The Iroquois "gentes" form phratria, and the latter, tribes; the tribe of the Senecas only numbered two thousand souls; the territory which it occupied was surrounded by a neutral zone; it had its own form of worship and its own council composed of sachems and chiefs of "gentes." The five tribes of Iroquois themselves (about twenty thousand souls) confederated together, forming an eternal league (as all leagues do!) directed by a council where the voting was done by tribes and where decisions had to be arrived at unanimously. In 896 the seven Hungarian tribes united under the leadership of Arpad.

§ 83. **The Gallic Towns¹ and the Germanic Towns. Political Divisions.** — Neither Gaul nor Germania was a State. Nor were they merely geographical terms. The inhabitants of these regions, while they were autonomous, had among them enough common characteristics to be called by the same name. Cæsar maintains, it is true, that the Belgians, the Aquitani, and the Celts (or Galli) have neither the same language nor the same institutions nor the same laws; but he exaggerates, for when he comes to describe Celtic institutions he does not find any differences to point out. Religious unity had been realized by the Druids, and several facts show us that progress was being made towards political unity. The Gallic towns placed themselves under one another's patronage. At the time of Cæsar's arrival the entire country was grouped around the Redui and the Sequani, who were disputing for the leadership and supremacy. In Germania this tendency is not betrayed to the same extent; however, there are independent States, such as the Ubii, who pay tribute to the Suevi, and federations like that of the Franks and the Alamans at the time of the barbarian invasions.

¹ *Bulliot and Roidot*, "La Cité Gauloise," 1879; *Lefort*, "R. gén. de Droit," 1880 et seq. — *D'Arbois de Jubainville*, "R. hist.," 1886, 3, does not seem to me to have established the existence of a great Gallic Empire extending from Thrace to the Atlantic Ocean about the fifth century B. C. We cannot apply to the Gauls that which we know concerning the Galates of Asia: *Strabo*, XII, 5; *Robion*, "Hist. des Gaulois d'Orient," p. 153.

The territory of each town was divided into cantons ("pagi"), and each canton included a certain number of villages or small towns ("vici"). It is presumed that the "pagus" (or "Gau") was the territorial district occupied by the "millena" or group which furnished one thousand inhabitants; it seems that this was so in the case of the Suevi. As to the "hundred," the recognition of whose existence has been attempted in the "Germania" of Tacitus, without having any direct proof of it, this would be a subdivision of the "pagus" if one were bound to see in it a territorial division, and then one would be tempted to liken it to the "vicus." But the silence of the texts will not allow us to see anything in it but a military division, the contingent of a certain number of lineages or "Sippen." In proportion as the organization of the "gentilice" becomes weakened, this personal grouping (to which can be likened those that were formed around the "godis" of Iceland) has a tendency to be transformed into a territorial division; the family is no longer at the base of the social scheme; it is residence in a given place, just as it was in Rome and in Greece. But at the time of Tacitus the change had probably not taken place. We merely read that in Germany, 1st, the judges had a hundred assessors; 2d, that each "pagus" furnished foot soldiers at first to the number of one hundred and later to an indeterminate number; but they kept the name of "centeni," the hundred, as an honored title (thus they used formerly to say, "the hundred-guards"). These numerical divisions of a military origin are not peculiar to Germania.¹

§ 84. **Classes of Population.** — Gaul and Germania were covered with forests and swamps; the rather sparse population gave itself up especially to the raising of cattle, to hunting and fishing; agriculture was very little advanced. Tacitus tells us that the women and the old men had to do all the hard work in Germania;

¹ The town of the Helvetii had 4 "pagi," 12 "oppida," and 400 "vici"; the "oppida" and "vici" were set fire to: *Cæsar*, I, 5, 12 (the "pagus" of the Tigurines made war by itself); IV, 1 (the Suevi had 100 "pagi"), 3 (strip of uncultivated land upon the frontier of the Suevi); *Mela*, III, 3; *Tacitus*, VI, 12, 16. As to the historical geography of Gaul: *Lognon*, "Atlas hist.," 1888; *Desjardins*, "Géogr. de la Gaule," 1878; *Deloche*, "Mém. des Savants étrang.," 2d series, IV, I, 365. — Among the Anglo-Saxons the division is carried out even to the "ten." The Salic Law speaks of the "Centenarius." Cf. *infra* on the personal or territorial character of the Frankish Hundred: "L. Wisig.," II, 1, 26: "millenarius," "quingentenarius," etc. — Rome had its tribes, its centuries, and many peoples analogous numerical divisions. "Alamans," 36, 1. — *W. Sickel*, "Der Deutsche Freistaat," 1879; "Mitth. d. oest. Instituts.," *Ergänz.*, I, 7; *Waitz*, "Verfass.," I, 201; *Stubbs*, "Constit. Hist. of England," I; "Johns Hopkins University Studies in History," 3d series, 143, 342.

the men's only occupation was warfare; in time of peace they remained idle ("ipsi hebent"). In Gaul, in the time of Cæsar, the population was divided into several classes: 1st. The **Druids**, a powerful clergy with privileges, exemption from military service and taxation, and with annual assemblies in the country of Chartres with a certain hierarchy among its members ("si quis . . . excellit dignitate"); with a supreme head elected by the sacerdotal body.¹ Germania had not yet specialized the religious function; it was there exercised, no doubt, by the political chiefs. It is only in the time of Tacitus that we find priests to whom the Scandinavian "godis" (but not the Icelandic ones, for the latter have also political attributes) may be likened. — 2d. The **Knights**, "**Equites**"; they constituted the military class, the nobility, and alone took part in the political assemblies and gained their influence through the number of their slaves, of their debtors and of their clients.² Among the Alemanni the nobility, the old families, do not form a distinct class with legal privileges; their clientele and their wealth give them a better position, in fact, than mere free men. The result of this is that their family can demand for them a greater "Wergeld," and that it is among them that ordinarily the chiefs and the kings will be chosen.³ — 3d. The "**Plebs**,"⁴ having no political rights and scarcely above slaves, are grouped around the knights and constitute their clientele. In Germania there was not, properly speaking, any "plebs." Society was still composed of only two classes, free men and slaves, which is an indication of a less advanced social state. —

¹ *Cæsar*, VI, 13. In Ireland, mere men of letters, "file," "brithem" or jurisconsults, are distinguished from the priests. *Diodorus of Sicily*, V, 31, also separates the Druids, the Bards, and the "Vates" in Gaul: *Ritterling*, "Hist. Tasch.," 1888, 195.

² *Ibid.*, I, 31; VI, 13.

³ *Cæsar*, VI, 23; *Tacitus*, "Germ.," 7, 8, 13, 25; "Ann.," 11, 16; *Jordanes*, "De Reb. Get.," 5; *Greg. Tours*, 2, 9. — In the tenth century it is shown that there were among the Saxons, as formerly, three classes of persons: nobles, "edlingi," free born, "frilingi," "servi" or "lazzi"; "M. G. H., S. S.," II, 361; "Frisons," I, 5, 11, 15; "Bavarois," II, 20; "Angles," I, 10. (Differences in the price of the "Wergeld"). "The Edda" of *Soemund*, III, 173, gives a divine origin to the three classes of men: the "Thrael," "servus"; the "Karl," "vir"; the "Jarl" or noble, warrior. — Detailed bibl. in *Brunner*, "D. Rechtsg.," § 14. Whence is this nobility derived? Perhaps from a prolonged holding of the public power which assumes noteworthy actions.

⁴ *Cæsar*, VI, 13 (*Viollet*, p. 13). — Were the "ambacti" or clients of the chiefs free men? *Cæsar*, VI, 15; *Festus*, see "Ambactus"; "N. R. H.," 1890, 709. The "devoti" or "soldurii" are chosen soldiers, who are so devoted to the chief whom they follow and who supports them that they will not survive him. — In Ireland we find free clients and vassals who are serfs. The "clientele" is connected with the grant of a farm and livestock made by the patron.

4th. The **Slaves**. Among the Alemanni they are rather like free men; there is scarcely any distinction made between them and a freedman; the master has over them a right of life and death, but it is a very rare thing for him to make any use of it. He gives them lands to cultivate and a separate house; he treats them rather as cultivators, contenting himself with demanding from them a portion of their profits.¹

§ 85. **The Political Function** was still very little developed. It was entirely an external one, the same as in a league, and consisted especially in the organization for attack and defense against the enemy. Within, clans and families kept their independence; collective action, when it took place, was the result, at least in Germania, of a deliberation on the part of the assembly of the free men. The State has no jurisdiction over the maintaining of order within itself. It is for each man to avenge his own wrongs. The only procedure known is private warfare, the vendetta, which is carried on from generation to generation until the families are exterminated, or until, tired of struggling, the two parties come to terms, just as to-day among States arbitration or mediation puts an end to differences. The Druids in Gaul and the Brehons in Ireland play the part of arbitrators. Both of them enjoy a sort of magic power; it is this which causes them to be chosen and which accounts for the fact that their judgments were respected; Cæsar maintains that they had the power to excommunicate those who disobeyed them. Already, however, alongside of these priests there appeared in Gaul a secular system of justice which was administered by the magistrates of the town. In Germania "principes" who were elected dispensed justice in the cantons and villages; they also were magistrates, and the people aided them in their duties.² This intervention of the people, which was perfectly natural at a time when the political

¹ *Tacitus*, "Germ.," 24, 25, 20.

² *Cæsar*, VI, 23; *Tacitus*, 12. One can bring a capital accusation before the national assembly; to each one of the chiefs ("principes") who render justice "perpagos et vicos" are joined, in order to serve them as advisers and to lend their "auctoritas" to their decisions (that is to say, to guarantee them, to validate them) one hundred assessors taken from among the people ("Centeni singulis ex plebe comites consilium simul et auctoritas adsunt"). Interpret the word "centeni" as you will, whether it concern heads of families or of the political division called the "hundred," of the assembly of the "hundred," or of some persons, it is none the less true that the popular element plays its part in the rendering of justice. Upon the part played by these "centeni" "comites," cf. *infra* the Frankish "rachimbours": *Brunner*, I, 143; *Vanderkindere*, 100; *Beaudouin*, "N. R. H." To the contrary: *Fustel de Coulanges*, "Rech.," 361.

power was feeble, is one of the most striking characteristics of Germanic justice. The magistrates' assessors do not limit themselves to giving him counsel, as in the Roman tribunals; they determine upon the judgment which the magistrate puts into execution.

If one judges it by traditions and the later law, the **putting outside of the law** seems to have been the most serious penalty that could be pronounced by the Germanic tribunals, or, rather the first of them, the popular assembly (later on, the king).¹ This is a sort of secularized excommunication, more lay than religious, and carrying with it death, confiscation of property, and the burning of the man's house. The individual put outside of the law, "exlex," outlaw, may be killed with impunity by the first comer; whoever shelters him is punished, even his relatives, and often his wife; he is an enemy of the community; he has only one resource left, — that is to flee, to take to the jungle, as the Corsicans say, and he is hunted there like a wild animal ("wargus," meaning wolf), to exile himself and to go and live abroad.

§ 86. **The Political Organs** of each town are: 1st, the popular assembly; 2d, the senate or council of the chiefs; 3d, the kings or magistrates.

§ 87. **The Popular Assembly**² in Germania is composed of all

¹ Cf. as to Gaul, *Cæsar*, V, 56 ("hostem judicat . . . in concilio"). — "L. Sal.," 56; Edict of Chilperic., 10: "homo qui per silvas vadit." — "Z. S. S.," XI, 62.

² *Montesquieu*, "Esprit des Lois," XI, 6: "If one will read the admirable work of Tacitus upon the customs of the Alemanni, one will see that it is from them that the English have derived the idea of their political government. This splendid system was found in the forests." *Guizot*, "Civilis. en France," I, 7: "The Alemanni have given us the spirit of liberty." Comparative jurisprudence has justified these theories. At a certain stage of their civilization other peoples have had the same political institutions as the Alemanni.

F. de Rocca, "Les Ass. politiques dans la Russie ancienne" ("R. hist.," 1895, LIX, 241). Ancient Russia had its classes ("boiars"), and among them courtiers, "kniazje," in the service of the prince, merchants, villagers and slaves. The nobles did not enjoy any hereditary privileges. Every free man had a right to take part in the "Vétché" or Popular Assembly and to speak therein (but because of the paternal power the son could not take part in it during the lifetime of his father). The "Vétché" deliberates upon all questions; unanimity is required in its decisions; this is obtained by means of a friendly agreement or by force, the majority forcing their will upon the minority; at Novgorod the dissenters are drowned in the Volga. The meetings are not periodical; the convocation emanates from the sovereign or a group of citizens; nobody is compelled to take part in it. The "Vétché" has a seal and officers who enforce its decisions. This political organ is found to be powerless to maintain order within and to protect independence without. It was necessary to call upon the princes, with whom the "Vétché" negotiated, rather like the Italian towns with their "podestas." The "Vétché" appoints and removes the sovereign; it decides upon war and peace; the sovereign commands the troops, administers justice, takes part in the "Vétché" and

the free men who are capable of bearing arms.¹ They come to it grouped, no doubt, in families and clans ("propinquitas Sippe"), as though it were a matter of a military expedition. They seat themselves fully armed² in the open air. The priests command silence and compel it if necessary. The king or the chiefs speak, seeking rather to persuade than to issue orders. The crowd gives evidence of its disapproval by murmurs, of its approval by the clash of arms.³ They have ordinary sessions at the time of the new moon and the full moon, and extraordinary sessions when circumstances call for them. The assembly⁴ decides the most important affairs of the town, chooses the chiefs who administer justice in the "pagi" and the "vici," hears, to the exclusion of the latter, accusations in capital cases, — such as high treason, cowardice, vices against nature, — inflicts penalties, death or putting outside of the law; it is in its presence that the political emancipation of young men takes place; when they are able to fight a chief or a relative goes through the ceremony of arming them with the shield and the staff.⁵

sees that all its decisions are carried out. The invasion of the Tartars ruined the "Vétché" and gave the Muscovite princes sufficient power to unify Russia.

¹ The Norwegians who emigrated and established themselves in Iceland and took with them their old customs had a popular assembly or "Althing." It sat in a vast plain upon an isolated block of lava, called the "Mountain of the Law"; here there were an altar, a lake from which they took water to wash away the blood of victims, and a rock from which the condemned were hurled. The sacrifices were followed by solemn banquets. During the holding of the diet private warfare was suspended; the priests proclaimed a holy truce. — *Brunner*, I, 130, thinks that in the Germania of the time of Tacitus the assembly was opened with religious ceremonies.

² The army is the people under arms: *Cæsar*, V, 56. Military service is for the free man a right just as much as a duty. Also, the giving of arms is a method of freeing slaves among the Lombards: *Paul Diacre*, "Hist. Langob.", I, 13, and the taking up of arms is for the young man the formality by which he enters upon political life.

³ General custom among the Alemanni (laws, election of kings). *Vápnatak* in Norway: *Greg. Tours*, "H. Fr.," II, 40; "Rotharis," 386.

⁴ Perhaps unanimously. In the primitive Customs they are scarcely ever satisfied with a majority (the Russian "Vétché," the Montenegrin assemblies, the Ossetes and the Abyssinians): *Viollet*, I, 286; "Cap. Saxon," c. 26, 27.

⁵ These assemblies are once more found after the invasion among the peoples of Germanic race under the following names: "Thing" (Scandinavians), "Ding," "Geddinge" (Germans) "Mallus" (Franks), "Gemot" (Anglo-Saxons), "Werf" (Saxons, Frisians). The "Landsgemeinde" of the little Swiss cantons such as Uri and Appenzell is nothing more than the old popular assembly, which has found a favorable environment and has perpetuated itself there even to our day. Cf. the Kabyle "Djemaa": *Masqueray*, "Form. des Cités chez les Pop. sédent. de l'Algérie," 1886; *Zimmerman*, "Volksversamml. d. alt. Deutschen" in *Brandes*, "B. üb. d. Germ. Gesellsch.," II, 1863. — The Italian towns and the French Communes of the Middle Ages have also had their popular assemblies; in these cases it was a beginning over again.

Thus this assembly is at one and the same time the army, the tribunal and the political body that exercises the direct government, only leaving to the kings or chiefs matters of secondary importance.

Among the Gauls popular assemblies are not in the foreground as they are in Germania. However, they meet in each town and are composed of all the armed men.¹ Cæsar also speaks of a national diet² which he himself summoned each year, and in which only the "principes civitatum" took part; but he is not certain that this "concilium totius Galliæ" existed [previously to his time; it is an institution which came into existence, perhaps, owing to the necessity of resisting the Romans; they call together national diets as one would appoint a dictator; Gaul was compelled to effect its unity, just as Greece had to do in order to resist the Persians.³

§ 88. **Senate.** — It becomes impossible to hold general assemblies, if for no other reason than that of the extension of territory and the increase of population; they are only held, where they are still in use, at rare intervals and for questions of vital importance. The ordinary affairs of state are in the hands of a less numerous assembly, — an assembly of noblemen or elders, of a senate. The assembly of the "principes" in the Germania of Tacitus is of this character ("de minoribus rebus principes consultant, de majoribus omnes"). The Gallic senates, which were composed, no doubt, of the best of the knights, seem to have played a more important part and to have almost annihilated the popular assembly. Among the Nervii it is composed of six hundred members; among the Edui two relatives cannot sit together in it, which would lead one to suppose that it only includes chiefs of families or of clans, just as in States that consist of an aggregation of "gentes" or of clans; under these conditions the senate resembles the diet of the modern confederation. In a country where the nobility exists, as in Hungary, it is the lords who form the political assembly; until the beginning of the sixteenth century they used to meet together on the race course of Rakos near Pesth. The same thing occurred in Poland.

¹ *Cæsar*, V, 6 ("Concilium Æduorum"), 56; VI, 20, 23; *Cougny*, II, 499.

² *Cæsar*, I, 30; IV, 6; V, 27, 54, 56; VI, 3, 44; VII, 1, 2, 63, 75; II, 4 ("Concilium Belgarum"). — Cf. *D'Arbois de Jubainville*, "Les Assemblées politiques de l'Irlande," 1880; these should be likened to the annual assemblies of the Druids in the country of Chartres; *Post*, "Bausteine," II, 81.

³ Another symptom: Orgetorix contemplates getting possession of the "imperium totius Galliæ": *Cæsar*, I, 2.

§ 89. **Kings or Chiefs.**¹—The authority of the chiefs corresponds to the development of the political function and is consequently very slight. “Reges habent quorum tamen vis pendet in populi sententia,” is said of the old Swedes. It is the same thing with respect to the kings of Germania,² whose greatest power lay in their “clienteles.” Half hereditary and half elective, the rule is to choose them from certain families because of their nobility, whereas military chiefs, in countries where there are no kings to command the army, and also, no doubt, where the kings are too old, are named because of their courage (“reges ex nobilitate, duces ex virtute summunt”). They have no right to punish, as the military chiefs of the time of Cæsar had; this right is reserved to the priests, who are supposed to carry out the will of the gods. They are to be distinguished from the people, somewhat as the chiefs of savage tribes, by the arrangement of their hair in such a way as to give them a more martial air and to frighten the enemy (Suevi, Franks). It is customary to offer them presents; a portion of the composition due in the case of a murder is paid them, whereas it is the town that receives it where there are no kings. The “principes,” or local chiefs, have still this power (cf. “reguli,” “ealdormen” among the Anglo-Saxons; “duces,” Lombards). They are ordinarily chosen among the nobles; but there is this difference between them and kings, — that birth prevails in the case of kings, whereas with chiefs it is election; it is not certain whether they are appointed for life.

Gaul has kings,³ and especially magistrates; the “vergobret,” who is a supreme magistrate among the Edui,⁴ is appointed for a year by the priests and the other magistrates; he has the right of life and death and he cannot leave the territory of the town,

¹ *Braumann*, “Principes der Gallier u. Germ.,” 1883; *Sybel*, “Entstehung d. Deut. Koenigthums,” 1881; *Dahn*, “Koenige der Germanen,” 1861–85; *Voss*, “Republik u. Koenigthum in alt. Germ.,” 1885; *Waitz*, “Forsch.,” II, 387; *Brunner*, § 17 (bibl.); *Cæsar*, I, 31; II, 5, 28; III, 16, 17; IV, 11; V, 54; VII, 32, 33; VIII, 21; *Hoffmeister*, “Das Koenigt. i. altg. Staats.,” 1886.

² The king or “princeps civitatis” (*Tacitus*, 10) is called “thiudans,” from “thiuda,” meaning people (cf. “L. Sal.,” 46: “ante theoda,” meaning “ante dominum”); “chunning,” “konungr” (“koenig”) from “chunni,” “kunne,” meaning race, nation; “leod” (Anglo-Saxons), word which also means people: “M. G. H., S. S.,” VII, 377; *Waitz*, I, 322 (deposition); *Grimm*, “R. A.,” 231; *Cæsar*, VI, 23.

³ *Val. Maxime*, 9, 6, 3; *Cæsar*, I, 3; II, 4; IV, 21; V, 25, 26, 54; VII, 4.

⁴ *Cæsar*, I, 4, 16; VII, 32, 33 (“intermissis magistratibus,” that is to say, with the intervention of the other magistrates of the town and of the chief alderman in his official capacity); others translate in the absence of the magistrates; *Strabo*, 4, 4, 3. The “Lexovii” also have a chief alderman. Cf. *Robert*, “R. archéol.,” 1886.

which compels him in case of war to appoint a military chief to rule with him. The authority of this magistrate seems to be greater than that of the Germanic chiefs; however, they complain that mere individuals have more influence than they in the State. The military aristocracy with its clientele, and the priesthood of Druids, counterbalance their power.

§ 90. **Composite Societies.** — The political apparatus becomes more complicated within these. The central organ includes various elements: thus in a monarchy we will find near the king a Council composed of officers or ministers chosen from the king's relatives or servitors, — for example, the eunuchs under the Lower Empire,¹ — and bureaus besides these ministers. In proportion as the attributes of the State become extended the authority of the ministers increases; the king, who is physically incapable of doing everything, only keeps the general direction of public affairs; and often even the real power passes to a prime minister, or a grand vizier; the king reigns but does not govern. At the head of the territorial divisions there are established local organs which are a reproduction of the central organ on a small scale, and which model themselves after it and are subordinated to one another in a hierarchic manner.² The central organ is charged with co-ordinating the action of the local organs, and also of the special apparatus which comes to be formed little by little alongside of it and at its expense: judiciary, military, and financial apparatus, — all with the same hierarchy and the same centralization. The separation of powers is a consequence of the division of labor, and even more pronounced separation takes place in modern societies: the industrial apparatus and the religious apparatus are distinct and to a very great extent independent of the political apparatus. Not that there are no protests raised

¹ Mistresses of the king (Louis XV), lovers of the queen (Catherine II), favorites of either one or the other have important political effects in monarchies. Nepotism is in modern systems a survival of the past.

² The local organs are sometimes created directly by the central organ (colonies, etc.). At other times this central organ is contented with subordinating to itself powers which already exist, with transforming local chiefs into mere functionaries. In confederated States these chiefs give up only a small portion of their attributes. The English have allowed little potentates, rajahs, who have a great nominal authority, to continue in India. Whatever their origin may be, the local organs have a tendency to resemble the central organ. In the Persian monarchy the satraps usurped the right of life and death. In Greece Sparta propagated aristocratic institutions and Athens democratic institutions. The free towns adopted in the Roman Empire the constitution of republican Rome, which apparently had still remained in force.

against this tendency. The socialistic theory of the organization of labor makes of the State a great manufacturer, and even the only possible manufacturer. In religious matters the ultramontanians, even Auguste Comte, want a State religion. Some of them restore to the State the religious function which it had for so long a time during antiquity, and almost everywhere until our own day; others give it the economic function of which it has deprived itself for so long a time. Even when we set aside these radical theories, there remain open questions as to the relationship of the Church and the State, and as to the intervention of the State in matters of industry and commerce.

The patriotism of old times required a man's entire devotion; we must picture to ourselves the States of olden times as towns in a state of siege and reflect that some trivial act in time of peace becomes a crime when facing the enemy. In our own day there is, as it were, a tendency to return to militarism; the State takes possession of the telegraphs and the railways; it enacts laws against drunkenness; there is a desire to make people happy whether they like it or not, and virtuous by decree. But liberal institutions, — such as free exchange, freedom of conscience, and freedom of the press, — urge the State to take everything. The modern State has gained in strength almost as much as the individual has in independence, — a thing which has solved a problem as difficult in appearance as the squaring of the circle. If the system of State control is to be the system of the future, rather than anarchy, it is a mistake to believe that the State must be everything and the individual nothing. The body draws its strength from the vitality of its cells; these must have an independent life of their own; it is the same in society; the more vigorous the individual, the more powerful the society; it is not the atrophy of the individual that should be sought; it is his complete development.

§ 91. **The Ancient Town and its Revolutions.** — The little Greek towns, even Rome itself, were originally organized according to the type of the Gallic or Germanic city, having popular assemblies, senates, kings, or magistrates. But in time their constitution became more complicated and was transformed. The history of their public institutions shows a great uniformity; the old writers, Polybius among others, had noticed it and had given the curve of their revolutions. For the most part they passed through the following phases: 1st. Patriarchal royalty, as at

Rome. 2d. Aristocracy of race, patriarchate being substituted for royalty, which had become tyrannical. 3d. Aristocracy of fortune, taking the place of the old nobility (the constitution of Solon at Athens and of Servius Tullius at Rome, political rights dependent upon wealth). 4th. Democracy, based upon equality between the "plebs" and the patriarchate. The military and financial charges weigh upon the "plebs" as well as upon the patriarchate, upon the poor as well as upon the rich. Those who pay a part of these charges wish to have a part in these rights. Artificial divisions that are purely territorial take the place of the old ethnical or family divisions (tribes and "demes" at Athens); the assemblies of the citizens voting by tribes having the last word as to all affairs of importance; the magistrates are temporary and may have their authority revoked by the people, and they are responsible to them; they are chosen by means of drawing lots, election still having something aristocratic about it (*cf.* the Athenian jury of the Heliastes drawn by lots and the Roman judges taken, even to the Gracchi, from among the senatorial class). 5th. Tyranny. The social question has always been the danger in the old democracies. After the attainment of the equality of political rights, equality of fortune has been demanded. In the pursuit of this object, which is as chimerical as equality of strength or intelligence, rich and poor, fat and thin, struggle without respite. If the poor and the thin are the strongest, they profit by it to obtain from the State distribution of the wheat and the food, the cancelling of debts, and the dividing up of the soil. The troubles arising from these measures cost the town its freedom and its political rights. A tyrant, a Cæsar, ordinarily chief of the democratic party, is found ready to re-establish order and repress the anti-social tendencies. This is submitted to as an evil in order to avoid a still greater evil: anarchy.

HISTORY OF PRIVATE LAW

§ 92. **General Evolution.**—Private law was but slowly detached from public law, with which formerly it came near to being confused. That which to-day is demanded of the State, the maintenance of order, the security of the individual, was formerly the concern of the family. With Feudalism public power passes into the hands of the feudal lords as a tribute to their proprietary right, that is to say, of private power; that which the sovereign has succeeded in preserving for himself is a portion of his domain. The monarchy was compelled to make a sustained effort in order to re-establish the sovereign power and distinguish it from private power. At the same time, and thanks to this evolution, a movement towards civil equality took place; private condition depended a great deal upon political condition; little by little class distinctions became more scarce; the Revolution abolished them and left in existence only economic inequalities, a simple expression in the majority of cases of physical or intellectual inequalities.

It is also due to the changes in political and religious order, under the action of economic causes, that the emancipation of the individual from the family ties and the individualization of ownership took place. From a state of perpetual war and violence, carrying with it the subjection of the individual, something like a state of siege, progress was made towards a system of internal peace and order, and consequently towards a system of liberty. The result of this revolution makes itself felt in every branch of private law.

Outside of these logical results, which occupy so large a place in our ancient legal history, one can say that private law is extended and becomes complicated, is enlarged and refined. Relations which for a long time remain strangers to law, as certain forms of contracts and possession, are regulated. Neighboring institutions are differentiated: thus from that common stock, the domestic power, are detached the power of the husband, the power of the father, the power of the guardian; credits and guarantees are organized in divers forms; transfers "inter vivos,"

gifts "causa mortis," pacts based on future inheritances, deeds of last will, are contrasted with one another. Roman legislation now harmonized with the spirit of modern law, the canon law and Christian ideas, the conception of equity and national right, are mingled with old Germanic bases in customs, laws, jurisprudence and doctrine, in order to complete the extensive structure of our old private law.

CHAPTER ONE

THE FAMILY

- TOPIC 1. MARRIAGE. LEGISLATION AND JURISDICTION.
- TOPIC 2. BETROTHALS.
- TOPIC 3. CELEBRATION OF MARRIAGE.
- TOPIC 4. IMPEDIMENTS TO MARRIAGE.
- TOPIC 5. EFFECTS OF MARRIAGE.
- TOPIC 6. DISSOLUTION OF MARRIAGE.
- TOPIC 7. SECOND MARRIAGES.
- TOPIC 8. UNIONS OTHER THAN MARRIAGE.
- TOPIC 9. POWER OF THE HUSBAND.
- TOPIC 10. THE PATERNAL POWER.
- TOPIC 11. CONCERNING ILLEGITIMATE CHILDREN.
- TOPIC 12. ADOPTION.
- TOPIC 13. CONDITION OF WOMEN.
- TOPIC 14. GUARDIANSHIP AND CUSTODY.

§ 93. General Ideas.

§ 94. Relationship.

§ 95. The House, or "mesnie."

§ 93. **General Ideas.** — Following the invasions, the barbarian family appears under two aspects: (A) under that of **Relationship** or **Lineage**, a vast circle embracing all the relatives, constituting an association whose members, united by close mutual assistance, must defend one another and assist one another under all conditions; (B) under that of the House, "domus," "mesnie," a less extended group, only taking in the nearer relatives, those who dwell together. Relationship is a confederation of "mesnies."

§ 94. **Relationship** extends as far as the ties of blood are to be recognized. In the purely patriarchal system it ought only to take in the relations designated as males or agnates, not the relations designated as women or cognates. But from the time of Tacitus remnants of the matriarchate give to those who are mere cognates a place alongside of the agnates; it is the same thing in

the Salic Law.¹ As a general rule, however, one can truthfully say that agnatic relationship alone is taken into consideration.² The relations by the sword, by the spear ("Schwertmagen," "Speermagen"), are contrasted with the relations by the distaff, by the spindle ("Spillmagen," "Kunkelmagen").³ There are here, as it were, two distinct circles, of which the second comes to resemble the first more and more. The proximity of relationship is not calculated by the number of generations, as in Roman law, but in a more rough and ready way by comparing the family to the human body, and placing the relatives in each limb. We shall come across this system further on in relation to marriage and inheritance.⁴

The effects of relationship were: 1st. Solidarity in the vengeance for wrongs committed against one of its members, and in the responsibility for those which they committed against third persons.⁵ 2d. The obligation of assistance in justice (oath takers). 3d. Right of inheritance⁶ and of repurchase. 4th. The right and the obligation of the guardianship of minors and women. The rights and duties of relatives became weakened throughout the whole of the Old Régime, so much so that in our day they are reduced to almost nothing, and one has some difficulty in justifying them, relatives having become almost strangers to one another. Formerly, on the contrary, men of the same lineage, always ready to risk their life and their fortune for one another, with good reason looked upon their rights as the reward and compensation accruing from the heavy duties of assistance which weighed them down. It is the State which, in guaranteeing public order, has rendered useless these associations of mutual protection and has indirectly overthrown these leagues of relatives whose existence was sometimes a menace to itself. Nor have economic changes failed to assist in bringing about this result. It has resulted very slowly and in an imperceptible manner. The relatives did not have formally to break the tacit agreement which united them.

¹ Tacitus, "Germ." 20; *infra*, "Inheritances"; Brunner, I, 81; Ficker, *op. cit.*

² Lefebvre, "Hist. du Dr. Matrim. Fr.," II, 315.

³ Rosin, "Schwertm. i. Rechtsbüch.," 1877; Stutz, "Verwandschaft. d. Sachsensp.," p. 7; Heusler, § 130.

⁴ *Infra*, cf. Viollet, 392; Morgan, "Syst. of Sanguinity," 1871.

⁵ Brunner, "Sippe u. Wergeld" ("Z. S. S., G. A.," 16).

⁶ The obligation to furnish nourishment, which in our day is confined to the very near relatives, must formerly have extended to the entire circle of relatives: Ciccaaglione, "Enciclop. Giur. Ital.," see "Alimenti"; Salvioli, p. 332; Pothier, VII, 25; Merlin, see "Aliments"; Henrys, IV, 681; "Z. f. Privat. u. Off. R.," 1893, 20, 481.

Formerly the abandonment of the family was permitted and regulated by usage;¹ possibly, the relatives even had the power to deprive of his rights the one among them whom they considered as unworthy, or whose conduct might involve their responsibility to too great an extent.

§ 95. **The House, or "mesnie,"**² the family in a narrow sense, is organized according to the patriarchal type, almost like an army, as required by the social condition which was so troubled in olden times, the lack of all security, the result of violent customs and of the weakness or the negligence of public powers. Such at least is the conception which seems to us to be most exact; although it has against it an opinion which is still very widespread, contrasting "the Germanic family, which rests before everything else on the idea of protection, with the Roman family, which rests upon the principle of authority," and a more recent thesis according to which these two families are rather to be discriminated because the first of them might contain vestiges of the primitive matriarchate.³ As we look at it, the head of the Germanic family

¹ "Sal.," 60; cf. "L. Henrici I," c. 88. In Hainaut the relatives of the homicide forswear him, that is to say, they make a declaration to the effect that they renounce every relation with him, so as to escape the consequences of private warfare: *Cattier*, "Evol. du Dr. Pénal Germ.," 1894, p. 135.

² Cf. Law of the Valleys of the Pyrenees. The house or the hearth ("Lar") goes to the eldest son or daughter (heir or heiress) to the exclusion of the other relatives. It is not a rare thing for each family to have its own system of succession. The house in which it has its seat is indivisible, inalienable, and inviolable. The children (for example, those who are in poor health) all have a right to live there, as well as the uncles and aunts who are not married. The younger sons pass into another family when they marry heiresses; in the same way the younger daughters do this when they marry heirs. If they married one another (younger sons or younger daughters) they formed a new family, a sort of colony of the parent house; the latter was like a center which drew to itself sometimes the possessions of each one of these colonies to the exclusion of the others: "Bayonne," ed. *Balasque*, II, 622; "F. de Navarre," 2 and 4, 8; "Fors de Béarn," *passim* (Noguès); "Cout. de Barèges," 1760 and 1789; *Lagrèze*, "La Navarre," II, 211; "Le Dr. dans les Pyrénées," 1867; *Cordier*, "R. h. Dr.," 1859, 257; 1868, 332; "Bulletin de la Inst. libre de Enseñanza," 1886, pp. 54, 73 (*Wentworth-Webster*); *Ricaume*, "Thèse," 1897; *Maurel*, 1900; *Butel*, "La Vallée d'Ossau," 1894; *Flach*, "Orig. de l'anc. Fr.," II, 455.

³ It may be that after the invasions the family preserved some traces of the matriarchate, but they are anomalies arising from characteristics which may be left to one side in an outline like this. In our opinion the patriarchal type already dominated in the time of Tacitus. To look upon the Germanic family as founded upon an idea of protection is to commit an anachronism and to carry into the past a conception which is relatively modern and due to the influence of Christianity and the changes in social and political status. As these changes took place little by little, and they are only proved by documents which are not very precise and are very incomplete, one has no difficulty in understanding the divergency of views held by historians of law: *Glasson*, III, 1; *Meynial*, "Le Mar. après les Inv.," 1898; *Heusler*, § 130; *Simonnet*, "Le Mundium dans le Dr. de Famille Germ.," 1898; Among the

differs but little from the Roman "paterfamilias"; he enjoys an almost unlimited power over persons and possessions. Whoever is a member of the household must submit to him: ¹ his wife, his sons and his daughters, their wives or their husbands, still more so their children, his brothers and sisters living with him, his mother, and lastly the servants.² Over all of them extended the domestic power or "mundium,"³ the patriarchal right which was the same for all, but which, however, was exercised in a different way according to the person; ⁴ the lawful wife was more respected if there were any chance of her relatives taking her part; the children, presumptive heirs, were treated better than the servitors; in the same way, the brothers were equal in strength to the head and had the right of going away; the house servants, in continuous contact with the master, were in their turn separated from the cultivators working at a distance on far-away lands. The germs of differentiation which already existed in very old times began to be developed. The pride of power of the head of the family diminished in proportion to the growth of public power. The State becomes the guardian of defenseless persons, — the clergy, widows, orphans, poor persons and strangers. He who has no longer a family finds a protector in the king; it is the same with the man who is forsaken by his family. From this supplying function the State passes to a more active rôle: it controls and oversees the exercise of the domestic power and checks the abuses of the same.⁵ As there is no form of tyranny which can be

old authors see: *Koenigswarter*, *Laboulaye*, and *P. Gide*. In order to appreciate the degree of uncertainty to which one is reduced on these important questions, see *Lefebvre*, "Hist. du Dr. Matrim. Fr.," whose ideas, which are hard to sum up, are very far removed from many of those that are commonly received. According to this learned man, out of a confused, anarchistic and disorganized situation Christianity drew a legislation which was well organized on the subject of the family. It is owing to the *Christian guidance* that all the matrimonial law of the barbarian period and the Middle Ages is to be accounted for; the Germanic origins amount to little compared with this. It seems to us that M. Lefebvre gives an exaggerated importance to one of the factors of our old law, — a factor, moreover, the effect of which no one contests. To judge from the Customs of feudal society, which were often so far from being Christian, it is very hard to believe that this legislation was entirely inspired by religion.

¹ "C. de Barèges," 1670, Art. 16: the younger son was called "esclau," which means slave.

² One can add to these free men such as "recommandés" and "vassi." *Thévenin*, "Textes," nos. 26, 51, and 144.

³ For the Frankish words see: *D'Arbois de Jubainville*, "Etudes s. la Langue des Francs à l'Epoque Mérov.," 1900; *Calmettes*, "Beh.," 1900.

⁴ *Aristotle*, "Polit.," I, 5; *Bodin*, "Répub.," I, 2.

⁵ During the Revolutionary period, owing to a curious phenomenon of regression, family lawsuits are taken out of the jurisdiction of the common law.

compared to that which is exercised by the head of the family over his own, a tyranny exercised at every moment and under the most futile pretexts, so, as soon as the State assures order, the emancipation of the individual takes place of its own accord. Free domesticity takes the place of servile domesticity. Having arrived at manhood, the children are freed from the paternal power; they are only subjected to it during their minority, when it is for their interest, and never as in the past because of the greater interest of the family. Woman becomes the equal of man, if she is not married, and when she is, her incapacity still exists, but it has no longer its "raison d'être" in the constitution of the "domus," it pertains to the marriage, to the necessity of the presence of a head in the house; also, the power of the husband is singularly decreased. This group of persons, which found itself, so to speak, outside of the State, because the State paid no attention to them, and which only belonged to the family, thus ends by belonging also to the State, in the same way and in as direct a manner, as the head of the family himself. Thenceforth, the unity of inheritance which the primitive "domus," assumed, ceases to exist on principle: the wife, the children, "a fortiori" the other members of the family, have or can have possessions of their own distinct from those which are in the hands of the head of the family. States of transition are met with, such as joint ownership among members, where, because of the joint possession of goods, the house seems to exist as it did under a single head. But these institutions are set aside in the same way, the conception of the maintenance of the family inheritance, of the conservation of property in the family, lasted as long as did the old law (theory of personal belongings.)¹

¹ Verdelet, "Du Bien de Famille en Allemagne," 1900.

TOPIC 1. MARRIAGE. LEGISLATION AND JURISDICTION

§ 96. Marriage after the Invasions.	§ 99. Legislation and Jurisprudence of the Monarchic Period.
§ 97. The Church and the Religious Marriage.	§ 100. The Revolutionary Law.
§ 98. Civil Marriage.	

§ 96. **Marriage after the Invasions.** — Marriage in old French law passed through three phases, corresponding pretty nearly to the Barbarian period, the Feudal period, and the Monarchic period. The Germanic Customs and the Roman law are mingled during the barbarian period into a rather confused stream,¹ to which were joined the limitations devised by the Church. From the time of the Roman period the canon law was in process of formation, the emperors had drawn their inspiration from it in their constitutions, and the Capitularies often borrowed from it. The civil legislation receives the imprint of Christian ideas more and more. In theory, however, as under the Roman Empire, legislation as regards marriage and the decision of questions dealing with matrimony still belong to the State.² The Church has not yet any legislative power over marriage; it leaves it to the decision of the civil law and superimposes upon it its own rules, limiting itself to punishing by means of penances the faithful who do not respect them.³ Marriage, upon the condition and the effects of which the civil judges are still pronouncing their views, is always a private act, a pact between two families, wherein the avoidance of misalliances is especially sought for, where the wishes of the parties are not always taken into consideration and the rupture of which is possible by means of divorce.

¹ *Meynial*, "Le Mar. ap. les Invasions," ("N. R. H.," 1898); *Lefebvre*, *op. cit.*, also correctly lays great stress on the law of the Lower Empire; "Wis.," III and IV.

² "Capit.," "Compiègne," "Verberie": the Papal legate says: "hoc ecclesia non recipit," "Edit Pistes," 30, 31 (marriages of slaves). Upon secular jurisdiction, see: "Bai.," 7, 1. "Alam.," 39; Council of Tours, 567, c. 15; *Rozière*, "Form.," 113. Neither the "False Decretals," nor *Régino* (906) attributes exclusive jurisdiction to the Church.

³ The secular power intervened when the Church was powerless. "Edit de Childeb.," 596, c. 2; "Cap.," 802, c. 33, 35; 826, c. 13; 829, c. 3. "F. Capit.," 5, 9. The Church is the auxiliary of the civil power. One must not conclude from these texts that its disciplinary action had the effect of depriving the State of its rights. *Anség.*, I, 104; "Edit Pistes," 864.

§ 97. **The Church and the Religious Marriage.** — In the tenth century¹ the Church profits by the anarchy resulting from Feudalism to reserve for its tribunals the exclusive cognizance of questions relating to marriage.² Its legislation³ is rounded out by borrowing from the Roman law, from the Germanic Customs, and even from the Jewish law.⁴ Not content with designating the birth of children and a life in common, with the effect of lending one another mutual assistance, as the object of marriage, it caused its matrimonial law to rest primarily on two fundamental ideas:⁵ (a) marriage is a remedy for incontinence;⁶ (b) it is a sacrament, a religious deed, which symbolizes the union of Christ with the Church.⁷ From this conception, which in one sense is very ideal-

¹ Date disputed; in the writings of Hincmar the exclusive right of the Church is not recognized. "Conc. de Tribur.," 895, 39, Dig. X, 4, 1, 1; *Sohm*, "Z. f. Kirchenr.," 1870, p. 193; *Dove*, "De Jurisd. Eccl.," 1855; *Friedberg*, "De Fin. Int. Eccl. et Civit.," 1861.

² The East: "Nomocanones" (the combination of civil laws and canons of the Church); the emperor, a sovereign judge, grants dispensations; the tribunals who give judgment upon matrimonial actions are composed half of laity and half of clergy. "Bulle d'or" of *Alexis Commène*, 1086, giving up matrimonial actions to the bishops. Cf. as to Russia, *Esmein*, I, 27; *Mitrovič*, "Die Kormtschayakniga," 1898 ("N. R. H.," 1899, 760).

³ *Gratian*, 2d part, C., 27-33, q. 3; C., 33, q. 4, 2, C., 36; Dig. X., 4 ("de sponsalibus et matrimoniis"); Trans. and notes in "Jostice," X; Council of Trent, Sess. 24; *Zdekauer*, "La Confessione di Legge nei Patti Dotali di Firenze" ("R. Ital. p. le Scienze Giurid.," III, 1887, p. 237), publishes the chapter on marriage of *Rainier de Pérouse*, "De Contractibus Judiciis et Voluntatibus Ultimis"; *Wunderlich*, "Tancredi Summa de Matr.," 1841; *Freisen*, XIII; *Mailland*, "Vacarii Summ. d. Matr.," ("L. Q. R.," XIII, 133). "Ass. de J.," "C. d. B.," 107; "Siete Part.," IV; *P. Durand*, "Specul.," 4, 4.

⁴ *Rabbinoviez*, "Législ. Civile du Talmud," 1880; "L. de Compiègne de Veille," "Hæbrorum de connubiis," 1673; "L. de Modène," "Cérém. et Coutumes . . . parmi les Juifs," tr. *Simonville*, 1710; *Ewald*, "Alterh. d. Volk. Israel," 1866; *Daresté*, "Etudes," p. 18; *Duschak*, "Mos. Talmud. Eherecht," 1864; *Pavly*, "Code du Jud.," 1896.

⁵ *Friedberg*, "R. d. Eheschl.," 142, 546; *Freisen*, 29; *Esmein*, I, 63; II, 122, 151; *P. Lombard*, "Sent.," Pars. IV, Dist. 25 (Vol. VII of "Op. S. Thomæ," 1612; *St. Bonaventure*, "Sent.," IV, 27 (Op., 1681); "Summa Hostiensis," 1568, p. 284; *Panorm.*, "in Decretal.," ed. 1547, Vol. VII; *Felin. Sandeus.*, "in Decretal.," ed. 1529, Vol. III, "de Spons.," *Sanchez, van Espen*, etc.; *Téphany*, "Expos. du dr. Canon.," 1891; *Schuitzer*, "Kathol. Eherecht," 1898; *Hinschius*, etc.

⁶ *Paul*, "1 Cor.," vii, 2, 9 (cf. "1 Tim.," v, 14). Cf. "Eph.," v. According to the Christian idea, the sexual union has something impure in it, and continence is a state which is superior to marriage. — Cf. disfavor towards celibacy in the old legislations; in the Middle Ages, privileges of married persons, of those who have a large number of children: *Salvioli*, no. 180. Under the monarchy, privileges to persons married under 25 years, fathers having 10 to 12 children (1666; *Isamb.*, 18, 90; 1667, id., 190). Trent, sess., 24, c. 10. *Contra*, Protestants, "Genesis," ii, 18.

⁷ *Paul*, "Eph.," v, 32: "Sacramentum hoc magnum est." Can the Greek "μυστήριον" be understood as applying to a Sacrament in the technical sense? *Lämmer*, "Sac. d. Ehe.," 1858; *Hahn*, "Lehre v. d. Sacram.," 1864; *Freisen*, 29; *Viollet*, p. 395, n. 1, cites de *Smedt*, "Principes de Critique Histor.," p. 111, as to St. Augustine, "De Bono Conjug.," 18, 21 (cf. here-

istic and in another very commonplace, the Church drew its governing ideas on the subject of the celebration of marriage, the conditions or impediments brought to bear upon its formation and its effects and its dissolution. It gave Europe a uniform law of marriage, and it is also only just to add that "it made the conjugal union moral, and protected the weakness of women" without weakening the authority of the husband, took care of the children, and imposed the law upon the spouses if they happened to forget it in order to give preference to their personal convenience or their caprices. It is the Church, moreover, which founded the modern family. But its legislation is not perfect; we must make reservations, especially on the subject of its repulsive casuistry, on that excessive number of impediments which it devised, on the extremities to which it went as far as divorce is concerned. Its **jurisdiction**,¹ which originally only related to the existence of the sacrament, of the bond ("*foedus matrimonii*"), extended to the accessories:² adultery, legitimacy of children, judicial separation (and separate maintenance), marriage contracts (marriage portion, dower).

§ 98. **Civil Marriage.** — The Reformation weakened the authority of the Church in matters of marriage; it ceased to see therein a sacrament,³ and, while preserving the canon legislation in its entirety, it modified many of its provisions by way of interpretation or even by amendments. In certain Catholic countries,⁴ particularly in France, the rights of the Church sustained a severe blow caused by the decline of its authority under the progress of monarchic absolutism.⁵ Both legislation and jurisdiction

inafter, Divorce), and a few important passages from *Tertullian* upon the primitive Christian conception of marriage: "*Ad Uxor.*," 2, 9; "*De Pudic.*," 4; "*De Monog.*," 11. — As to the meaning of "*sacramentum*," cf. "*Acad. Inscr.*," Mar. 1, 1901.

¹ *Lesurre*, "*Jurid. de l'Eglise s. le c. de Mar.*," 1823.

² Concurrence of the secular tribunals: legitimacy (with respect to a feudal inheritance); marriage agreements: *Beaumanoir*, 18, 1; 13, 3, 9, 10. Cf. Conference of Vincennes; *P. Pithou*, "*Roisin*," p. 373; St. Thomas, book *infra cit.*, p. 1010; *Siciliano*, "*Giurisd. Eccles.*," 1896.

³ *Luther*, "*Von Ehesachen*," 1530; "*Tischreden*, pass."; *Calvin*, "*Inst.*," 4, 19; *Strampff*, "*Luther üd. die Ehe.*," 1857; *Friedberg*, "*R. d. Eheschl.*," 153; *Scheurl*, "*Abhandl.*," 437. Moreover civil marriage made its appearance only momentarily in England, under Cromwell; in Holland it has been optional since 1580.

⁴ The Church preserves its rights in Italy and Spain, but not in Austria and France: *Huszar*, "*De Potest. Eccles. circa Matr.*," 1900.

⁵ *Launoy*, "*Regia in Matrim. Potestas*," 1674; *Gerbais*, "*Pouv. de l'Eglise et des Princes s. les Empéch. du Mar.*," 1690; *Boileau*, "*Empéch. du Mar.*," 1691; *Mantrot*, "*Véritable Nature du Mar.*," 1788; *Le Ridant*, "*Deux Quest. sur le Mar.*," 1753; *Dufour*, "*Dr. des Souv. s. les Empéch. Dir.*," 1787; "*Rel.*

were almost entirely taken away from it, or, at least, it was reduced to that disciplinarian effect over the faithful which belonged to it in the Roman period, which still belongs to it to-day, and which is scarcely of a nature to arouse the distrust of the State. The point of departure of this remarkable evolution was in a theological, legal theory of which Saint Thomas Aquinas was perhaps the first to give the formula.¹ According to that writer, marriage could be regarded at one and the same time: 1st. As a contract of natural law (a borrowing from the Roman writings, which understood by this the law which is given to man and to animals). 2d. The civil contract, that is to say, one governed by the Roman law as it was organized, so long as the Church did not have the monopoly concerning questions relating to marriage. 3d. A sacrament, of which the contract was the element and which could not exist without the latter. The civil marriage and the religious marriage are separated in this analysis, whereas in former times they were not distinguished. These speculations, which had no very great bearing so long as they remained shut up within the Schools, were propagated during the sixteenth century by virtue of the favor shown them by the Renaissance and the Reformation; they were presented before the Council of Trent by more than twenty prelates and theologians, and, a more serious thing, the jurists took possession of them in order to make of them a weapon against the Church.² From this they came to the conclusion that marriage ought to be subjected to the Church in so far as it was a sacrament, to the State in so far as it was a civil contract. To each one of these powers its own sphere; a good solution — if we could tell where one ceases and the other begins. Theologians and jurists fiercely contested with one another for a large portion of the ground, and the battle, very keen in the time of Pothier, has lasted until the present time.³ But, rightly or wrongly, the kings did not hesitate, from

de la Contest. éI dans l'Univ. de Louvain," 1785; *Lorry*, "Rech. s. le Mar.," 1760; *Vantroys*, "Th.," p. 3.

¹ "Somme c. les Gentils," I, 4, c. 78. Cf. "Summa theol.," III add. 41.

² Parliamentarians and Gallicans, second half of the XVIth cent. See especially *Launoy*, *op cit.*, in "Opera," 1731, I, 2; *Le Ridant*, etc.; *Maultrot*, "Ex des Principes du Pastoral de Paris s. le Contrat de M." (1788); *Boyer*, "Examen du Pouv. Législ. de l'Eglise s. le Mariage," 1817. The Italians, such as *Bellarmin*, do not admit that the civil contract was distinct from the sacrament: *Tabaraud*, "Principes sur la Dist. entre le Contrat et le Sacr.," 1825. Pius IX in the "Syllabic," 65, s, condemns opinions which are contrary to this doctrine.

³ *Encycl. of Leo XIII*, Feb. 8, 1880. Cf. *Trent*, s. 24, c. 3-12.

the sixteenth century on, to enact laws on the subject of marriage, creating impediments.¹

§ 99. **Legislation and Jurisprudence of the Monarchic Period.**—In a general way, the State borrowed its law from the Church;² it adopted it and made it its own, not by virtue of a general law, but in the way of court decisions, and it was understood that the invasions of the canon law should not be applied by the French tribunals unless they were promulgated as laws of the State. Thus, the decrees of the Council of Trent relative to marriage were not received in a lump, but the most important provisions were promulgated and sanctioned by the Royal Ordinances.³ Without having its jurisdiction disputed, any more than its power of legislating was denied it, the Church came to lose its jurisdiction over the majority of questions relating to matrimony. Litigations over which the State had never lost all right reverted back to the tribunals of the State: system of possessions between spouses, separate maintenance, legitimacy of children, adultery.⁴ As to marriage, the lay judges seized hold of the difficulties which it gave rise to every time the sacrament was not made use of. Judicial separation, says Pothier, does not affect the tie of marriage, because this tie still goes on existing; the re-establishment of the conjugal domicile by the wife is a question of the police power and springs from the force of the State; impuberty is a question of fact; rape, concealment, bigamy, are offenses punished by the Decrees. They thus come to annulling not the sacrament, but the contract, without which the sacrament could not exist. As to the little which remained to the ecclesiastical judges, questions of “*fœdere matrimonii*,” the appeal against abuse of power permitted of the submission of the judgments of the ecclesiastical judges and the acts of ecclesiastical authority to the Parliaments.⁵ The Courts of the Church thus

¹ For example, prohibition of marriage between whites and persons of color (1778; *Isamb.*, XXV, 596). Soldiers cannot marry without the king's permission (1788; *Isamb.*, XXXVIII, 596); *Isamb.*, XXI, 319, 121. Prohibition of marriages abroad. *Ib.* 19, 370, 510. Cf. D., March 8, 1793.

² *Le Ridant*, “Code Matrim.” (texts), ed. 1770 (bibl.); *Du Perray*, “Tr. du Contr. de Mar.,” 1741; ed. *Sérieux*, 1761; *Pothier*, 1768; *Horry*, 1750; *Astruc*, 1758; Indices: *Ferrière*, *Guyot*, etc., see “Mariage,” etc., *Launay*, “Instit.,” etc. *Basdevant*, “Thèse,” 1900. *Glasson*, “Acad. sc. mor.,” 1900, 32.

³ *Maultrot*, “Examen des Décr. du Conc. de Trente et de la Jurisp. Fr. en Mat. de Mar.,” 1788.

⁴ *Viолет*, p. 399, n. 2, cites *Chenu*, “Statuta Judicior. Ecclesiastic.” (Gallican Council of 1606), 1621. *Beaumonts-Beaupré*, “Cout. de l'Anjou,” I, 52.

⁵ *Pothier*, no. 350. Doc. of 1712, cited by *Duvergier*, “Et. de Lég.,” p. 37. The Parliaments having cognizance of cases of nullity can demand that the

found themselves abandoned, and in the rather infrequent cases when they were appealed to their decisions were subordinate to the good will of the judges of the king. In 1789 their competence was purely theoretical.

§ 100. **The Revolutionary Law**,¹ had but little to do except to round out the Monarchic legislation, starting with the new principle of the liberty of the conscience. As both logic and tolerance required, civil marriage was organized by the State independently of the religious sect to which the husband and wife belonged, and, if one may say so, parallel to the religious marriage. Leaving the Church, or, rather, the churches, free to impose upon their faithful the conditions or the forms which might please them,² the State limited itself to not recognizing marriages which did not conform to the rules which it had established.³

parish priest give the parties the nuptial benediction: *Houard*, "Diet de dr. Norm.," I, 337.

¹ *Perreau*, "Elém. de Législ. Naturelle," year IX; *Viолет*, p. 398, n. 1, cites a small Code relating to marriage which was the work of the Constitutional Church ("Collection des Pièces impr. p. Ordre du Concile National," 1797) and which departs from the Civil legislation. *Nougarède*, "Lég. s. le Mar.," year X; "Hist. des Lois s. le Mar.," 1803.

² Could the religious ceremony precede the civil marriage? The "Art. Org.," 18, Germ., year X, 3, 54, forbade it.

³ *Bassibey*, *op. cit.* 1899 (Procedure); *Périers*, "Le Canoniste," 1892.

TOPIC 2. BETROTHALS

§ 101. Barbarian Period.	§ 103. Consent replaces Betrothal.
§ 102. The Same. Betrothal Es-	The Canon Law.
sential.	§§ 104, 105. Betrothal Restored.

§ 101. **Barbarian Period.**—The Betrothals (or promises of marriage) which were in constant use, it seems, in the ancient **Roman Law**,¹ acquired a special importance under the Lower Empire² with the very widespread practice of the gift “ante nuptias.” They were accompanied by the giving of earnest-money, of a ring,³ and sealed with a kiss⁴ (“osculo interveniente”).⁵ If they were broken before the “osculum,” the gifts of the engaged woman had to be restored in their entirety; after the “osculum” she kept half of them. Thus they already amounted to half the marriage.⁶

In the Germanic Law marriage is split up into two acts: 1st, the *betrothals*; 2d, the *nuptials* or marriage properly so called.⁷ The betrothals⁸ consisted, among the early Germans, as among many primitive people, in the purchase⁹ of the woman¹⁰ from her

¹ And in the Jewish law: *Freisen*, 206, p. 1009; *Mayer*, “Rechte d. Israelit.,” 1866; *Frankel*, “Mos. Talmud. Eher.,” 1860.

² *Meynial*, *op. cit.* (effects since the “Lex Julia”); *Laroque*, “Don entre Fiancés.,” 1898; *Lefebvre*, *op. cit.*

³ *Deloche*, “Le Port des Anneaux” (“Mém. Ac. Inser.,” 35); *Kornmann*, “De Annulo Triplici,” 1756. Cf. Jewish Customs. *Bruns*, “Fontes,” p. 390 (5th ed.); *Hoffman*, “Wien. Akad.,” 1870, 825; *Chaisemartin*, “Prov.,” p. 288.

⁴ Christian usage: *Tertullian*, “De Vel. Virg.,” c. 2 (“de osculo sponsalatio”). Cf. *Rivier*, “Dr. de Famille Romain,” p. 135.

⁵ *Tamassia*, “Osculum Intervenien” (“R. Stor. Ital.,” 1885, II, 259). “L’oscle,” in the documents of the Middle Ages means the gift itself: *Girart de Roussillon*, pp. 8, 17, 35, ed. *Meyer*. See *Du Cange*. See *post*, “Increase of Marriage Portion.” *Viолlet*, 421; mentioned in the eighteenth century at Limoges. “Touraine,” 13; *Lattes*, “Dir. Consuetud. Lomb.,” 229.

⁶ *Constantine*, “Cod. Théod.,” 3, 5, 5; “Cod. Just.,” 5, 3, 16; *Esmein*, “Mélanges,” p. 416; “Wis.,” 3, 1, 5; “Fuero Viejo de Castille,” 5, 1, 4.

⁷ Cf. Roman sale and delivery which follows it.

⁸ *Koenigsvarter*, “Et. hist. s. le Dével. de la Soc.,” 1850, p. 19; *Thévenin*, “N. R. H.,” 1880, 451; *Schupfer*, “Arch. Giur.” 1868; *Friedberg*, § 153, n. 12; *Beauchet*, “Form. et Dissol. du Mar. d. le Dr. Islandais,” “N. R. H.,” 1883; *Marignan*, *op. cit.*; *Grimm*, “R. A.,” 421, *Schmid*, “Ges. de Angels.,” Table, see “Ehe.”

⁹ Criticism of this idea by *Lefebvre*, II, 354; *Meynial*, pp. 78, 90. Cf. “Acad. lég. Toulouse,” 1900 (“Le mariage par Achat”); *Viолlet*, “Burg.,” 42, 2, *Esmein*, “N. R. H.,” 1899, 613; *Chaisemartin*, “Prov.,” p. 285.

¹⁰ Or of the “mundium” over the wife, according to a formula which does

father (or from her "mundoaldus").¹ The price was fixed by the parties,² that is to say, by the relatives of the betrothed woman and by her betrothed, assisted or not assisted by the members of the family. In time a Customary or legal rate came to be established,³ as in the case of "Wergeld." The payment of the price was an indispensable condition of the betrothal; in conformity with the ancient theory of obligation, it was a contract "in re."⁴ The engaged man negotiated with the relatives of the woman without the latter necessarily being consulted.⁵

From this primitive legislation progress was made, little by little,⁶ to a law by means of which the betrothals did not disappear, but were consummated in another way. The purchase price became divided into two parts: a small sum paid for symbolic purposes to the relatives of the woman ("sou et denier" among the Franks),⁷ and a stipulated marriage portion to the woman herself.⁸ The consent of the relatives, always necessary, was no longer sufficient;⁹ that of the woman was also required.¹⁰ The rôles be-

not fundamentally differ from ours, but which brings out the difference between betrothals and the purchase of a slave: "Alam.," 54, 2, "Liut.," 127 ("mundium facere ex ea").

¹ Marriage by means of abduction is still possible as an exception in certain barbarian laws: "Sal.," 13, 10; "Alam.," 52, 51; "Burg.," 11; "Add.," 1, 14; "Saxon.," 6; "Roth.," 190; "Liut.," 119; "Bar.," 8, 16; "Wis.," 3, 1, 2; *Dargun*, "Mutter.," 1883, 21, 111. See *post*, "Marriage without Betrothals." "Z. V. R.," V, 334; XII, 129.

² "Burg.," 34, 52; "Wis.," 3, 4, 2; "Roth.," 213; *Val. de Lièvre*, "Launegild," 1877, pp. 18, 130, 212, 277.

³ "Sax.," VI (300 s.).

⁴ "Wis.," 3, 4, 2 (Anc.), "Roth.," 215; "Burg.," 52, 3.

⁵ It is the same in the old Roman law: "Vit. Salaberg.," 6; *Bladé*, "Contes Pop. de la Gascogne," III, 23. Henry IV marries his daughter, the Princess Triste-Mine, without consulting her; afterwards he breaks the marriage in the same way as he had formed it. "Liut.," 12, 19. *Infra*, "Marriage without Betrothals."

⁶ The evolution has taken place more or less rapidly according to the people; it has not always been very regular. From this there arise difficulties, the details of which we cannot enter into. Cf. "Contract of Marriage."

⁷ Marriage of Clovis: *Frédégaire*, 18; *Junghaus*, "Hist. de Childerich et Clodovech," p. 140 (*Monod* trans.); *Greg. Tours*, 9, 16; *Rozière*, "Form.," 230 s.; "Roth.," 178; "Liut.," VI, 119. — This fictitious price is sometimes called "arrha." Examples of betrothal contracts: *Thévenin*, "Textes," nos 4, 48 and 135; *Ficker*, "Forschungen," IV, 458, 505; *Prampero*, "Matrim. e. Patti Dotali. Doc. Friul. de Sec. XIII.," 1887. Persistence of these forms in Swedish law: *Lehr*, "Grande Encycl.," see "Mariage"; *Daresté*; *Beauchet*.

⁸ See "Contract of Marriage," Council of Arles, 524; *Yves de Chartres*, "Part.," 8, e. 144; *Labbe*, "Conc.," VIII, 633; *Martène*, "Thesaur.," I, 142 b; *Viollot*, 356.

⁹ "Form. Tur.," 14; *Lindenbr.*, 7; *Rozière*, 231. Cf. *Dig.*, 2, 7, 11.

¹⁰ "Roth.," 182, 195; "Liut.," 120; "Wis.," 3, 3, 1 and 3, 1, 2 (prohibition forbidding relatives to marry a woman off against her wishes); *Marculfe*, 2, 16, 29; *Greg. Tours*, "de Vit. Patr.," 16, 20. "Life of St. Bertha," *D. Bouquet*, III, 622; "Præcept. Chlot.," 7: that no one shall wed a woman against

came reversed. The woman engaged herself,¹ the relatives being limited to giving her the authority to do so. At the same time, the contract, which was already "in esse," became *express*.² Under the Roman influence was introduced the custom of stating in writing the delivery of the marriage portion by the husband to the woman, and consequently the betrothals themselves, of which this was a clause ("libellus dotis"). The "carta" could thus be the only formal element of the contract, but the drawing up of a writing never became a necessary condition of the formation of the latter.³

Already in certain barbarian laws one sees the woman thus stepping into the foreground when it is a question of contracting a marriage. Outside of economic considerations, which will be pointed out later on, it is to the Roman customs and Christian ideas⁴ that this transformation should be attributed.

§ 102. **The Same. Betrothal Essential.** — Whatever their form, betrothals are indispensable.⁵ Such is their importance that it

her will by invoking the "auctoritas regia." "L. Rom. Wis.," "Cod. Théod.," 3, 10, 1; *Læning*, 12, 581.

¹ In the novel, "Perceforest," a young girl answers to the man who is asking for her consent: "Sir, what is the pleasure of my friends pleases me." *Duméril*, "Etudes d'Archéol." p. 40. "T. A. C., Norm.," 3. In Navarre the girl may refuse two of the suitors who are offered to her by her father, but she is compelled to accept the third one; *Yanguas*, "Dicc. de las Antiguas, de Navarra," see "Matrimonis." "Le Fuero Real," 4, 10, 8, forbids the father to marry off his daughter against her wishes: *J. d'Ibelin*, 171.

² Cf. "N. R. H.," 1880, 459; *Val de Lièvre*, "Launegild," 18, 130, 239. *Schupf.*, I, 116. Giving of a ring in the guise of earnest-money: "Liut.," 5, 30; *Girart de Roussillon*, p. 17. Giving of the "Festuca": *Edict. Chilp.*, c. 7. Real or simulated oath, "manualis porrectio" ("Sikirheit"); *Ass. Jérus.*, "C. d. B.," 162; "Reg. Crim. du Châtelet," I, 151. Cf. "Contracts." — On the ring and the earnest-money see: *Sohm*, "Eheschl.," 103, 162; *Friedberg*, 26; *Stobbe*, "Z. R. G.," XIII, 228; *Hofmann*, "Wien. Akad.," 1870, 834; *Grimm*, 177, 432; "Fragm. Juris Siculi," ed. *Merkel*, 1856, p. 20. — Burgundy, exchange of food, etc. — Giving of the money in the Catholic liturgy (Rituals of the Middle Ages: the fiancé puts 13 deniers in a plate). *Goncourt*, "Hist. de Marie-Antoinette," p. 22: in 1770 Louis XVI, who was at that time dauphin, presented 13 pieces of gold to Marie Antoinette with his ring. The same custom is found in Barrois, Dijon, and Bordeaux, according to *Viollot*, 419, 3. Cf. "Etabl. de St. Louis," I, 247: the number 13 is not arbitrary; in the old Frankish system of coinage 13 "deniers were equal to one sou and one denier; then the marriage took place by the sou and the denier." "Gr. Encycl.," see "Anneau"; *Brandileone*, "Z. f. Kirch.," 1900, 311.

³ "Rib.," 37, 2; "Wis.," 3, 1, 9. Cf. "Conc. Arles," 524. In the absence of the setting of a marriage portion, marriage degenerated into concubinage: *Bruns*, "Canon. Apost. et Conc.," 1839, does not give this canon, which is found in *Régino*, *Yves*, etc. *Gratian*, D., 30, q. 5, c. 6 (ed. *Richter*).

⁴ The Church proclaims the principle that after a certain age, 15, 16, 17 years, one cannot be "desponsata" against one's will: *Wasserschleben*, "Bussordn.," "Cap. Theod.," c. 18; "Pœnit. Theod.," II, 12, 36; "Conc. Compiègne," 757, c VI.

⁵ "Marriage without previous betrothals": *Kohler*, "Ehe mit u. Ohne

could even be maintained that the marriage related back to the betrothals. It is certain that they carried with them several of the effects of marriage. The duty of fidelity is the same between persons who are engaged as between spouses.¹ Of two consecutive marriages contracted by the same person, the only one which is valid is the one which is preceded by betrothals.² But we have here results which are rather penal than civil, and from which we must not conclude, consequently, that marriage can be reduced to a question of betrothals.³ This would be to run counter to the most well-established facts. The "traditio puellæ" or the "nuptiæ" are clearly to be distinguished from the betrothals and are added to them in order to make them complete;⁴ it seems that

Mundium" ("Z. V. R.," 6, 321); *Dargun*, "Mutterrecht," pp. 23-43. *Infra*, "Abduction," "Consent of the Relatives." — (A) The father who kept his "mundium" over the woman who had been taken away was authorized to take her back from her husband, although she had gone with the latter willingly, and thus break the first marriage: *Heusler*, II, 277. But the marriage existed, nevertheless, and produced certain of its effects (repression of the adultery of the wife, "Liut.," 139). The husband does not acquire the "mundium;" the wife loses the right to inherit from her parents and cannot have the benefit of the rights of widows: "Liut.," 5, 114, 119; "Wis.," 3, 2, 8; "Thur.," 47; "Roth.," 188-218; "Liut.," 126. If the abductor pays a composition to the relatives, *Zeumer*, "Form.," 277, the marriage is validated retroactively: "Burg.," 12, 3; 34, 2; 525 (pecuniary penalties) *Greg. Tours*, 9, 33. (B) In the law of the second formation nullity of the marriage and illegitimacy of the children: *Greg. Tours*, 9, 33; "Alam.," 54 "Bai.," 8, 16; "Sal.," 71, 1; "Wis.," 3, 1, 2; "Capitul.," 3, 413; *Schroeder*, "Gesch. d. Ehel. g.," I, 8. To this inferior type of union, which is a trace of the marriage by abduction, we can liken marriage "sine manu" at Rome: *Illegitimate Children*; *Glasson*, III, 19.

¹ Cf. *Dig.*, 48, 5, 13, 3; "Cod. Just.," 9, 9, 7 (from which it follows that it is only incumbent upon the engaged woman); "Rothar.," 179 (death of the adulterous engaged woman); cf. 189, 211 *et seq.*; "Wis.," 3, 4, 2 (Ant.): giving up of the fiancée and her accomplice to the "sponsus," who is allowed to chastise her. — It does not follow from the fact that penalties are pronounced against the unfaithful fiancée as against the married woman that betrothals produced all the effects of marriage; thus the "pretium" is only finally acquired by marriage itself: "Rothar.," 216.

² *Pardessus*, p. 667; "Alam.," 51, 52; "Bai.," 7, 16. These texts merely establish the existence of severe penalties against abductors and declare the nullity of a marriage which follows upon abduction.

³ Controversy between *Sohm*, who has brought out to the point of exaggeration the importance of betrothals, and *Friedberg*. To the authors cited above add: *Kohler*, "Z. V. R.," 3, 354. — *Infra*, "Children of Engaged Persons"; *Chaisemartin*, p. 289.

⁴ Marriage of Clovis, "*Frédég.*," 18 and 20: "sponsalio" by the "legati" of Clovis, offering the "sou" and the "denier" to Gondebaud; "traditio puellæ" from these "legati" at the sittings of the court of Châlons. "Tradere per baculum," *Thévenin*, no. 135; "L. Rom. Cur.," 3, 1, 3; "Sal.," 46: marriage of widows at the "mallus." Was this a practice which was obligatory in the case of ordinary marriage? There is nothing to prove this. Marriage of St. Bertha (*D. Bouquet*, III, 622): public delivery, but not to the "mallus"; *Marculte*, 2, 15, 16; "Sal.," 14, 6; "puella quæ druchte ducitur," that is to say, "per nuptiatores" (cf. "trustis"). Germanic Customs: "Braut-

they consisted in a sort of "deductio in domum mariti," a survival of the primitive abduction. Neither the necessity of the life in common, at least, immediately, nor the exercise of the "mundium," resulted from the betrothals; also it was easier to break them than to dissolve the marriage. But, as a general thing, the engaged man had the right to compel her relatives to give up the engaged woman to him. It was a positive obligation for them, just as he was bound to marry the woman who had been promised him.¹

§ 103. **Consent replaces Betrothal. The Canon Law.** — The Church, borrowing from the Roman law the well-known formula, "Nuptias non concubitus sed consensus facit," which harmonizes with its realistic and mystical conception of marriage, held it as consummated by the mere exchange of consent between the husband and wife. Thenceforth the betrothals ceased to be the necessary preliminary to marriage, and were even confused with the latter.² When they did take place, a distinction was made according as the spouses had manifested their intention to take one another as husband and wife immediately or only in the future.³ (a) In the first case, the betrothals spoken by words "in præsentî" ("Sponsalia per verba de præsentî") were equivalent to marriage, although

fahrt," "Brautlauf," *Grimm*, p. 733; *Dargun*, "Mutterrecht," pp. 111-138. *Schrörs*, "Hinemar," see "Reims," 1884, p. 212. *Brandileone* maintains ("Code Dipl. Lagob.," n. 74; "L. Rom. Chur.," 3, 1, 3; "Form. s. Roth.," 182, 195) that in Italy marriage took place before a public officer ("seuldasius," "judex," notary). Custom of Gaete (sixteenth century): exchange of consent "interrogante iudice," and the following day "interrogante sacerdote": *Salvioli*, 174.

¹ An unjustified rupture carries with it the payment of a composition, the loss of the earnest-money, the restitution of the "pretium nuptiale" and the payment of a penalty previously provided for. See "Repudiation or Divorce"; "Burg.," 34; "Sal.," 70; "Bai.," 7, 15; "Alam.," 53; "Roth.," 179-192; "Liut.," 5, 30; *Thévenin*, "Textes," no. 135; *Greg. Tours*, 4, 47; 9, 32; 10, 16; *Sjörgren*, "Conventionalstrafe," 1899. — Restitution of the "meta" to the betrothed man if the betrothed woman dies before the marriage, "Roth.," and of the double "meta" if the relatives of the betrothed woman are to blame in any way. In case of the abduction of the betrothed woman the abductor must pay a composition to the betrothed man and another composition to her parents: "Æthelb.," 31.

² A rather common usage of having the betrothals blessed by the priest. *Esmén*, I, 102, shows why the Church preserved the old practice: betrothals were a general usage, which was in harmony with the organization of the family: *Héricourt*, "Lois Ecl.," "G.," 5; *Durand de Maillane*, "Inst.," IV, 1273; "Rec. des Actes du Clergé," V, 646. Sometimes an abuse in the case of solemn betrothals, the people seeing in them a true marriage. Statutes of Aleth, 4, 19.

³ *Rolandus* is still unaware of this distinction. "Summa Coloniensis," in *Scheurl*, "Eheschl.," 166 (Gallican Church); Dig. X, 41, 3; "Comp.," I, 4, 5. *Yves de Chartres* holds that betrothals accompanied by the oath were the equivalent of marriage and were no more capable of being dissolved than was the latter (*cf.* *Fulbert*, "Ep.," 41); *Fournier*, "R. G. II.," 1898, p. 97. According to *Gratian*, the marriage is simply "initiatum" by virtue of the "spon-

they might not be surrounded with any publicity or accompanied by any religious ceremony. (b) The betrothals spoken by words "de futuro" ("Sponsalia per verba de futuro") or simply promises of marriage, obliged the engaged parties to proceed with the marriage and were transformed into a marriage by the mutual giving of consent or by the "copula carnalis," which is but a form of it.¹

§ 104. **Betrothal Restored.** — The Council of Trent repudiated marriage formed simply by consent, and consequently with betrothals formed by words "de præsentī." It left in existence the **promises of marriage** with the effect of meaning for the engaged parties a reciprocal obligation to marry one another.² They ordinarily constituted the first clause of the marriage contract of the spouses.³ Before and after the Council of Trent the betrothals preserved the character of a contract of mutual agreement;⁴ the Ordinance of 1639 ordered, it is true, that they should be expressed in writing, but this Ordinance only related to the proof of the act.⁵ In order that the betrothals should exist, the reciprocal consent of the future spouses was required on principle; but the rules as regards capacity greatly reduced the force of this principle. Whoever was capable of marrying, or could decently hope to do so,

salia"; it is only "ratum" by virtue of the "copula": *C.*, 34, c. 27, q. 2. At the end of the twelfth century the Roman Church adopted the distinction of *P. Lombard*, "Sent.," 4, 27, 1, between betrothals "in presenti" and "de futuro"; *Dig. X*, 4, 1, 31; 4, 4, 3; 4, 2, 14. Marriage is "initiatum," by means of the betrothals; "ratum," by means of the consent; and "consummatum," by means of the "copula."

¹ Theory of the "matrimonia præsumpta" (completely abolished by Leo XIII, Dec. 15, 1892): *Dig. X*, 4, 1, 30.

² The importance which was given to the solemnity of marriage ought to have caused a disappearance of betrothals. The "copula carnalis," at least, no longer changed them into marriage; *Durand de Maillane*, see "Dict.," and authors cited.

³ Out of date motives given by our old authors: (a) they served to prevent people from rushing too headlong into marriage; but the delay which separates them from the latter can be very short; (b) impediments may arise during this delay; but it would be rather the publication that would give rise to them; (c) the reason given by St. Augustine is strictly modern: "Confess.," 8, 3. *C.*, 27, q. 2, c. 28.

⁴ Custom of accompanying the exchange of consent with the giving of some object, — for example, a piece of money, a fruit or a flower. Ex. in "Invent des Archiv. du Dép. de l'Aube," Series G, 1896, p. 429: a man and a woman become engaged to a tune played on a flute! P. 309: a woman who receives a pin as a pledge of marriage has her doubts upon the validity of betrothals contracted in this manner.

⁵ It was customary to set out at one and the same time in the same deed (contract of marriage) the consent of the two betrothed parties and the pecuniary agreements which were made with a view to the proposed marriage: *Cayron*, "Le Practicien Fr.," 1665, p. 343. Other examples in *Viollet*, p. 423.

was capable of becoming engaged ("habilis ad matrimonium, habilis ad sponsalia"). Those who had not yet attained puberty could validly become engaged after the age of seven years, the age of discretion, on condition that they had the authority of their relatives or guardians.¹ The relatives themselves betrothed their children who were of tender age or absent, one may guess with what motives.² The tie formed by the betrothals was not a very firm one. Its rupture took place: (a) "mutuo dissensu"; (b) by the changes which took place in one of the spouses (disgrace, heresy, leprosy, becoming notoriously rich or poor), a serious insult (boasting of the engaged man, absence), an impediment to the marriage taking place after consummation of the betrothals (intercourse between an engaged person and a relative of the other) vows or entering into holy orders, expiration of a certain agreed time, marriage of one of the parties, refusal of a child who has arrived at the age of puberty to ratify the promise made in his name by his relatives.³

§ 105. **The Same.** — Valid betrothals carried with them an impediment to the marriage of each of the engaged parties with the near relatives of the other. **The obligation to marry**, which became incumbent upon the engaged parties as a result of this, was enforced by means of ecclesiastical censure. An action could be brought before the ecclesiastical judge against the recalcitrant betrothed, and he was adjudged to be "in sponsum" or "sponsam."⁴ These severe measures tallied very well with the old laws, according to which the betrothals were scarcely to be distinguished from the marriage itself. They were rejected at the beginning of the seventeenth century by the jurisprudence of the

¹ *Mazure*, "Fors de Béarn," p. 177; *Gratian*, **C.**, 31, q. 2 and 3. Variations of the canon law, which finally no longer demands this authorization: *Esmein*, I, 159.

² *Esmein*, I, 161. *Gratian*, **C.**, 21, q. 2, c. 2; **C.**, 30, q. 2, c. 1; "in VI," 4, 2, 1. These betrothals, excepting in very early times, were only binding upon children if they were expressly or tacitly ratified after they had attained the age of puberty: *Beautemps-Beaupré*, "Cout. de l'Anjou," II, 263. But, although the law was such, as a matter of fact betrothals formed in this way were often forced upon the children, whose consent had been anticipated. It was all too often the same with marriage as it was with regard to entering into religious orders. Customs, which were stronger than the laws, allowed only a very limited freedom to the spouses. Cf. *Goncourt*, "La Femme au VIII^e s.," p. 22 (account of the marriage of Mme. d'Houdetot); *Isambert*, VII, 59 (1403); *B. de Xivrey*, "Lettres de Henri IV," 4, 659; *Welschinger*, "Divorce de Napoléon," p. 159. *Infra*, "Puberty"; "Arch. f. Kirch.," 1895, 369.

³ Enumeration in the verses attributed to *Eustache du Bellay*.

⁴ Dig. X, 4, 1, 10, 17: censures, excommunication, imprisonment.

Parliaments;¹ the ecclesiastical judge had only power to declare that the betrothals were dissolved and to inflict a light penance upon the guilty betrothed. But the other betrothed had the right of addressing the secular judge in order to obtain damages.² The penal clause, which might have been abused in order to force people into marriage, was always forbidden.³ This was not so in the case of the earnest-money, which was often given by one betrothed to the other; this was too small a sum ordinarily to have any restraining effect upon marriage; it was tolerated by making the betrothed who was in the wrong lose it. — The usage of betrothals has lost all importance since the Revolution; the Civil Code does not even make any mention of them.

¹ *Loysel*, 103; "Arrêts Dep.," 1606; *Le Ridant*, "Code Matr.,"; *P. de Combes*, "Procéd. en l'offic. de Paris"; *Fevret*, "Abus," 5, 1, 20; *Pothier*, 51.

² In this there was seen, not an obligation "ex delicto," but an obligation to carry out, which resolved itself into damages: this was sometimes an indirect means of compulsion, and one which was almost as efficacious as the punishments of the Church. Cf. in English law, "Breach of Promise." On the estimation of damages, see the authors cited in the preceding note. "Law Quart. Rev.," 1894, X, 135.

³ "Cod. Just.," "De Spons.," 3; Dig. X, 4, 1, 29; "Et. de St. Louis," I, 124. In Burgundy the penal clause is admitted (1350): *Beaum.*, 34, 62; *P. de Font.*, 15, 32; *Launay*, "Inst.," 2, 4; *Hostiensis*, p. 341.

TOPIC 3. CELEBRATION OF MARRIAGE

§ 106. Canon Law Previous to the Council of Trent	§ 108. Civil Legislation.
§ 107. Council of Trent.	§ 109. Marriage of Protestants.
	§ 110. Revolutionary Law.

§ 106. **Canon Law Previous to the Council of Trent.** — While considering marriage as a sacrament, the Church had not imposed upon the faithful any particular form for its celebration.¹ It referred for its carrying out to the civil law, and especially to the Roman laws.² It is thus that it had interpreted the Roman maxim, "Nuptias non concubitus sed consensus facit," in this sense, that marriage was formed simply by the exchanging of consent between the spouses.³ The act thus found itself simplified and, if one may say so, reduced to its most simple expression. This doctrine did not prevail without some difficulty; not only did it run contrary to the Germanic system of the betrothals, but it struck at a maxim which perhaps issued from the Germanic customs concerning the "traditio puellæ," perhaps from the popular conception of marriage, the maxim: "Matrimonium desponsatione initiatur, commixtione perficitur."⁴ Marriage is only perfected by its consummation,⁵ so much so that in later law⁶ a marriage

¹ Marriage with the intervention of the "Perorator" (Italy, late Middle Ages), who established the consent of the parties and the drawing up of the deed, and declared that the spouses were united. How are we to account for the part played by this personage? Civil marriage? *Friedberg*, "Eheschl.," 5; *Sohm*, "Trauung," 2; *Thaner*, "Z. f. Kirch.," 1881, p. 209; *Brandileone*, *op. cit.*; *Ruffini*, "Per la Storia d. Dir. Matr.," p. 26. See: Marriage established by notarial deed; *Friedberg*, "D. zei. f. Kirch.," IV, 354; *Friedberg*, "Handb. d. Kirch.," § 153; *Patetta*, "Studi Senesi," 1896, p. 3.

² *Saint P. Damien*, *Yves de Chartres*, often cite the Roman texts: *P. Fournier*, "Yves de Chartres" ("R. G. H.," 1898, p. 89); "Z. f. Kirch.," 1889, 269.

³ Joseph and the Virgin. In this sense the Fathers of the Church, — *Ignatius*, *Chrysostom*, *Ambrose*, *Augustine*, — cited in *Gratian*, C. 27, q. 1, c. 1 *et seq.*

⁴ Cf. "Genesis," ii, 24; coarse usages: *Agde*, 39.

⁵ *Freisen*, p. 92, 206 (*contra*, 2d ed.); *Heusler*, "Inst.," II, 282; *Ficker*, "Mittheil. Inst. f. Oesterr. Gesch.," 188, 2, 70; *Hörmann*, *op. cit.*; *Schling*, p. 174; *Scherer*, "Arch. f. Kath. Kirch.," 1891, p. 353; *Fournier*, "Yves," p. 91. — As we see, there are as to the formation of marriage at least three distinct tendencies; from this there arise in science three contrasting theories: 1st, theory of the betrothals; 2d, theory of the "copula;" 3d, theory of the "consensus"; *Freisen*, "Arch. f. Kath. Kirch.," 67, 369.

⁶ Acquirement of the marriage portion, *Beaumanoir*, 13, 25 ("Compagnie carnelé"); *Loysel*, 140. Cf. "Bretagne," 450 (putting the foot into bed; German "Beilager"); *Bourges*, "Mar.," 1 (prohibition of gifts between spouses

can only be entirely dissolved when it has been consummated. Then only, they say, does it represent the union of Christ and the Church.¹ So long as there has not been any consummation it can be broken by the entry into religious orders of one of the spouses,² and the pope has authority to dissolve it.³ Anomalies for the jurists, survivals for the historian.⁴ The later canon law, as it was fixed by a celebrated edict of Nicholas I for the Bulgarians in 866,⁵ depended exclusively upon the consent of the spouses.⁶ The Germanic Customs lost all legal importance, although in many localities in Germany the consummation of marriage was symbolized during the Middle Ages by the ceremony of the "Beilager" or going to bed of the spouses in the presence of witnesses.⁷ The theory of consent had never sufficient strength to relegate to the background the **nuptial benediction**⁸ by the priest, although this pious custom dated back to the time of the apostles.⁹ It was

only after consummation); "L. Sax.," 8 (birth of a son); Swedish law: "Ascencio thori," banquet; *Grimm*, 435.

¹ If the marriage has not been consummated the wife who survives is not a widow.

² *Gratian*, c. 27, q. 2. For example, St. Macaire and St. Alexis. Various explanations: cf. "Commentaries" of *Bernard de Parme*, *Hostiensis*, *Panormitanus*. Entering into the religious profession does not break the "matrimonium ratum et consummatum."

³ By reason of the fullness of his legislative power. A very commodious expedient, and one which is frequently made use of to conceal divorce.

⁴ Cf. Dig. X, 4, 13, 2 ("affinitas superveniens"); Dig. X, 4, 8, 3 ("lepra superveniens"); 4, 19, 1 and 7; 4, 20, 1; 4, 1, 19.

⁵ "Secundum leges," *Labbe*, VIII, 518, Art. 3 (usages of the Roman Church); *Gratian*, "c." 27, q. 2, 1 and 2; Councils of Châlons, 813; *Tribur*, 893; cf. *Trosch*, 909 ("dotatam et a parentibus traditam per benedictionem sacerdotum accipiat"; no annulment); "Pseudo Isid.," ed. *Hinschius*, p. 87; "Faux Capit.," 7, 463, 179; *Glasson*, "Et. s. le Consent. des Epoux au Mariage."

⁶ Examples in *Chronicles*, *Poems*, *Gautier*, "Chevalerie," p. 354. But cf. *contra* "Betrothals," "Consent of the Relatives"; *Jostice*, pp. 181, 188.

⁷ Cf. "Marriage by Abduction": *Weinhold*, "Deut. Frauen," I, 399; *Hannauer*; "Sachsensp. Landr.," I, 45, 1; *Stryk*, "Usus Mod. Pandect," 23, 2, 21. If the husband dies before the official retiring together, the wife does not attain the pecuniary advantages which result for her from the marriage (dower, rights of inheritance). — The very widespread custom in France of taking a bowl of milk, soup, a roast, hot wine, etc., to the newly married couple when they were in the marriage bed, undoubtedly had no other origin: "F. de Béarn," 267; *Pineau*, "Folk-Lore du Poitou," p. 488; *Sébillot*, "Contes Popul. de la Haute-Bretagne," p. 136. This last exponent of the folk-lore establishes that there are localities in which the newly married couple cohabit only upon the second day. Cf. as to this: *Fournel*, "Adultère," p. 52; "Ord." 1336, 1338; "Arr." 1439 (prohibition forbidding the Bishop of Amiens to demand anything from newly married people for having slept together the first three nights of the marriage).

⁸ *Salvioli*, "Arch. Giur.," 1894, p. 173; *Brandileone*, "Ac. Sc. Nap.," 27, 269; "Riv. p. sc. Giur.," 18, 1. Cf. *Ruffini*, *op. cit.*; *Patella*, "Studi Sen.," 1896, 3.

⁹ The idea of drawing down celestial favors upon the act which is being

not classified among the essential conditions of marriage.¹ The Church limited itself to recommending it, and to the infliction of penances upon those who did not subject themselves to it.² Thenceforth there were, in fact, two sorts of marriages: the one official to a certain extent, solemn, public,³ "in facie Ecclesiæ,"⁴ the other a private act, secret, a marriage by simple consent,⁵ or what was the same thing, the "sponsalia per verba de præsenti."

carried out: *Duchesne*, "Orig. du Culte Chrét.," c. 14; *Tertullian*, "Ad Uxor.," 2, 9. Rescript of Nicholas I to the Bulgarians, 866: "sponsalia," "subarratio," "libellus dotis," mass and benediction of the spouses while the veil ("pallium," "paile") is extended over them, crowning them as they come out of church. This is the first text which describes in detail the Christian rites appertaining to marriage, and it is remarkable to see that they so closely resemble the pagan rites.

¹ *Gratian*, "C.," 35, q. 6, c. 2; *Tertullian*, "De Pudic.," 4. Even in the thirteenth century, second marriages are not blessed. Council of Lateran, 1215, c. 51; Paris, 1429; Narbonne, 1551, etc. *Boutillier* sees in them only an "honorable thing," II, 8; *Viollot*, p. 425.

² Cf. "Appointment of Marriage Portion." Council of Arles, 524; *Gratian*, C., 30, q. 5, c. 6; "Faux Capit.," 7, 463. Germanic Marriage Portion. At Rome the "instrumentum dotale" served to distinguish marriage from concubinage and as a proof of the "nuptiæ": "Cod. Just.," 5, 4, 22 s. Living together, also, was a presumption of marriage between persons of equal station in life, and later on between persons who were free: "Nov.," 74, 4, and 117, 4; "Wis.," 3, 1, 9.—*Marculfe*, 2, 15; "App.," 37; "Sirm.," 14, etc; "L. Rib.," 37. See *infra* "Concubinage."

³ The Capitularies prescribed it ("Cap.," 755, c. 15) so as to prevent incestuous and irregular marriages ("Cap.," 802, c. 35; 804, etc.; "F. Capit.," 6, 408; 7, 169, 463), but not under penalty of nullity (cf. however *Pothier*, IV, 3, 2); the penalties which were decreed fell into disuse. Leo, the philosopher, in 815, "Nov.," 89, pronounced their nullity. Cf. as to Sicily, "Ass. Normandie" of 1140; "Const. Sic.," 3, 20.

⁴ A thing which very clearly shows the auxiliary character of the intervention of the priest is that the nuptial benediction was not given in the interior of the church before the altar, but "ad valvas, ad fores ecclesiæ," at the door of the church. At least, such was the general custom during rather a long period. The priest asked the spouses if they consented to take each other as husband and wife, and, upon their replying in the affirmative, gave them his blessing: *Daresté*, "Etudes," p. 288 (Scandinavian law).

⁵ *Erasmus*, "De Matr.," 67: the marriage may be concluded "nutu," "litteris," "signo" (giving of a half of a piece of money), "facto," "silentio" (the relatives come to an agreement before the future spouses, who remain silent). **Marriage through an agent** was thenceforth looked upon as being lawful. Cf. *Michelet*, "Orig. du Dr. Fr.," pp. 27, 32; *Hanauer*, "Mém. Acad. Stanislas," 1893, 260: the agent lies down with the engaged woman completely armed, with his right arm and his right foot bare, and a naked sword between them (official "Beilager"). Marriage by an agent of Frederick III and Eleanor of Portugal, and of Maximilian and Ann of Brittany. Other examples in 1477, 1501 and 1737 (at Lunéville): "Glose du Décret X.," 3, 34, 14 (cf. 23, 2, 5); "in VI, de procur. in f. Acta S. Sedis," 16, 10; *Laboulaye*, "Cond. d. f.," p. 133; *Lagrèze*, "Navarre," II, 183 (in 1336, 1384). After the Council of Trent the celebration of a marriage through an agent has no meaning, for it does not do away with the necessity of another celebration taking place between the parties themselves: *Welschinger*, "Le Div. de Napoléon," p. 158. At the same time, the doctors disagreed upon this subject: *Pothier*, no. 367; *Dur. de Maillane*, "Dict. de Dr. Canon," see "Procurat."

It is scarcely necessary to point out the serious inconveniences which resulted from the concealment of marriage:¹ bigamy was frequent, the condition of the parties uncertain; one could always contest it, as the status had not been proven.² In the

¹ This was remedied to a certain extent by **Banns** or **Publication of Marriage**: *Viollot*, p. 372; *Richter*, §§ 267, 281; *Pothier*, no. 64; *Durand de Maill.*, see "Dict.," *Merlin, Ferrière*, "R. h. Dr.," 13, 563. Precedents: *Tertullian*, "De Pudic.," 4; *Ignat.*, "De Monog.," 11; "Ad Ux.," 2, "In Fine"; "Ep. ad Polyc." The forbidding of incestuous or irregular marriages must have contributed towards the maintenance of the custom of having the proposed marriages of the faithful known beforehand. Penalty of a royal bann pronounced by the Capitularies: 802, 35; "F. Capit.," 2, 130; 327, 408; 3, 179, 389, 463; *Gratian*, c., 30, q. 5, c. 1. From this arose publications. In the twelfth century it became a custom of the Gallican Church: *Dig. X*, 4, 1, 27. "Banna" or "denunciationes" published by the priest. *Viollot*, p. 430: at the beginning of the twelfth century at Théronanne, where they were published in 1150; Eudes de Sully organized them in Paris in 1198. The Council of Lateran, 1215, made them general: *Dig. X*, 4, 3, 3. Sanction: a sin for the spouses or the priest and no reputed marriage. The Council of Trent, s. 24, c. 1, renews these prescriptions with the object of avoiding hidden and incestuous marriages (3 publications during 3 successive holidays). Dispensation if there is any risk of the marriage being maliciously prevented: "Ord. Blois," 1579, 40. Analogous provisions: publication at the time of the sermon in the parish church of each one of the parties and their fathers and mothers. The interval between the holidays varies in the different dioceses (Orléans: 1 day). The Ordinance of Blois only allowed the bishop to dispense with two publications, and then only for an urgent and lawful need (opposition offered through malice, pregnancy of the engaged woman); but they often went so far as to dispense with the three publications, and that without cause. As to the remunerations demanded by the clergy, cf. *Févet*, "Abus," 5, 2, 32. — The principal effect of banns was to facilitate objections. Before they were published the parish priest had to make sure of the consent of the parties, and, if need be, have brought to him the consent of the fathers and mothers or guardians and custodians. An Order of June 15, 1691, provided for the keeping of a register to contain these objections and renunciations. Cf. Civil Code, 67. — Lack of publication: the priest is subjected to canonic penalties and a fine; the marriage is not void according to the canon law (dispensations); French jurisprudence itself at first held that they were void, but made this apply only after the seventeenth century to the marriages of minors that were concluded without the consent of their relatives: *De Verdelin*, "Analyse des . . . Mémoires du Clergé," 1821, I, 419; *Louet*, M, 6; *Denisart*, see "Ban."

² The canon law had made the proof of marriage easy; just as it had its formation: witnesses, authenticated or private writings, possession of status, registers. French legislation showed itself to be more severe. — Witnesses: two are sufficient for the proof to be absolute (even relatives). It was sufficient if they had seen the giving of the ring and had taken part in the customary celebration. The Ordinance of Blois, in providing for the keeping of registers, wished to set aside the proof by means of witnesses; and the Ordinances of 1629, 40, and 1639 logically came to the conclusion that, as a general thing, marriage could not be proved excepting by means of the registers (this being contrary to the canon law: *Panorm.* on *Dig. X*, 2, 18, 13). A private writing was also found to be set aside, as a general rule. The notarial deed, which was formerly in use (cf. Italy upon this point) (Order of Feb. 4, 1576), was forbidden by the Ordinance of Blois, 1579, 44. The contract of marriage did not prove the marriage: *Dig. X*, 2, 33, 11. Difficulties as to possession of status, its elements ("nomen," "tractatus," "fama") and their respective forms: "Decis. Capell. Tolos.," q. 173. — The declaration is not here a proof (cf., however, as to "copula" following "sponsalia de

same way, nothing was easier than to break the conjugal tie. Very often this depended upon the spouses themselves, or upon one of them. The evils of this practice to-day close our eyes to its beneficial side, and to that which caused it to remain in existence four centuries. It alone could assure the full independence of the individual (especially of the woman) in the most serious act of life, and at a moment when everything seemed to conspire to take it away: the sovereign disposing of the hand of his daughters to his subjects, the lord imposing on his vassal until the age of sixty the service of marriage and forcibly marrying his serfs, and finally and especially the family, which, having little regard for individual likes and suitableness, only too often made of the conjugal union a bargain in its own interests. The only means of removing the individual from these influences has been the recognizing of marriage contracted without formalities and without publicity. It is this which accounts for the fact that in countries of exaggerated individualism, as among the Anglo-Saxons, it has been possible to uphold marriages "solo consensu" for so long a time. The marriages in Scotland near the English frontier, before the blacksmith of Gretna Green, only ceased in 1848.¹ In our day, and from the time when freedom of marriages was assured, solemnities and publicity have merely afforded additional advantages.

§ 107. **Council of Trent.**² — (Session 24, 1563.)³ The abuses resulting from secret marriages were such, however, that the Church at last decided, not without some hesitation,⁴ to break with its secular discipline.⁵ The Council declared that the spouses

futuro"). — Clandestine marriages proved by witnesses, etc., could not prevail against a later marriage which was public. — As to exceptional proof by means of witnesses, etc., cf. *Pothier*, ed. *Bug.*, vol. X, p. 79, C. civ., 46. *Post*, "Certificates of Civil Status."

¹ The English evaded their law, which demanded the presence of a priest (1753) by being married at Gretna Green: the blacksmith served as a witness and the register which he kept facilitated proof of the deed. *Viollet*, p. 428, n. 1: the parish priest of Lay-Saint-Remy in Lorraine is the counterpart of the blacksmith of Gretna Green.

² "Hist. du Concile," by *Sarpi and Pallavicini*; *Schulte*, 64; *Friedberg*, 107; *Sohm*, 187; *Salis*, "Public. d. Trident. R.," 1888; *Druffel*, "Mon. Trid.," 1884.

³ Pius IV reserved to himself alone the right to interpret decrees, and very soon this right passed to the Congregation of Cardinals of the Council which was created in 1564. The jurisprudence of this body was an authority upon the subject of marriage. Choice of its resolutions in *Schulte and Richter*, 1853 (ed. of the Council), "Jur. Literat.," 1896, 7, 16.

⁴ Controversy, according to Paolo Sarpi, between the Dean of the Sorbonne, Maillard, who was hostile to the reform, and the Jesuit, Salmeron. Opposition of 56 prelates when the vote was cast.

⁵ It was said formerly: "to drink, to eat, and to sleep together, — this

were incapable¹ of marrying one another excepting in the presence of the priest of their parish² ("proprius sacerdos")³ and of two or three witnesses; every marriage celebrated in another way was branded as a nullity. Thus marriage became a solemn and public contract;⁴ nevertheless, it was always the contracting parties, and not the priests, who were looked upon as the ministers of the sacrament. After having asked the parties if they consent to take one another as husband and wife, it is true that the priest should say: "Ego vos in matrimonium conjungo"; but this is not a compulsory form;⁵ it is only the presence of the priest which is required under penalty of nullity. Such is the doctrine of the canonists, and as a consequence the priest finds himself playing no other part in the marriage than that of a witness qualified as "spectabilis." In reality, from the moment when his presence becomes indispensable, when no one can take his place, he is rather a party to the act than a spectator; it is said: "the spouses marry one another before the priest"; the expression con-

is marriage, it seems to me." After Trent it was necessary to add, "but the Church must have sanctioned it."

¹ They did not dare directly to annul a marriage which was not contracted in the presence of the priest, because it was a tradition that his presence was only required "ad honestatem." This object was attained by the creation of a new disability. Previous forms of nullity, such as violence and lack of consent, could still less affect clandestine marriages, because their validation took effect retroactively. It was proposed that they should annul the civil contract, the legal part of the sacrament; but the general opinion was that the contract could not be distinguished from the sacrament itself.

² Domicile of habitation (and not of origin) or residence of one year: Dig. X, 5, 38, 12.

³ Or of another priest, but with the permission of the parish priest or the ordinary: George, "De Parocho Putativo," 1859.

⁴ Marriage by means of an agent between persons who were absent (special order, verbal or written) continued to be permitted (Henry IV and Marie de Medici, *Isambert*, XV, 245). *Sanchez*, 2, 12, 2, admits the existence of marriage by letter (ordinarily before the parish priest by the person who has received it). Conditional marriage, even, was not forbidden, in spite of its disadvantages: Dig. X, 4, 5. It was lawful on condition that one spouse should give money to the other, or that third parties should give their consent to the marriage; it was unlawful if the conditions were not written, unless they were contrary to the very essence of the marriage, in which case they themselves annulled it. But presumed marriages ("copula" following "sponsalia per verba de futuro") disappeared (lack of celebration, difficulty of proof). The secret marriage was not valid as a promise of marriage, although no particular form was required for the latter. As to conditional marriage, see *Ianke*, "De Cond. Matrim. Oppositis," 1851; *Manenti*, "D. in Apponibilita d. Condizioni ai Negozi Giurid.," 1889; *Riedler*, "Bedingte Eheschl.," 1892; *Hussareck*, see *Heinlein*, "Die Bed. Eheschl.," 1892; *Ruffini*, "Per la Storia d. Dir. Matrim.," p. 10; Dig. X, 4, 5 and 5-7; "in VI," 4, 1, 1; *Gratian*, C., 32, "in Pr.," C., 27, q. 2, "palea," 8. In the end there was seen in them nothing but "sponsalia de futuro."

⁵ Cf. old rituals, where we find for example: "Matrimonium per vos contractum, ego tamquam minister Dei, confirmo, ratifico et benedico."

forms especially to the old law. It is also said: "the priest marries them," and speech thus marks the change which has taken place in the part played by the priest.¹

§ 108. **Civil Legislation.** — If the decrees of the Council of Trent² were not received in France because they affected the rights of the secular power, royalty was forced to appropriate them to itself and to decree them in the form of laws of the State.³ This was the object of Arts. 40 and 44 of the Ordinance of Blois, 1579, and of some later proclamations which rounded them out, particularly the Declaration of November 26, 1639,⁴ of the same obligation of celebrating the marriage, under penalty of nullity, before the priest of the parish of the two spouses or of one of them,⁵ in the presence of witnesses (four instead of five). The Declaration of 1639 even gives the parish priest the active part. It is not enough, in order that the marriage should exist, that the parties should present themselves before him at the church and declare that they take one another for husband and wife; the priest must declare them united.⁶ He is not only a "spectabilis," witness, he is the civil and religious officer of the State.

§ 109. **Marriage of Protestants.**⁷ — The part played by the

¹ The theologians disagreed, as they always did, without perceiving that their contrary theories were correct, — one with respect to the past, and the other with respect to the future: *Durand de Maillane*, "Dict.," see "Mariage."

² Distinguish canons relative to dogma from decrees relative to discipline. *Boyer*, "Diss. s. la Récept. du Conc. de T." in "Examen du P. Législ. de l'Egl. s. le Mar.," 1817; *Le Ridant*, "Deux Quest. s. le Mar.," p. 344; *Bibl. on the Council in "Jurist. Literaturbericht,"* 1896, VII, 16.

³ Cf. forbidding of secret marriages in Lombardy, 1783; Tuscany, 1786; Naples, 1718, 1767. — *Lagrèze*, "Navarre," 2, 169 (co-existence of religious marriage and marriage according to the forum in the giving of earnest-money and surety).

⁴ *D'Aguesseau*, "Œuvres," 1762, V, 161; III, 215; *Merlin*, "Rép.," see "Mariage."

⁵ "Ord. Blois," 1579, 40, 44; 1629, 39; Nov. 26, 1639; Edict of March and Decree of June, 1697; Decree of May 14, 1724; Nov. 22, 1730; Decree of Apr. 9, 1736.

⁶ This was, however, contested. On the day following the Declaration of 1639, marriages were celebrated at La Gaulmine, — that is to say, before a notary; and the deed was made known to the parish priest. The parliament forbade notaries to establish these marriages, Sept. 5, 1560, and annulled them August 12, 1692. The Edict of 1697 pronounced the most severe penalties against irregular marriages (cf. "Dél. poster"; *Isambert*, XX, 292). As to Gaulmin, dean of the masters of applications, cf. *Desforges*, "Thèse," pp. 149–151. Marriages before notaries were formerly quite frequent; prohibited by the Ordinance of Blois, they were still preserved in plays, because it was not allowed to portray ecclesiastics on the stage: *Glasson*, 7, 155; "Mém. du Clergé," V, 780.

⁷ *A. Martin*, "Anc. Lég. Gènevoise s. le Mar.," 1891. Let us remember that for Protestants marriage is not a sacrament; it is the spouses who become united themselves, and it is not the priest who joins them together: *Sohm*, 197; "Trau." 110 (cf. Art. in 1879).

priest in marriage was double, civil and religious at the same time. The reformers could not have recourse to him without renouncing their faith. Until the time of the revocation of the Edict of Nantes they were married before their ministers, invested in the eyes of the State with the same powers that the priests had with respect to the Catholics.¹ The Edict of Revocation (October 22, 1685) punished the ministers; this was the same thing as indirectly compelling the Protestants to be married before Catholic priests.² The courts gave to the Edict its whole power upon this point,³ following the Declaration of December 13, 1698, starting with the fiction that there were no longer any Protestants in the kingdom, but only the newly converted.⁴ There was thenceforth no way of marrying open to them other than to abandon their religion, having their union blessed by Catholic priests.⁵ Towards the end of the eighteenth century jurisprudence became milder and thus found itself prepared for the Edict of 1787, long since demanded by liberal minds. And by the terms of this Protestants could marry, according to their choice, either before the first officer of justice of the locality or before their minister, acting no longer as a minister of the faith, but as an officer of the civil government. From the time of the Old Régime, the diversity of religion had had as its result the secularizing of the marriage of Protestants.

¹ Art. 40 of the Ordinance of Blois did not apply to Protestants; but Art. 44 was absolute. Edict of Jan. 17, 1561, 9; August, 1570; May, 1576; September, 1577. The Edict of Nantes, April, 1598, Art. 23, compelled them to respect the impediments established by the Church and placed matrimonial actions in which they were parties under the jurisdiction of the civil judges. Protestants were impliedly authorized to marry before their own ministers: Synod of 1559; *Brodeau*, on *Louet*, II, 122. Their ministers kept registers in the same way as parish priests did; and, *in fact*, they were recognized as having the same authority as the latter. Various statutes organized this keeping of registers, and, consequently, admitted of the celebration of marriages by Protestant ministers. The Order of the Council, of Sept. 15, 1685, half secularized the marriage of Protestants. The minister took part in the union and blessed it before the chief official of justice of the locality after publication had taken place at the nearest court of the king: "Arr. Cons.," Sept. 22, 1664; Decl., April 2, 1665; Feb. 1, 1669. (*Lorry*) "M. des Protestants," 1756.

² Marriages in the desert blessed by pastors who were hidden there. Unions blessed by old men, by the heads of families. Marriages abroad in the frontier provinces: *Pothier*, no. 363; Decl. June 16, and Aug. 6, 1685. Abrogated by Law of Sept. 20, 1792. — Evangelical church: *Blumstengel*, "Trauung," 1879.

³ "Arr. Parl.," Aug. 14, 1709. Presidial of Nîmes in 1739. Toleration in fact which ceases after 1743 (death of Fleury).

⁴ Decl. March 8, 1715; *Pothier*, no. 275; *Portalis*, "Consult. s. la Valid. du Mar. des Protestants," 1770.

⁵ Who made them give proofs in order to assure themselves of the sincerity of their belief. From thence comes the custom of the Certificate of Confession, which is to-day required of Catholics themselves.

§ 110. **Revolutionary Law.**¹—The Revolution in proclaiming freedom of belief was led to a complete secularization of marriage. The theories of the jurists, and even of the theologians, according to which the contract was the material side of the sacrament, contributed thereto at least as much as the teachings of the philosophers. The Constitution of 1791, 2, 7,² laid down the principle that the law only considered marriage as a civil contract;³ the Church was free to set up the sacrament in establishing the forms and conditions which might please it, the faithful were at liberty to respect its doctrines,⁴ but the State had no power to bind itself to impose them upon all citizens without affecting their liberty of conscience.⁵ The Decree of September 20, 1792, organized the certificates of civil status and marriage;

¹ *Agier*, "Du Mar. dans ses Rapp. avec la Religion et les Lois Nouvelles," year IX; *Daniel*, "Le Mar. Chrétien," 1870; *Sagnac*, "Lég. Civ. d. Révol.," 1898; *Rosmini-Serbatì*, "Sul. Matr. Christ. e le Legge Civ.," 1862; *Fleiner*, "Obligat. Civileke," 1890.

² In conformity with the report of Durand de Maillane in the name of the Ecclesiastical Committee. It had been caused by the refusal of the parish priest of Saint-Sulpice to publish the banns of Talma.

³ *Friedberg*, "Gesch. d. Civilehe," 1877; *Glasson*, "Le Mar. Civil," 1880; *Esmein*, I, 46. Modern civil marriage is distinguished by the presence of a public officer who represents the State. Cf. Marriage before the Venetian "Peroratores" (*Thauer*, "Z. f. Kirch.," 1881, p. 209) or before a notary (Dig. X, 4, 4, 3): *Friedberg*, "Handb.," § 155, n. 1. Civil marriage was admitted for the first time in Holland in 1580 through motives of tolerance; in 1656 it was admitted in the entire Netherlands; in 1653 in England (but the Restoration did away with it). Cf. *Friedberg*, *Ruffini* translation, § 155, n. 6 (bibl.); *Del Giudice*, "Studi," 1889, 209; *Gabba*, "Matr. Civ. e Rel.," 1876; *Padellèti*, "Scrit. d. Dir. Publ.," 1881; *Brunialti*, "Stato e Chiesa i. Italia," 1892; "Arch. giur.," 61, 142; *Sohm*, 284.

⁴ The Catholic Church maintains that Christ has given it the legislative and judicial power with respect to marriage because of the fact that he raised this act to the rank of a sacrament; according to the Catholic Church, in localities where the rulings of the Council of Trent are applicable, the spouses who are only civilly married live in a state of concubinage. The Catholic doctrine is summed up in five propositions, laid down in 1808 by Pius VII for the Bishop of Warsaw: 1st. There is no marriage excepting one which has been contracted according to the forms which the Church has established. 2d. Marriage once having been contracted according to these forms, there is no power on earth which can break its tie. 3d. In case of a doubtful marriage the Church alone has authority to judge of its validity or invalidity. 4th. A marriage which is not opposed to any canonic impediment is good, valid, and consequently indissoluble, whatever impediment may be opposed to it by the secular power without the consent of the Church. 5th. On the other hand, every marriage contracted in spite of a canonic impediment must be held as null, although some government might make a pretense of abrogating such impediment. Cf. *Encycl. "Arcanum"* of Leo XIII; *Viollèl*, "Gr. Encycl.," see "Mariage"; *Sinholle*, "Mar. Civil," 1876.

⁵ *Viollèl*, p. 429, points out that, while waiting for the new method of establishing marriage to be organized, certain Catholics, who did not wish to have their union blessed by the Constitutional clergy, conceived of the idea of being married before a notary (before the Law of 1792): *La Révillère-Lepeaux*, "Refl. s. le Culte," year VI.

the latter must thenceforth be executed before a municipal official in order to be recognized by the State.¹ Freed from its religious character, marriage is none the less a solemn contract; the mere consent of the parties is not sufficient to form it; the interest of society which is brought into play in this contract is far too great for it to be lowered to the level of private and secret acts.² By means of the publicity and the solemnities with which it is surrounded the liberty of the parties is protected, their consent is assured, the status of children and the rights of relatives are established on a firm basis, to everybody an easy and lasting proof of the most important act in civil life is supplied beforehand. But if, as far as the forms of the celebration of marriage are concerned, Revolutionary law only introduced an innovation in transferring to the lay officials the functions of the clergy, the new conception results: 1st, in permitting the marriage of priests; 2d, in introducing divorce into civil legislation; 3d, in a modification of the theory of impediments. Impediments of a religious order disappear. The consent of the relatives is no longer necessary after the age of twenty-one years.³

¹ The mayor and his deputies, according to the Law of the 28th Pluv., year VIII. Cf. Decree of Sept. 25, 1792, and Const. of the 5th Fruct., year III., Art. 7. Provisions against the clergy in order to avoid the resumption of their functions, D. 1792, 6, 2, 5; 7th Vend., year IV, 20 *et seq.*, Law of the 18th Germ., year X, or Arts. drawn up by the Concordat, Art. 54 (religious marriage after the civil marriage). In 1816, prop. *Lachèze-Murel (Mavidal*, "Arch. Parl.," 16, 1), cf. Edict of 1787.

² Facilities granted for marriages. D., 1792, 4, 2, 3: only one publication a week before the celebration; Law of 25th Vendem., year II (one day free); Law of the 7th Therm., year VII, re-enacted the Decree of 1792. — There were no longer any trifling objections, and it was necessary to determine within a very short time those which were due to the father or the mother or those which depended on some cause of annulment. — Locality of the celebration (house of both parties). Law of the 30th Germ., year II.; Law of the 18th Flor., year X. Celebration of the "Decadi," Decree of the 13th Fruct., year VI; 26th Prair., year VII; Law of the 15th Flor., year X. "R. Cath. Inst.," 1880.

³ In Russia marriage is still a religious act. — In Hungary before the Law of 1894 there existed as many as nine different matrimonial systems, and as many different beliefs; a Catholic spouse only had to change his religion in order to acquire the right of obtaining a divorce. In order to escape from this state of anarchy, the intervention of the State and the creation of a civil law were necessary, the latter being a sort of neutral ground where all beliefs met. "Gr. Encycl." See "Mariage" (Art. by *Lehr*), "Spain: Double legislation, civil and religious."

TOPIC 4. CONCERNING IMPEDIMENTS TO MARRIAGE

§ 111. The Basic Conditions.	§ 117. The Same. — (V) Incompatibility of Marriage with Certain other Conditions.
§ 112. Classification of Impediments.	
§ 113. Invalidating Impediments. — (I) Lack or Defects of Consent.	§ 118. The Same. — Prohibitive Impediments.
§ 114. The Same. — (II) The Consent of the Relatives to the Marriage.	§ 119. Preventing a Marriage.
§ 115. The Same. — (III) Incapacity.	120. Dispensations.
§ 116. The Same. — (IV) Impediments resulting from Relationship.	121. Nullity of Marriage.
	122. Rehabilitation and Repudiated Marriage.

§ 111. **The Basic Conditions** required for the validity of marriage consisted first of all in the Germanic law, in the consent of the relatives¹ and of the spouses, and in the equality of condition, or, at least, in the freedom of these latter.² Hostility was shown to unions between persons belonging to different classes of society; in every other respect the law was not very strict. The Christian Church was inspired by totally different ideas; it took no account of social condition, because in its eyes the faithful are equal before God; in return, it attached the highest importance to the religious condition of the spouses, if one may speak of it thus, and to the morality of the marriage. In these two respects it increased impediments far too much, contrary to its habitual tendency, which is to facilitate access to the sacraments. Outside of reasons of a religious³ or moral⁴ nature which caused it to arrive at this decision, it found in this systematic enlargement of obstacles to marriage a means of making up for lack of divorce.⁵ Upon a point on which the canon law showed itself to be lax, that

¹ "Wis.," 3, 1, 1 (*Ant.*); 3, 2, 8; "Roth.," 195, "Liut.," 120; *Grimm*, 436.

² "Wis.," *id.* (marriages between Goths and Romans permitted); *Meynial*, p. 31; cf. *post*, "Misalliance"; *Koehne*, "Geschlechtsverb. d. Unfreien i. Fr. R.," 1888 ("Unters.," by *Gierke*); *Glasson*, 3, 28. At Naples, prohibition of marriage with a "persona turpis"; "Cod. Just.," 5, 5, 7; *contra*, canon law (meritorious act). Sometimes it was forbidden for the citizens of a town to marry foreigners.

³ Difference in belief, monastic vows, etc.

⁴ *Infra*, see each one of the impediments by itself.

⁵ Cf. *infra*, "Dissolution of Marriage for Political Reasons." It has been pretended, we think wrongly, that the Church had increased the number of impediments because it had an interest in so doing, as by this means it could have the power to grant dispensations and require payment of the customary remunerations for their granting. But it is quite possible that this concern of a fiscal nature was not entirely foreign to the maintaining of impediments which had been originally created with quite another object.

is, regard to the consent of the relatives, royal legislation revived, in accord with custom, the principles of the Germanic and Roman laws; the consent of the family was strictly demanded. As regards the canon law, marriage was a sacrament; as regards monarchic law, the union of two families; as regards Revolutionary law, it was a contract between two individuals, and it was likened as much as possible to ordinary contracts by the suppression of impediments of a religious nature or of those which were drawn from the old organization of the family.¹

§ 112. **Classification of Impediments.** — The classifying of impediments into two classes, invalidating and prohibitive, is the work of the Courts of the Church. Called in to give their opinion upon the validity of marriages, they often recoiled from annulment: there was in this an early check to the increase of impediments.

§ 113. **Invalidating Impediments.**² — (I) **Lack or Defects of Consent.**³ Consent is defective, for example, in cases of drunkenness or madness,⁴ or, again, when one of the spouses has pretended to give consent.⁵ Even since Trent, no essential formula is required. Defects in consent are: mistake,⁶ violence, abduction. In order to constitute an impediment to marriage the mistake⁷ must have a bearing upon the person or the condition; if it has a bearing upon qualities or upon wealth, it is of no effect.⁸ The

¹ Law of Sept. 20, 1792. Cf. Plans for the Civil Code in *Fenet*, I, 18, 108, 159, 330.

² The list of these has become fixed, after the thirteenth century, at least.

³ *Launay*, "Inst.," 2, 5; *Scaduto*, "Consenso n. Nozze," 1885; *Freisen*, 229, 257, 276; *Esmein*, I, 302.

⁴ *Gratian*, C., 15, q. 1, c. 7; C., 32, q. 7, c. 26; Dig. X, 4, 1, 24; *Pothier*, no. 92. Validity of a marriage contracted during a lucid interval (*Gratian*, C., 7, q. 1, c. 14; *Bardet*, 2, 467), of the marriage of deaf mutes (Dig. X, 4, 1, 23; "Arr.," Jan. 16, 1658), according to *Hostiensis*.

⁵ The nullity of the marriage under the pretext that one of the spouses had pretended to give his consent, but had not in reality consented, was proposed under the system of marriage "solo consensu" (Dig. X, 4, 1, 26); after the Council of Trent it would have been necessary to set it aside. This nullity, however, was so thoroughly maintained that Napoleon I was able to invoke it before the Ecclesiastical Judge of Paris as a basis for his request for annulment of his marriage with Josephine. Cf. "Acta S. Sedis," 1885, 28, 14, Henry IV and Marguerite of Valois.

⁶ *Stahl*, "De Matr. ob Err. Resc.," 1841; *Halfes*, "De Imp. Err.," 1861; *Daller*, "Irrth. als Ehehind.," 1862; *Leonhard*, "Irrthum," 1882; *Gerigk*, "Irrthum u. Betrug als Ehehind.," 1897; *Gaugusch*, "Irrth. als Eheh.," 1897; *Andreae*, 1893.

⁷ And not fraud. It was otherwise in the Evangelical Church.

⁸ Qualities: incurable madness, disgraceful penalty, pregnancy of the fiancée due to a third party, prostitution, also station in life, etc.; Dig. X, 2, 24, 25, etc.; *Bardet*, 2, 45; *Pothier*, no. 313 (order validating marriage with a man condemned to the galleys after publication of banns). The quality

"error personæ" consists in a mistake in the physical identity of one of the spouses¹ or in a mistake as regards qualities so essential that they amount to the same thing as though the spouse were a person other than the one supposed to have been married; these qualities are those which constituted the civil status of persons² (for example, if a man should falsely say he was the son of such and such a prince).

The "error conditionis" only exists when one marries a slave³ believed to be free. Violence is only an impediment when it is "adversus bonos mores" and can act "in constantem virum."⁴

Abduction by violence⁵ is also an impediment,⁶ although the

can be put "in conditione" according to the canon law ("copula purificatur pendente conditione"). — In the old "For de Navarre," 4, 2, if the betrothed woman was not a virgin the marriage was broken (proofs analogous to those in use among the Arabs). *Kornmann*, "De Virginitate," 1765; *St. Jerome*, I, c. "Jovin"; *Bédier*, "Tristan et Iseult"; *Thamer*, "Abälard u. das Canon. Recht," 1900, "Legre v. Error Qualit. Akad. Wien" ("B. Ch.," 1902, 377).

¹ Classical example: marriage of Jacob and Leah, when he thought he was marrying Rachel.

² "Error qualitatis redundans in personam." *Huc*, "Le Code Civil Ital." I, p. 51, cf. "C. Civ.," Art. 180; error as to the person; *Héricourt*, "Loix Ecclés.," G 76; *Caressut*, "Theoria et Praxis," p. 351; *Esmein*, I, 314. — A young man represents himself to be the son of the king of France; the young girl believes that she is marrying the son of the king of France (who actually exists and who would be capable of ratifying the marriage) and does not consent to marry the person who is present; it would be otherwise if he represented himself as being a king's son, in general: *Stahl*, "De Matrimonio ob Errorem Resc.," 1841; *Thamer*, "Wien. Ak.," 1889; *Sehling*, "D. Z. f. K." I, 51.

³ And not a serf. *Gratian*, C., 29, q. 1, c. 4 and 6; *Dig.* X, 4, 9; "Fuero Real" 4, 11.

⁴ *Dig.* X, 4, 1, 28; *Scaduto*, 432. Reverential fear is not sufficient. *Sanchez*, "De Matr.," 4, 12. — Marriage validated "ex nunc" by consent or "copula" and after the violence has ceased; tacit consent by cohabitation for a year and a half: *Dig.* X, 4, 7, 2; 4, 18, 4. Cf., however, "Arr.," April 24, 1651 (*Soefve*, I, 3, 74). After the Council of Trent another celebration was necessary: *Oliverio*, "De Null. Matr. ex Defectu Consens.," 1609; *Giordano*, "Matr. Contr. Vi.," 1842; *Ploch*, "De Matr. Vi ac Metu Contr.," 1853; cf. *P. de Fontaines*, 15, 60. Mere reverential fear is not an impediment. Council of Trent, s. 24, 9. Marriage contracted under the compulsion of violence ceases to be voidable for this reason when it is freely consummated or life in common goes on without any compulsion during a year and a half. *Dig.* X, 4, 1, 21. As to rape, cf. "Schwabensp.," c. 33, 87, 196; "T. A. C. Norm.," 50; *Bout.*, 2, 8.

⁵ *Colberg*, "Entführ.," 1869; *Scaduto*, § 12, 23, 178; *Freisen*, 567; *Du Plessis de Gr.*, "Autor. Pat.," 227, 392.

⁶ *Esmein*, I, 391; II, 250; *Dargun*, "Mutterrecht u. Raubehe," 1883. Horrible penalties under the Lower Empire, so frequent was abduction: "Cod. Théod.," 9, 24; "Cod. Just.," 9, 13; "Nov.," 143, 150; "Wis.," 3, 3. Death of the ravisher: "Conciles"; *Chalcédoine*, 451, c. 27; "Paris," 557, 6; *Gratian*, C., 36, q. 2; "Meaux," 845, 64; "Capit.," 817, 23; 819, 9; 6, 60 and 7, 395. Contrary tendency (favoring marriage, Jewish law, which validates after the thing has taken place, provided the consent of the parents be given. *Seneca* and *Quintilian* say that the girl who has been ravished has the right to compel the ravisher to marry her, or else to demand his death). *Gratian*, C.,

first violence may have ceased; so long as the woman carried away is still in the hands of the abductor,¹ she is considered as being incapable of giving a free consent. **Abduction with seduction**² was likened by French jurisprudence to abduction by violence; in its desire to prevent marriages contracted by minors without the consent of their relatives it went so far as to establish the presumption that this sort of abduction took place in every marriage of this kind.

§ 114. **The Same.** — (II) **The Consent of the Relatives to the Marriage**³ was required by Roman legislation⁴ as well as by the

36, q. 2: marriage allowed if the father is not opposed to it; Dig. X, 5, 17, 7: validity of the marriage provided the consent of the woman has been free, — even if she is found to be under the power of her ravisher. Dig. X, 5, 17, 6; *Innocent III*, before 1210; *Yves de Chartres*, "Ep.," 19. — Trent, s. 24, c. 4: marriage is not possible as long as the girl who has been ravished is in the power of the ravisher; if she is no longer in his power she may give her consent to the marriage (penalties against the ravisher: excommunication, infamy). "Ord." 1579, 41; 1629, 169; 1639, 5; "Arr.," 1681; *Horry*, "Mar. Chrétien," p. 159; *Muyart de Vouglans*, "Lois Crim.," 3, 4; *Guyot, Ferrière*, — "Alais," 16; "Montp.," 85; "Nav.," 4, 3; *Labourt*, 19, 10. — "Ass. de J.," "C. d. B.," 134; "L. d. Droiz," 226; "G. C. Norm.," 33, 11; *Boutaric*, I, 39, etc.

¹ Rape: death, castration, an arbitrary penalty in the old law; sometimes the perpetrator of the rape himself obtained a husband for the outraged woman of similar condition to the one she would have been able to have, had there been no rape, which amounts to the same thing as giving her a marriage portion: "For de Navarre," 24, 6; *Lagrèze*, "Dr. d. Pyrénées," p. 311; "C. de Barcelone," 108; "L. d. Droiz," 659, etc.

² "Ord.," 1579, Art. 40; 1629, 39, 169; 1639; Nov. 22, 1730; "Encycl. Méthod.," "Jurisprud.," VII, 198; *Durand de Maillane*, see "Dict. de Dr. Canon"; *Fournel*, "Tr. de la Séduction," 1781; *Duguil*, "N. R. H.," 1886, 586. — Cf. *Rozière*, "Form.," no. 241. — On the canon law *Van Espen*, 2, 13, 10; 3, 4.

³ *Gibert*, "De Doctr. Canon. c. Requis. Parentum Cons.," 1709; *Wüffel*, "De Parent. Cons.," 1740; *Valsecchi*, "De Spons. ad Inst. par. a Filio f. Contr.," 1710; *Muscettula*, "De Spons. et Matr. q. a Filio f.," 1762, 1772; *Heyer*, "De Cons. Par.," 1863; *Scaduto*, "Il Consenso n. Nozze," 1885; *Van-troys*, "Thèse," 1889; *Stobbe*, "D. Privatr.," § 254; *Freisen*, 227, 308; *Esmein*, I, 211; *Duguil*, "N. R. H.," 1886, 587; *Viollet*, 402.

⁴ As a consequence of the power of the father, first of all; under the Lower Empire, if there were no father, then the mother or the near relatives intervened ("Cod. Just.," 5, 4, 18 and 20) so that the consent of the family seems to have been required with the object of protecting the child: "Cod. Théod.," 3, 7, 1; *Meynial*, p. 18 *et seq.* Disagreement: the prince or the judge settles the dispute. Cf. powers of the Frankish kings: "Chlotar. Præc.," 7 and 18 ("viduæ" and "sanctimoniales," as in Roman law). — A misapprehension of the meaning of the celebrated passage from Paul: "Sent.," 2 (19), 20, 2, "Int." (cf. *Sirmond*, "Form.," 16; *Rozière*, 241 *et seq.*), made people see in the lack of this consent only a prohibitive impediment; Paul said, "Those who are 'in potestati patris' cannot marry without the consent of the 'pater,' but public interest demands that the 'pater' should not be able to break the marriage to which he has given his consent, whereas, in the olden times, he had a right to do this." This text was understood to mean this, that marriage contracted in spite of the "pater" could not be dissolved ("sed contracta non solvuntur"): *Meynial*, 19, n. 4. "Petrus," I, 31, 49, absolutely demands the consent of the father. *Van-troys*, p. 77.

Germanic Customs.¹ One is surprised to find that the canon law departed upon this question from the two legislations from which it had especially borrowed. It was not without some hesitation that it arrived at this point.² Gratian still teaches that the betrothal and the marriage of children are not valid without the consent of the father.³ But his contemporary, Peter Lombard, is of a contrary opinion: the consent of the spouses, according to him, alone constitutes the marriage.⁴ The distinction between the "desponsatio" in which the relatives figured, and the celebration of the marriage, where the spouses alone had anything to say, favored the victory of this explanation. As the betrothals came to be necessary no longer, so did the consent of the relatives pass to the rank of impediments which were merely prohibitive.⁵ The Church was compelled to enforce the rule that as to spiritual matters the child was from puberty withdrawn from the paternal power;⁶ he was permitted to enter into religious orders, which constituted a sort of spiritual marriage, in spite of his father. At the Council of Trent the question was discussed at the request of the representatives of France. The Council adhered to the classical doctrine of the Church, but in forbidding secret marriages it indirectly prevented many unions which were only hidden because they were contrary to the views of the relatives.⁷

This was an insufficient reform, considering the old usages and

¹ Betrothals. Consent of the "mundualdus" (father, guardian). Cf. Frankish law, intervention of the mother: "Cap.," I, § 6, "ad L. Sal. extrav.," A, 1; *Hincmar*, "De Div. Loth.," 5 (*Migne*, "Patr. Lat.," 25, 717); *Ficker*, "Mitth. Oest. Gesch. f.," II, 455, 1888; "Majestas Carolina," c. 85 (Bohemia, fourteenth century; *Jirecek*, "Cod. Jur. Bohem.," 2, 2, 168); *Darestes*, "Etudes," *passim*; *Pertile*, § 108 n. 57; *Lattes*, p. 231 *et seq.*

² *Tertullian*, "Ad Uxor.," 2, 9 (consent of the father); *C.*, 30, q. 5, c. 7; Canon, "Aliter"; *Gratian*, *C.*, 30, q. 5, c. 1; Canon, "Nostrates" or rescript of Nicholas I to the Bulgarians; *C.*, 30, q. 5, c. 3.

³ *C.*, 31 and 32; 35, q. 6, c. 2; cf. "Capit.," 7, 463; *P. Lombard*, "Sent.," IV, D. 28, b; Dig. X, 5, 6; "Trent," s. 24, 1; (*Migne*, "Patr. Lat.," 192, 915). The Eastern Church requires the consent of the father for the marriage of a child "alieni juris," and even sometimes that of the mother or the relatives for the marriage of the daughter "sui juris."

⁴ "Sent.," IV, D. 28, b. (*Migne*, "Patr. Lat.," 192, 915); Dig. X, 4, 5, 6; "Trent," s. 24, 1 (after the age of 14 and 12). Freedom of the contracting parties, conception of the sacrament.

⁵ Similar evolution in that which concerns the consent of the master to the marriage of slaves: Dig. X, 4, 9, 1; Council of Trent, 24, 1; *Freisen*, 283; *Scaduto*, 338.

⁶ Cf. "Power of the father."

⁷ The Council limited itself to the condemnation of these marriages, but did not dare annul them for fear of driving people to debauchery and out of respect for the freedom of the soul. Cf. English law, *Glasson*, "Inst. Angl.," VI, 172.

customs.¹ The **monarchic law** went much further than this.² The Ordinances of the sixteenth century,³ and first of all the Edict of Henry II of February, 1556,⁴ compelled sons to obtain the consent of their parents⁵ up to the age of thirty, daughters up to the age of twenty-five years;⁶ having attained this age, it was enough if they asked for their opinion and their advice.⁷ The penalty for an infringement of these rules was very severe: (a) power of the parents to disinherit⁸ the child who had married in spite of them, and to revoke gifts made to him (Edict of 1556); forfeiture of all right⁹ to the inheritance and the advantages resulting from the

¹ *Beaumanoir*, 15, 31; 21, 12; "Et. de St. Louis," I, 67 (marriage by the father or the mother who survived, without the counsel of relatives). *Infra*.

² The State, they said, can regulate the conditions of the civil contract, which is the material part of the sacrament, and can create invalidating impediments. As to Protestant theories, cf. *Strampff*, "Luther," 304, 325; *Böhmert*, "Jus. Eccles. Prot.," 1738.

³ Edict of Feb., 1556; "Ord. Blois," 1579, 40; Edict. 1606; "Ord.," 1629, 39; "Ord.," 1639; "Arr.," 1651, 1659 — *Mellier*, "Edit d'Enri II," 1558; *Coras*, "Paraphrase s. l'Edit," 1579; *Pulvæus*, "De Nupt. s. Parentum Cons.," 1578; *Pasquier*, "Rec. Chronol. Conc. les Mar. Clandestins," 1660; *Le Merre*, "Justif. des Usages s. les Mariages des Enf. de Famille," 1687; *Le Conte*, on The Edict of 1556 in "Néron and Girard," I, 351. *Le Prestre* has written two treatises on Clandestine Marriages. *Horry*, "Obs. s. les Edits," 1692; *Muyart de Vouglans*, "Loix Crim.," 3, 4; "Fors de Navarre," 24, 3 (nullity of marriage, disinheritance); *Labourt*, 12, 14; *Isamb.*, XI, 569 ("Bret.," 1510).

⁴ Enacted upon the occasion of the marriage of Montmorency de Piennes. *De la Ferrière*, "Correspondant," Aug. 10, 1885; "N. R. H.," 1886, 605; cf. Preamble of the Edict; *Isambert*, XI, 569 (marriage of minors in Brittany); "Letters of Pasquier," III, 1.

⁵ Of the father and the mother; but in case of disagreement the wishes of the father are alone to be taken into consideration. If the father is dead, the mother who has not remarried should give her consent: *Boutaric*, "Inst.," 1, 10.

⁶ *Fevret*, "Abus.," 5, 2, 13; *Héricourt*, 3, 5, 2, 75, who does not draw any distinction between girls and boys, and only annuls marriage in the case of both of them if it has been contracted before the age of 25 years; *Julien*, "Elém. de Jur.," p. 19 et seq.

⁷ Advice of the mother who remarries. Procedure: Order of August 27, 1692; request addressed to the royal judge in order to give the father and mother a *respectful summons* to give their consent to the marriage with such and such a person. Upon obtaining permission from the judge, the child goes with two notaries, or with one notary and two witnesses, to ask for the consent; the notary draws up the deed. — The Declaration of 1639 requires the consent of the parents to the publication of the banns. The Ordinance of Blois had prescribed this publication, especially in order to avoid marriages which were carried out against the wishes of the parents: *Gibert*, "Consult. s. le Mar.," 1727; *Launoy*, *op. cit.*, p. 1032.

⁸ Penalty of disinheritance at Rome in a case of this sort: "Cod. Théod.," IX, 24, 1; "Nov. Just.," 115, 3; "Wis.," 3, 2, 8 and 4, 7; "Burg.," 12, 5; *Papien*, 9, 2; "Liut.," 5, 19; "Thur.," 47; *F. de Daroca*, 1142; *P. de Font.*, 23, 36; *Poullain du Parc*, "Princ.," I, 116; *Pothier*, "Succ.," 1, 4, 1: a daughter would not have been disinherited for having allowed herself to be seduced *once or twice (sic)* but only if she had become a prostitute. Cf. "Disinheritance," "Power of the Father."

⁹ Jurisprudence does not strictly adhere to this rule: *Boutaric*, "Inst.," 1, 10, 3.

contract of marriage, from a will, from Customs (Declaration of November 26, 1639); (b) arbitrary penalties against children and their accomplices; these latter were punished as *abettors of the abduction*, according to the Ordinance of Blois, 1579, Art. 40; (c) nullity of the marriage of the minor, pronounced not by the ordinances,¹ but by jurisprudence,² because he was presumed to be tainted with abduction.³ When the consent of the parents had not been sought (a respectful asking)⁴ by the son who was more than thirty years of age, or the daughter who was more than twenty-five, disinheritance was possible, but the marriage was not annulled.⁵ In default of father or mother,⁶ the minor who was under the care of a guardian had to have the consent of his guardian, who gave it after having obtained the opinion of the family.⁷ The nullity of marriage contracted without this consent was not so easily pronounced as when the consent of the parents had been lacking.⁸

¹ Cf. however "Ord.," 1629, Art. 39; *Louet*, "M.," 6; *Vantroys*, "Thèse," p. 264: details as to the establishment of this jurisprudence and as to its variations.

² The son who was over twenty-five and under thirty who married without obtaining the consent of his parents, was disinherited; but his marriage was not annulled: Order of July 2, 1660. After twenty-five the boy who had neither father nor mother did not have to obtain anybody's advice: Ordinance of Aug. 11, 1716.

³ See "Abduction with Seduction." According to *Boutaric*, "Inst.," 1, 10, 3, disinheritance and annulment of the marriage did not concur; it was necessary to choose between them: *D'Aguesseau*, 1772, IV, 674; *Vantroys*, p. 291.

⁴ *Denisart*, see "Somm. respect."

⁵ Decl. 1639; Edict March, 1697; cf. "Arr.," Aug. 6, 1661; Aug. 27, 1692.

⁶ Death, absence (not knowing where a person is), civil death; Decl., Aug. 6, 1686; May 24, 1724, 16. The judge can only with great difficulty supplement the consent of the relatives who are present and, for example, favor the wishes of the mother and of the relatives rather than those of the father. Natural children must have the consent of their guardians as long as they are minors; they are not under the power of the father and have neither to obtain nor request the consent of their fathers and mothers: *Pothier*, "Mariage," 1, 1, 2, 3.

⁷ *Beaumanoir*, 15, 31: the relatives obtain a security from the custodian or the guardian that he will not marry off the minor without their advice; if he refuses to do this the guardianship is taken away from him: cf. 21, 12 (*id.* father or survivor, mother); "Ord. Blois," 43. Summons before the judge. Decl. of Aug. 6, 1686 (parents who have emigrated because of religion; consent of the guardian and the six nearest relatives and relatives by marriage, or, if these are lacking, friends and neighbors): *Boutaric*, "Inst.," 110; "Bret.," 496 (mother, guardian and near relatives with the authority of the law). "Placités de Norm.," 32 (the mother who is a guardian should have authority).

⁸ According to jurisprudence, the father and mother are the only ones who have a right to attack the marriage. Thenceforth their consent, given after the marriage has taken place, will validate it: this is the same thing as a renunciation of the action for annulment: *Boutaric*, "Inst.," 1, 10.

The **Revolutionary Laws** fixed puberty at fifteen and thirteen years of age, and did not impose the obligation of being provided with the consent of the father (lacking his consent, that of the mother; lacking hers, that of a council of five relatives or neighbors under the supervision of the Mayor) until the end of the twenty-first year.¹ The only penalty for those who did not conform to these provisions was the annulment of the marriage.²

a. To the consent of the parents one can liken the **consent of the king** to the marriage of princes of the blood,³ the intervention of the Frankish kings in the marriage of their subjects,⁴ and finally that of the **feudal lords** to the marriage of their vassals⁵ or their

¹ The same in English law: *Glasson*, "Inst. Anglet.," VI, 172.

² Law of Sept. 20, 1792. Decree of Sept. 7, 1793: the family council is composed of near relatives *who are not heirs presumptive*; if it is opposed to the marriage at the end of a month the minor need take no notice of it, unless the opposition is based upon notorious badness of the morals of the future spouse or upon failure to become re-established after a judgment carrying with it infamy. *Sirey*, "Lois Civiles Interméd.," I, 380. Reaction in the direction of the old law in the Civil Code: puberty at the age of eighteen and fifteen, consent of the parents up to the age of twenty-five and twenty-one, acts of respect.

³ Originally, especially because the king is the head of the house (*cf.* with respect to this the law relating to the princely families in Germany); afterwards through political motives and because the marriage of an heir to the throne is not a matter of indifference to the State: *Isambert*, XI, 447, 453; XVI, 413; *Lebret*, I, 8; *Durand de Maill.*, "Dic.," 4, 36. The Order of September, 1634, annuls the marriage of Gaston of Orléans with Marguerite de Lorraine because it had been contracted without the consent of the king. The doctors of the Sorbonne, however, hesitated because there was no law on the point. This marriage was re-established in 1647: "Mémoires de Math. Molé," II, 214. Re-enactment of this law by Napoleon: Senate Decrees of May 18, 1804, 12 and 7, and of Nov. 10, 1852, 6.

⁴ See as to this, "Violence." Roman origin? *Lampride*, "Alex. Sév.," 42; "Cod. Théod." 3, 10, 1; "L. Rom. Cur.," 1, 3; *Meynial*, p. 27. Germanic origin? *Post*, "Bausteine," II, 123. In 614, the "Præceptio" of Clotaire II, 7 and 18, abolishes this law, or, rather, seeks to put an end to the abuses which it gave rise to. "Conc. Orl.," IV, 541, 22 (*Bruns*, 2, 205); "Wis.," 3, 3, 11; 3, 5, 1; *Brunner*, II, 56; *Viолlet*, 411; *Loening*, "D. Kirch.," 2, 605; "Acad. se. Toulouse," 1895 (guardianship of Women, 16); *cf.* *Du Plessis de Grenélan*, "Autor. Pat.," p. 248; *Grimm*, 437. After this the king married the daughters of the lords by force; examples in the old epics, like "Raoul de Cambrai," and in real life (Louis XI and Louis XII): *Viолlet*, p. 411 *et seq.*, who cites *Tagereau*, "Practicien Fr." 1647, p. 624; same right for emperor (*e. g.* in 1232 for Frankfort, *Böhmer*, "Cod. Dipl. Francof.," I, 55), for the king of England, etc., *Pertile*, § 108, n. 59 *et seq.*

⁵ "T. A. C. Norm.," 11, 4; "Gr. C.," 33; "Norm.," 231; *J. d'Ibelin*, 227 *et seq.*; 171 *et seq.*; "Et. de St. Louis," edit. *Viолlet*, 3, 357. — Let us recall the celebrated passage from the "Assizes of Jerusalem," where J. d'Ibelin shows us the Ordinary presenting three barons to his lady vassal for her to choose from, c. 227. *Grawville*, 7, 12. *Cf.* *Glasson* "Hist. du Dr. de l'Angleterre," II, 207; *Pollock and Maitland*, I, 299. The seigniorial right disappeared rather soon in France, at least, generally speaking, and the lady vassal was left with the power to marry herself as she wished: "Olim." IV, 56, 8; "Charroux," 1247, 11; "Montp.," 84; "Bretagne," 678.

serfs.¹ The Council of Trent and the Ordinance of Blois, 1579, Art. 281, were obliged to forbid these abuses on the part of the lords;² but until the Revolution something of the old law which had been abolished remained in the Customs.

§ 115. **The Same.** — (III) **Incapacity.** 1st. *Impuberty.*³ Girls, until the age of twelve years, and boys until the age of fifteen, are presumed not to have arrived at the age of puberty;⁴ the marriage, however, would be valid in case of puberty in fact previous to this age ("malitia supplet ætatem").⁵ Cohabitation after attaining puberty removes this impediment.⁶ 2d. *Impotence.*⁷ The idea that marriage was a remedy for incontinence and the old practice of divorce⁸ led the Church to make an impediment of impotence⁹ (in conformity with the Gallican

¹ A number of Customs of the South of the twelfth and thirteenth centuries allow the inhabitants of those countries freedom with regard to marriage: *Bacquet*, "Aubaine," 1, 4; "Code Matrim.," 1, 217; *Thudichum*, "Ueb. Unanläss. Beschränk d. Verhehlich," 1866; "Ord." XI, Table, see "Mariage." As to the right of the lord, see "Raepsaet," *id.*, 1878.

² Bull of Pius IX, "Apostolicæ Sedis," 1869. *Viолет*, p. 414, likens the compulsory marriages in Canada in the seventeenth century to these facts: shiploads of disorderly women were sent out from the metropolis, and within fifteen days of the time they disembarked every bachelor had to take a wife from among them. *Cf.* Manon Lescaut — let us also liken to this the marriage of soldiers in our day.

³ *Hormann*, "Despons. Impuber.," 1891; Dig. X, and "in VI," 4, 2.

⁴ Twelve and fourteen years completed: Dig. X, 4, 2, 10; *cf.* Roman law (*Ulp.* 11, 28); *Beaumanoir*, 15, 29 (10 yrs.). *Cf.* Puberty at an advanced age among the Alemanni (*Tacitus* 20), *Lagréze*, "Navarre," II, 178. *Caesar*, "B. G.," 6, 21; "Roth.," 155; "Liut.," 129.

⁵ Dig. X, 4, 2, 3, 8; *Montesquieu*, "Esprit des Lois," 23, 7. *Viолет*, p. 415, seems to us to attach too much importance to the Sabine tradition: *B. de Mer ville*, "Majorités," p. 516 (1729); "Code Matrim.," 2, 540. — Possible dispensations (Louis XI). Dig X, 4, 2, 2. In the olden times people were often married before the legal age: *cf.* "Jostice," p. 186; "L. de Droiz," no. 910; *Gautier*, "Chevalerie," p. 351. As to the betrothals or marriages of those who had not attained puberty that were made for them by their parents, *cf. Pertile*, § 108, n. 53; *Etienne*, "Droit de Djébr. et Mar. des Impub. chez les Musulmans," 1898.

⁶ Dig. X, 4, 2, 10; *Boutaric*, "Inst.," 1, 10; *Pothier*, no. 95.

⁷ *A. Hotman*, "Tr. de la Dissol. du Mar. par l'Imp.," 1581; *Tagereau*, "Disc. s. l'Imp.," 1611; *Rouillard*, "Capitulaire," 1600; *Grimaldi*, "Dissert.," 1765; *Boucher d'Argis*, "Null. du Mar. p. e. d'Impuissance," 1756 (with the treatise by *Bouhier*, 1735); *Pasquier*, "Inst. de Just.," p. 63; *Maul-trot*, "Ex. des Princ. s. une Quest. Matr.," (1788); *Richter*, § 274 (bibl.); *Friedberg*, § 145; *Freisen*, 323; *Esmein*, I, 232; II, 273; *Canus*, nos. 1488 s.; *Horry*, "Mar. Chrétien," 1700, p. 237; "Obs.," p. 80. *Cf. Michelet*, "Orig.," p. 53; *Sehling*, *op. cit.* no. 8; see "Encicl. Giur. Ital."

⁸ Roman Law: D., 23, 3, 39, 1 (distinction between castration and the "spado"); *Leo* the Philosopher annuls the marriages of eunuchs: "Const.," 98; D., 24, 1, 61; divorce "bona gratia propter sterilitatem, senectutem, valetudinem"; "Cod. Just.," 5, 17, 10 (impotence just cause for divorce); time of proof of two years, and according to the "Nov.," 22, 6, three years. *Sehling*, "Wirh. d. Geschlechtsgemeinschaft auf d. Ehe.," 1885; *Loening*, "Deut. Kirchenr.," II, 617.

⁹ (A) Just cause for divorce according to *Hincmar* (avoiding a murder);

theories); again, it was necessary for this that the latter be previous to the marriage¹ and incurable. Neither age in the case of the husband nor sterility in the case of the woman affected the validity of the marriage.² It was an easy matter to demand the annulment of the marriage because of impotence;³ it was far less easy to know when impotence existed. The practice wavered between two dangers: very uncertain proofs to be deemed sufficient, as the confession of the spouses,⁴ ordeals,⁵ the oath,⁶ cohabitation for three years,⁷ and then arbitrarily to dissolve the marriage at the pleasure of the parties; or to demand a positive proof and then not to be deterred by any scandal. It is thus that a physical examination by experts⁸ was arrived at, and that in the middle of the sixteenth century the jurisprudence of the Parliament of Paris imposed the ridiculous and shameful proof of the "Congress."⁹ An order of the 18th of

Gratian, c., 33, q. 1; "Council of Compiègne," 757 (the papal legate Georges, accepts this doctrine); "Verberie," 758 or 768 (proof of the cross); "Faux. Capit.," 6, 55 and 91. If there were no consummation of the marriage indissolubility did not exist. — (B) The theory of marriage by mutual consent caused this point of view to be abandoned, and impotence became an impediment. Cf. "Divorce." — (C) The Roman Church admitted that the spouses ought to live like brother and sister: "Compil.," 1a, 4, 16, 2; Dig. X, 4, 15, 2.

¹ Was a mistake on the part of one spouse necessary? Controversy: *Esmein*, I, 240; Dig. X, 4, 15, 4.

² According to the theory finally accepted, three kinds of impotence are recognized in the case of a man: (a) natural or accidental impotence; (b) frigidity (*Sixtus V*, "Motu Proprio" of 1587; *Richter*, "Conc. Trid.," 556; his wife may remarry; but for him there is a prohibitive impediment); (c) hidden impotence because of some sorcery (the "malificiatus" husband can remarry, for the impotence is relative); *Hincmar*, "De Div. Loth.," 15 (*Migne*, "Patr. Lat.," 125, 716); "Dec. Capell. Tolos.," 381. It was only at the end of the fourteenth century that they began to be concerned with the very rare cases of impotence in women, which were ordinarily relative; Dig. X, 4, 15, 4, 6; *Durand*, "Spec.," P. IV, p. 444.

³ From this arose abuses and divorces in disguise; "Decis. Cap. Tol.," *loc. cit.*

⁴ At least, if he is in favor of upholding the marriage; cf. *Beaumanoir*, 18, 15.

⁵ "Conc. Verberie"; cf. c. 1, c., 33, q. 1; Dig. X, 4, 15, 1. At the end of the twelfth century the Church condemns them: Dig. X, 5, 35.

⁶ Oath "cum septima manu"; c. 2, c., 33, q. 1; Dig. X, 5, 15, 5; *Esmein*, II, p. 285, n. 4 (still in force).

⁷ *Supra*, laws of Justinian: "Petrus," I, 37; Dec. d'Yves, 8, 79, 80; cf. *Burchard*, "Dec.," 9, 44 (Dig. X, 4, 15, 1); *Bernard de Pavie*, "Summa," p. 177. The time of proof is useless if the impotence can be established by means of a direct examination; recourse is had to this examination in cases of sorcery.

⁸ Examination to establish the virginity of the woman: Dig. X, 2, 19, 4 (1187), 4, 15, 6; fear of mistake (c. 4, c., 27, q. 1). To reciprocate, the judges ordered that the man should be examined at the time the examination was customary for the wife: cf. *Viollet*, 432, 2. Regulations of the Ecclesiastical Judge of Cerisy, 54a.

⁹ About 1550. *Anne Robert*, "Rer. Judicat.," 4, 18; *A. Hotman*, "Dissol.

February, 1677, abolished this indecent procedure.¹ Thenceforth the tribunals, without any certain rule, prescribed sometimes an examination, sometimes three years' cohabitation.² To-day, in case this fault is present, the canonists do not admit of any nullity, because it is impossible to prove that the impotence is incurable and previous to the marriage. In other cases, if it is established that the marriage has not been consummated, the assemblage of the council asks the pope to make use of his power in order to dissolve the marriage; thus are avoided scandalous and unreliable investigations, and each one of the spouses is authorized to marry again.

§ 116. **The Same.** — (IV) **Impediments resulting from Relationship.**³ 1st. **Natural relationship.** Starting with the very general text of "Leviticus" viii, 6, and exaggerating the horrors of incest, a sentiment very strongly marked in Rome, the Church has come to consecrate, or pretty nearly so, the old system of exogamy, or prohibition of marriage within relationship.⁴ The influence of Christian ideas was already felt in Roman legislation under the Lower Empire, by the forbidding of marriage between uncle and niece,⁵ between first cousins,⁶ between brother-in-law and sister-in-law.⁷ The severe tendency which these innovations display

du Mar. par l'Impuissance," 1610 (2d ed.). The innovation was introduced by the ecclesiastical judges; from the fourteenth century a few canonists, such as Jean d'André, proposed a proof in the presence of matrons; although this opinion did not prevail (*Sanchez*, "De Mat.," 7, 109, 15; "res. turpissima" proving little, no text prescribes it) it was introduced into practice by agreement of the parties (this was the suggestion of an impertinent person, says *Hotman*, who furnished the first example of it). An order of the Parliament of Jan. 20, 1587, decreed this: *Cabassut*, "Theoria et Praxis Juris Canon.," 1, 3, c, 25, no. 6; *P. de Croos*, "France Jud.," 1878-1879, 392.

¹ "J. du Palais," II, 780. Sharp criticism as early as the sixteenth century: cf. *Fevret*, "Abus," 2, 106; *Voltaire*, see "Dict. Phil." The Marquis of Langeais, declared to be impotent, marries nevertheless and has seven children: *Cabassut*, *op. cit.*, 1, 3, c, 25, no. 4; *F. de Lamoignon*, "Plaid. s. le Congrès," 1680; *Isamb.*, 19, 174.

² "Recueil des Pièces au Procès de Gesvres, etc.," 1714; *Pothier*, 96; *Esmein*, II, 284; "Hermaphrodites," "Acta S. Sedis," 21, 501.

³ *Richter*, § 275 (bibl.); *Friedberg*, § 146; *Loening*, "G. d. d. Kirchenr.," II, 542; *Freisen*, 371; *Esmein*, I, 335; II, 259; *Pothier*, no. 121; *Launay*, 2, 6; *Luckock*, "Hist. of Marr.," 1894; *Huth*, "The Marr.," 1893.

⁴ (cf. "Numbers," xxxvi, 7: All Israel shall take a wife in their tribe and from among their relatives, "ut hereditas permaneat in familiis." As to the old Roman law, see *Cug*, "Inst.," p. 211; *Chaisemartin*, "Prov.," p. 298; "Heirath ins Blut — Thut selten gut.")

⁵ In 342: "Cod. Théod.," 3, 12, 1 (cf. "Marriage of Claude").

⁶ "Cod. Théod.," 3, 12, 3 (396); 3, 10, 1 (409). Abrogation in Justinian law, "Cod. Just.," 5, 4, 19 (405); "Levit.," xviii, 6-18; xx, 11-21; "Deuter.," xxvii, 20-23; "Can. Apost.," 19; *St. Ambroise*, "Ep.," 60 (although permitted by Moses, these marriages are forbidden "quadam voce naturæ"); *August.*, "De Civ. Dei," 15, 16.

⁷ During the classical period a relationship in the collateral line was not

gained strength little by little¹ and finally became exaggerated in the canon law to such a point that marriage was forbidden between relatives (anathema against whosoever marries any one "de propria cognatione") (eighth century).² The rule is thus understood: in the direct line the prohibition extends to infinity (as in the past); in the collateral line, also to infinity, in theory, and in fact to the seventh degree, after which the Roman law gives no more effect to the "cognatio."³ This is not all. Each people calculating relationship in its own way, and the Germans having a particular method of computation, the impediment was found to be extended out of all proportion among them; their seventh degree was the equivalent of the fourteenth degree according to the Roman laws.⁴ The Church adopted this method of calculation and extended it to all the faithful. Outside of the reasons given in the books and of the old repugnance for incest,⁵ the canonists

an obstacle to marriage: "Cod. Théod.," 3, 12, 2 (355) *et seq.*; "Cod. Just.," 5, 5, 5 *et seq.*; "Mark," vi, 18; "Conc. Elvire," 306, c. 61; "Néocésarée," 314, c. 2; Rome, 384-398, nephew and uncle's widow; "Epas," 517, *id. Id.*, "dr. juif," 1st "Conc. Orléans," 18; "Burg.," 36; "Acta Sanct.," Oct. 5th, III, 59.

¹ Avitus of Vienna and the Council of Epao, 517, c. 30: prohibition for the future of marriage between cousins who were issue of persons of the whole blood. Excommunication: "Orléans," 538, 10. — Resistance: *Greg. Tours*, 4, 26 and 9; 5, 2-14; "Dec. Childeb.," 596, c. 2. (death for anybody who shall marry his stepmother; separation in the case of marriages between brothers-in-law and sisters-in-law, excommunication and, if necessary, expulsion from the court, conferring of their possessions upon their relatives). *Frédég.*, 54; "L. Sal.," 13, 2; *cf.* "Inst.," c. 3; "Cod. Théod.," 3, 12; "Alam.," 39, 1: relations by marriage, first cousins; separation by the secular judge and confiscation of possessions: "Bai.," 7, 1; "Rib.," 69, 2; *Sickel*, "Acta Karol.," no. 209.

² "Cap.," 743, 3 (*Boret.*, I, 28); and in the Index, see "Incestus"; "Conc. Tours," 567, 21.

³ The prætor calls to the "bonorum possessio" children born of cousins who are the issue of persons of the whole blood: *Dig.*, 38, 10, 10; 38, 8, 1, 3; *Paul.*, "Sent.," 4, 10, 8; 4, 11, 7 (Int.). — *Cf.*, however, "Nov.," 118, 3. — 2d, "Conc. Tolède," 531, 5; "Wis.," 4, 1: 6th degree only. Such is the rule of the Eastern Church; *cf.* "Wis.," 3, 5; 12, 2, 6 and 3, 8; *Isid.*, "Etymol.," 9, 6; "Conc. Rome," 721, 9; *Agde*, 506, 61; *Vermer.*, 758-68, 1 (4th degree); *Greg. II*, 726 (beyond the 4th degree); *Greg. III*, 732 (7th degree); *Jaffé*, nos. 1667, 1750; *Leo III*, 800 (*Jaffé*, nos. 1724, 1912); Roman laws, virtue of the number seven. — "Compiègne," 757 (4th and 3d degree); "Mayence," 813, c. 54 (4th degree); "Worms," 868, c. 78; "F. Capit.," 6, 130, 229 (7th degree); "Douzy," 874; *cf.* "L. Sal.," 44; "Rib.," 56, 3; "Bai.," 14, 9, 4; "Roth.," 153; *Loening*, II, 255; *Stobbe*, V, 282; *Bluhme*, "Abhandl. f. Homeyer," 1871, p. 11.

⁴ *Cf.* heresy of the incestuous. "Ecole de Ravenne," I; *Gratian*, C., 35, q. 5, c. 2; *Migne*, "Patr. Lat.," 145, 19. From the time of Gratian this method of calculation was generally admitted. *Beaumanoir*, 19 (same results as the canon law).

⁵ Penalties for incest: "Cod. Théod.," 3, 12 and "Int. Wis.," 3, 5; "Rib.," 69, 2; "Burg.," 36; "Alam.," 39, etc.; *Loening*, I, 560; II, 547; *Van Espen*, III, 4, 48; *Ferrière*, see "Diet.," and "Inceste Spirituel"; *Boutaric*, I, 10, 12; see *Guyot*, and authors cited. The civil legislation punished "incest" or union between relatives within the prohibited degree in a more or less serious manner, according to the degree of relationship (see "Encicl. Ital.").

have justified these very extensive prohibitions: (a) by physiological reasons; from these unions, they say, "procreari solent cæci, claudi, gibbi et lippi";¹ (b) for moral reasons; if marriage were possible between relatives, it is to be feared that there would be no reservation or restraint in the life of the family; (c) for reasons of benefit to society; marriage, says St. Augustine, should be a school of love, "seminarium charitatis"; it is only between strangers that it fulfills this higher object, relatives being already attached to one another by ties of blood.²

The method of **computing relationship** employed by the Roman law was abandoned as far as marriage was concerned for ordinary reckoning, according to which the number of degrees or generations between the relatives and the common ancestor were sought for, only taking into account the farthest removed of them when they were of a different degree.³ Thus, two first cousins separated from each other by four generations are relatives in the fourth degree according to the Roman computation. But, as they are only separated from the common ancestor by two generations according to the canonic computation, they are relatives in the second degree; uncle and nephew are in the third degree Roman and in the second degree canonic ("tot gradibus collaterales distant inter se quot uterque (remotior) distat a stipite communi").⁴ This clumsy procedure is related to the Germanic customs.⁵ The barbarians represented generations by the limbs of the upper part of the body, rather like children who count on their fingers.⁶ The head represents the spouses; the elbow, the children; the

¹ "Faux Capit.," 7, 179.

² A reason of vital importance in the Middle Ages. A marriage may cause the cessation of secular enmities between two families and give to one party useful allies against another.

³ "Form. ad Roth.," 153. Gregory I to Augustine, towards the end of the sixth century or the beginning of the seventh century (authenticity doubtful) (*Jaffé*, no. 1414). End of the seventh century; "Pœnit." of *Theodorus*, c. 13; Gregory II to Boniface, 726 (prohibition to the 4th degree); Greg. III, 732 (7th degree); Zachariae, 747 (marriage is forbidden as far as relationship can be traced); "Compiègne," 747, 757 (one of the spouses is of the fourth degree, the other of the third); "Wis.," 4.

⁴ "Actæ Sæ. Sedis," 14, 226 (1884).

⁵ *Contra Freisen*, 436; according to this author, this method of calculation was created by the Church: cf. "Sachsensp.," 3; *Thévenin*, "Textes," no. 46; *Laspeyres*, "Diss. Canonice Computations," 1824; *Siegel*, "Die German. Verwandtschaftsberechnung," 1853; *Delbrück*, "Die Indogerm. Verwandtschaftsnamen," 1889; *Stultz*, "Verwandtschaftsbild d. Sachsensp.," 1890; *Amira*, "Recht," p. 156. Cf. *infra* "Inheritance"; *Guyné*, "Degrés de Parenté," in the "Tr. de la Représ.," 1779; *Brunner*, "Anglonorman, Erbfolge system," p. 15.

⁶ "Rib.," 56, 3; "Roth.," 153.

shoulders, the grandchildren; the neck, the great-grandchildren; the wrists and the joints of the fingers, subsequent degrees; the nearest after these are on the nail.¹ From the seventh degree, going back to the common ancestor and redescending to the seventh degree, one gets a total of fourteen degrees. Relationship stops at this point and, consequently, the impediments. But this point is so remote that the relationship is often forgotten, or ignored; the spouses do not seek to discover it unless they are tired of the marriage, and then if only the judges are accommodating, it is not a rare thing to find them making this discovery. After ten or twenty years of life together they separate, and public opinion is not to be deceived; it calls divorce that which the subtlety of the jurists only classifies as nullity.² The Church felt that it had gone too far; it began by remedying the evil in the granting of frequent dispensations, and then the Council of Lateran, 1215, limited the impediment to the fourth degree (in the collateral line) for the peculiar, outlandish reason that there are four humors in the body.³ This was still going too far, and the practice of dispensations persisted as it had done in the past.

2d. **Civil relationship**⁴ between relatives by adoption had the same effect as natural relationship,⁵ or, rather, would have had if the adoption had been practised.

3d. **Spiritual relationship** (the relationship of godfather and godmother)⁶ was the result of baptism; the godfather and the godmother being the same as the spiritual father and mother of the children baptized; marriage between them was forbidden (Justinian).⁷ The impediment was extended; in the eighth cen-

¹ "Sachsensp. Landr.," I, 3, 3; cf. *Gratian*, C., 35, q. 5, c. 1 and 2; Dig. X, 4, 14, 7; *Wasserschleben*, "Bussord.," p. 45; *Migne*, "Patr. Lat.," 140, 781 (*Burchard*, 7, 10). As to difficulties, cf. *Heusler*, 593, 600; *Stutz*, *op. cit.*

² *Isambert*, I, 184 (*Phillipe-Auguste*); III, 309 (*Charles IV*); XI, 313 (*Louis XII and Jeanne de France*). Cf. *Gautier*, "Chévalerie," 353; "Fors de Béarn," 267.

³ Dig. X, 4, 14, 8; *Galien*, "De Elem.," 1, 5; 2, 2; *Beaum.*, 18, 7. As to the Protestant law, cf. *Friedberg*, § 146, II.

⁴ *Freisen*, 507; *Esmein*, I, 362; II, 261.

⁵ To a lesser extent, however (the person adopting or his wife, person adopted or his wife), cf. C., 30, q. 3, c. 15.

⁶ *Laurin*, "Arch. F. Kath. Kirch.," XV, 226.

⁷ "Cod. Just.," "De Nupt.," 26; "Conc.," "in Trullo," c. 53; "Rome," 721, c. 4; "Compiègne," 753 (cohabitation should cease if one of the spouses held a son of the other at the baptismal font); "Mayence," 813, c. 55; "Capit.," 5, 167; 6, 4; 7, 179; C., 30, q. 1, c. 2 and 3 (modifies the preceding rule). In the thirteenth century marriage is forbidden between the person baptizing and the person baptized and their relatives; between these persons and the godparents; between godparents themselves; between the children of the godparents and the godchild (annulment of the marriage of Charles

ture a godfather and godmother could neither marry each other nor marry the father or mother of the godchildren. Then, owing to a reaction analogous to that which is to be observed in the case of natural relationship, the effects of spiritual relationship were limited. According to the French practice of the monarchic period, the godfather is allowed to marry the godmother.¹

4th. **Relationship by Marriage**² ("affinitas")³ was established: (a) by the consummation of the marriage, between each spouse and the relatives of the other,⁴ as they had become but one flesh, the relationship of one was communicated to the other,⁵ and as a consequence the prohibition was the same as far as it affected the relationship; after the Council of Lateran, 1215, it was limited to the fourth degree in the collateral line; (b) as a consequence of an illicit intercourse ("delictum publicum et notorium");⁶ it was restricted to the first and second degrees by the Council of Trent (Sec. 24, Chap. 4).⁷

5th. An impediment called one of **Public Propriety**⁸ resulted: (a) from betrothals⁹ between each engaged party and the relatives of the Handsome and Blanche of Burgogne); between the surviving spouses of godparents, the person baptized and their relatives. The Council of Trent s. 24, c. 2, limited this impediment as is pointed out in the text: *Viollet*, 435; *Friedberg*, § 148 (Evangelical Church).

¹ *Boutaric*, "Inst.," 1, 10, 60.

² "Thes.," *Oehlricks*, III, 2; *Freisen*, 439; *Esmein*, I, 374; II, 262; *Friedberg*, § 147.

³ Jewish law: "Leviticus," xviii, 6; *Stubbe*, "Ehe in Alt. Testam.," 60. Cf. as to this: the levirate in Roman law, D., 23, 2, 14, 4; 38, 10, 4, 5; "Cod. Just.," 5, 4, 17. — Christian influence: in 355 prohibition of marriage between brothers-in-law and sisters-in-law; "Cod. Théod.," 3, 12, 2; 5, 5, 5; "Ann. Ec. Sc. Pol.," 1900, 316.

⁴ A conception which is found in *St. Augustine* (§ 430) and which prevailed in the eighth century: C., 35, q. 32, c. 15. Cf. "Conc. de Néocésarée," 314 c. 2, prohibition of marriage with the brother of the deceased husband (cf. "Mark," vi, 18); *Eliberr.*, 305, c. 61: with the sister of the deceased wife; "Rome," 402, 11: with the wife of the uncle. "Dec. Childeb.," 596; C., 35, q. 2, c. 7; Dig. X, 4, 14, 8; cf. *Loysel*, 134: "Morte ma fille, mort mon gendre."

⁵ The canon law ended by drawing a distinction between, 1st, the marriage "primi generis" between each spouse and the relatives of the other; 2d, the marriage "secundi generis" between each spouse and the "affines primi generis" of the other; 3d, the marriage "tertii generis" between each spouse and the "affines secundi generis" of the other. The impediments resulting from this species of affinity were done away with in 1215: C., 35, q. 10; q. 2, c. 12; *Pothier*, no. 161; *Durand de Maill.*, "Dict.," see "Affinité." — Evangelical Church, *Friedberg*, § 147, II.

⁶ Earliest traces in a pseudo-Gregorian letter: *Ainschus*, "Pseudo-Isid.," 749; Dig. X, 4, 13, 9; "Affinitas Superveniens"; Dig. X, 4, 13, 6; *Hörmann*, "Quasi-Affinität," 1897.

⁷ Evangelical Church: *Friedberg*, § 147, II.

⁸ Cf. *Pothier*, no. 224 (marriage of a man with the stepmother of his deceased wife).

⁹ Dig., 23, 2, 12; 14, 4; *Gratian*, C., 27, q. 2, c. 15; C., 17, q. 2, c. 31; "VI.," 4, 1; "Trente," s. 24, c. 3; "Acta S. Sed.," 12, 147.

tives of the other, for this would be a marriage "in spe" and would produce a "quasi relationship by marriage"; the Council of Trent limited this to the first degree and made it subordinate to the validity of the betrothals; (b) of a marriage not consummated.¹

The Law of September 20, 1792, simply forbade marriage: (a) to infinity between relatives or relations by marriage in the direct line; (b) between brother and sister in the collateral line. Every other impediment resulting from relationship was done away with.

§ 117. **The Same.** — (V) **Incompatibility of Marriage with Certain other Conditions.** 1st. **Existence of a previous marriage**² ("ligamen").³ Bigamy is forbidden,⁴ and still more so is polygamy.⁵ 2d. **The entering into higher religious orders** (above and including an under-deaconship) is a sort of marriage.⁶ 3d. It is the same with regard to **monastic vows**.⁷ 4th. **Diversity of religion**

¹ "Cod. Just.," "De Inc. Nupt.," 5, 5, 8; Dig. X, "de Spons.," 4.

² *Scaduto*, 420; *Freisen*, 364, 626; *Esmein*, I, 267; II., 240; *Cornu*, "Thèse," 1887.

³ Polygamy in the Bible: "Deuter.," xxi, 15 *et seq.*; "Paralip.," 2, 24, 3. Cf. "concubinage." — The idea of the sacrament and the influence of the Roman law have caused bigamy to disappear: "Conc. de Trente," sess. 24, c. 2. Cf. "Anabaptists," "Mormons."

⁴ Proof of the death of the absent spouse: Dig. X, 4, 1, 19; "Acta S. Sedis," 436. See "Certificates of the Civil Status," "Marriage Capable of Annulment," "Second Marriages."

⁵ "Tr. de Polygamia," 1610 (extract from *Th. de Bêze*); *Weise*, "Ex. Bigamia per Dispens.," 1824; *Koestlin*, "Luther," 2, 481; *Daphnaeus Arcuaris*, "De Polyg.," 1679; *Aletheus*, "Polyg. Triumph.," 1682; *Rady*, "Reform. in B. Z. Doppelhe d. Landgr. Philipp.," 1890; *Luther*, "Mém.," 2, 60; "Mercur de Fr.," 1757, 95; *Grimm*, 440.

⁶ As to ecclesiastical celibacy, see *Gratian*, D., 27, c. 8; *Freisen*, 759, 763 impediments "ordinis votii" established by way of interpretation, and not by law). Parliament annulled the marriages of priests (Order of Aug. 22, 1640; cf. *Marnier*, "Etabl. de Norm.," p. 139. Rejected by the Protestants, ecclesiastical celibacy is attacked by the philosophers of the eighteenth century: *Montesquieu*, "Espr. des Lois," 23, 21; 25, 4; *Diderot*, "Œuvres," ed. *Garnier*, vol. 14, p. 54; "Inconv. du Célibat. des Prêtres," 1781. The Abbé of St. Pierre considered it a fatal thing to the State and the Church, as it deprived one of well brought up children and, as a consequence, of honest people, and the other of good Christians. The Memorials of the States General complained of the scandals which resulted from this celibacy (cases of adultery and seduction). After 1789 many pamphlets demanded its abolition: *Mautrot*, "Discipl. de l'Eglise s. le Mar. des Prêtres," 1790. In 1791 the Legislative Assembly refused to deprive married priests of their salary. From that time on many priests were married. The Convention made various provisions in their favor: *Duvergier*, V, 107; VI, 37, 97, 214, 351; *Cerati*, "Du Célibat et du Mar. des Prêtres," 1829; *Plocque*, "Condition Jur. du Prêtre," 1887; *Theiner*, "Einführ. d. Ehelosigk.," 1898; *Horoy*, "Mar. du Prêtre," 1890; *infra*, "Concubinage"; "Capitul.," "table," see "Sacerdotes"; "Wis.," 3, 4, 18; Dig. X, 4, 6; 3, 1, 2, 3. As to the English clergy see *Glasson*, "Inst. Anglet.," 5, 90; *Laurin*, "Coelib. d. G.," 1880.

⁷ The Roman and Frankish laws pronounced penalties against anybody

("dispar cultus")¹ creates an impediment which recalls the old impediment resulting from a difference in social condition.² The Roman laws forbid marriages between Christians and Jews.³ After the fourth century the councils forbid Christians to marry with infidels, as the Old Testament had forbidden the Jews to do;⁴ but the nullity of such marriages was not decreed until the middle of the twelfth century.⁵ The reason given was that marriage, being a sacrament, assumed that those who contracted it had been baptized.⁶ The Eastern Church even annulled marriages with heretics;⁷ in the West heresy was looked upon as simply a prohibitive impediment.⁸ The question was of no importance excepting as regards the Reformation, and when the Council of Trent had required the presence of the parish priest in order to make the marriage valid, the Church was obliged to regulate mixed marriages and to give its opinion upon marriages con-

who married a virgin or a widow who had made a vow of chastity: "Wis.," 3, 5, 2; "Liut.," 30, 95; *Greg. Tours*, 9, 39. The Edict of Clotaire, 614, 18, annuls these marriages. The marriage of monks was forbidden, under penalty of annulment, only at a rather late period: "Conc. Tours," 567; "Trosli.," 909, 8; "Latran.," 1123, c. 21; Dig. X, 27, q. 1, c. 22; "Trente," sess. 24, c. 9; *Pothier*, no. 112: simple vows do not annul the marriage; it is only solemn vows that have this effect, and on this point it is less the vows themselves than the religious professions to which these effects are attached: C., 1, "in VI," 3, 15. French jurisprudence does not admit of any tacit profession. "The coat does not make the monk."

¹ *Wiesenhahn*, "De Imped. Disp. Cultus," 1865; *Freisen*, 635; *Esmein*, I, 216; II, 267; *Friedberg*, § 150 (bibl.).

² And which makes the "consortium omnis vitæ" difficult. The Church sees therein a special danger to the faith.

³ "Cod. Théod.," "De Jud.," 6 (Death); C., 28, q. 1, c. 17 and 10; *Beaum.*, loc. cit.; "Cod. Just.," I, 9, 6. The Evangelical Church condemns them with Melanchthon, contrary to Luther: *Strampff*, 283; *Sarcerius*, "V. Ehestande," 1556 (82, 5); "Orléans," II, 19 (*Bruns*, 187), etc.

⁴ Disfavor: *Paul*, 2, "Cor.," vi, 14; 1, "Cor.," vii, 12; *St. Augustine*, "De Fide," 19; *Tertull.*, 2 "Ad Ux.," 2-8. St. Augustine tolerates them (*Monica* converts *Patricia*): *Ambros*, "De Abraham," I, 9; "Conc. Arvern.," 535; *Loening*, II, 565.

⁵ *P. Lombard*, 4, D., 39, a; *Gratian*, C., 38, q. 1, c. 14; *Bernard de Pavie* ("imped. dispar cultus"); *Benoît XIV*, "Bulle Singul. Nobis" custom.

⁶ The marriage of infidels (with one another) not being a sacrament, is not absolutely indissoluble; divorce is possible ("casus apostoli, privilegium Paulinum"; *Paul*, "1 Cor.," vii, 12, who only gave advice in referring to the civil law of his period); C., 28, q. 1, c. 4; Dig. X, 4, 19, 7; 3, 22, 6; 3, 33, 1; a spouse, upon being converted, can repudiate the other spouse when the latter does not wish to continue to live in common or renders it insupportable because of religion ("contumelia Creatoris," a sort of adultery), *Benoît XIV*, Feb. 9, 1949 (India); *Esmein*, II, 270; *Desessarts*, "Dissert.," 1763, 1765; *Guyot*, see "Mar." (converted Jew).

⁷ But not with schismatics: "Conc.," "In Trullo," 692, c. 72. In this sense *Bernard de Pavie*, "Summa de Matr.," p. 291; *Tancred*, id., vol. 24.

⁸ *Durand*, "Spec.," 4, 3, 2. Baptism is sufficient, even if it is performed by a heretic, for one to be a Christian: *St. Thomas*, "Comm. in IV l. Sent.," d. 39, q. 1, Art. 1; *Agde*, in 506, c. 67.

tracted by heretics among themselves.¹ In 1680 an Edict of Louis XIV decreed the nullity of marriage between Catholics and Protestants; it was in the same spirit as that of the canon law since the Reformation; the Catholic Church only allowed such marriages by means of a dispensation of the Pope, and upon condition that the heretic forswore his beliefs before the celebration of the marriage in the presence of the Catholic priest.² Only in cases where it did not have sufficient power did the Church resign itself not to demand the forswearing and to the taking of precautions with the object of avoiding the conversion of the spouse who was a Catholic³ ("impedimentum mixtæ religionis"). It is this "modus vivendi" which is still the foundation of ecclesiastical discipline. 5th. **Impediments to marriage between the spouse guilty of adultery**⁴ and his accomplice⁵ (if they have promised to marry each other). 6th. **Between one of the spouses and the murderer of the other.**

§ 118. **The Same. — (VI) Prohibitive Impediments. 1st. Be-**

¹ *Benôit XIV*, "Déclaration," Nov. 14, 1741: validity of the marriages of heretics in the Netherlands. Extension to the majority of the Protestant countries; wherever the Council of Trent was not made public the old law subsisted (England); it was the same thing wherever it was practically impossible to conform to it: *Friedberg*, § 150, no. 25.

² *Benôit XIV*, "Encycl. p. la. Pologne," 1748; *Richter*, "Conc. Trid.," 559. ³ (A) Dispensation granted by the bishop without any abjuration: (*Benôit XIV*, 1750; *Jacobson*, "Ueb. Gem. Ehen," 1838); the forms of the Council of Trent are not necessary (*Bênôit XIV*, 1741); they simply demand a promise that all the children shall be brought up in the Catholic religion (*Pius VI*, 1782), or they are even contented with a division (Silesia). At the end of the eighteenth century this impediment is abolished in effect in certain dioceses (Mayence, etc.). — (B) More severe tendencies in the nineteenth century. A written declaration under oath by which the heretic pledges himself in the presence of two witnesses to allow his spouse freely to practice her religion; the Catholic promises to do everything in his power to convert his spouse. Both spouses pledge themselves to bring up the children in the Catholic Religion. (Nevertheless, they decided that the boys should be brought up in the religion of the father and the girls in the religion of the mother.) The spouses also promised not to present themselves before heretic ministers in order to have their union blessed. The Catholic parish priest must not bless the spouses; he takes part as a witness outside of the church when the exchange of consent is given ("assistentia passiva"). The Holy See can dispense with these conditions: "Acta. S. Sed.," 16, 207. — Measures of retaliation in Germany: *Friedberg*, "Ev. Verfassungsgr.," 279, 282.

⁴ *Schultz*, "De Adult. Matr. Imped.," 1857; *Freisen*, 615; *Esmein*, I, 384, 398.

⁵ Originally a perpetual penance and a prohibition of any future marriage: *Frank*, "Bussdisciplin.," 670; *Loening*, II, 567; *Réginon*, 2, 235. Following this temporary penance: *C.*, 31, q. 1, c. 5; "Capit. Compend.," 757, c. 11; "Conc. Tribur.," 895, 40. Estimation of the bishop. The impediment does not become an invalidating one excepting in *Gratian* and *Dig. X*, 4, 7, 6; 4, 7, 1; "Summa Rolandi," p. 155; "Ord. de Genève," 1541 (*Richter*, *Kirchen-ordn.*, I, 349). Cf. *Strampff*, "Luther," p. 279; *Böhmert*, *op. cit.*

trothals; there is an impediment between one of the betrothed and every person other than the other betrothed. 2d. **An Ordinary vow**. 3d. **Public penance**. 4th. **Heinous crime**: murder of a spouse, of a husband by his wife or vice versa, marriage with a nun. 5th. "**Tempus feriarum**": from Ash Wednesday to Easter Week;¹ during the three weeks which precede the Feast of Saint John the Baptist; from Advent to Epiphany. 6th. "**Interdictum Ecclesiæ**" or prohibition by the ecclesiastical judge of contracting marriage until the prohibition shall be removed, because it is to be feared that there is an impediment.² 7th. **Heresy**.

§ 119. **Preventing a Marriage**.³ — (I) *Evangelical Denunciation*.⁴ In order to assure respect for these numerous impediments, the Church created denunciations. When publishing the banns of the marriage the priest declares that it is the duty of every one of the faithful to make known any impediments which may exist. The parish priest who is notified of the existence of some impediment should put off the celebration of the contemplated union until such time as the ecclesiastical judge shall have permitted it to take place; the latter sends forth an interdict of the marriage as soon as he has received this notice. (II) *Injunction* (fourteenth, fifteenth centuries).⁵ This method, a result of practice, differs from the preceding⁶ in that the person offering opposition is a party to the proceedings with regard to the possibility of the marriage (costs). The right of claiming injunction belonged, perhaps, first of all, to the betrothed who claimed performance of a prior

¹ Council of Laodicea, 368. "Trente," s. 24, c. 10. Certain dioceses have special customs, — for example, it is forbidden to celebrate marriages at night.

² Excommunication did not allow of the receiving of any sacrament; as a consequence, people who were excommunicated could not receive the nuptial benediction before being absolved. Now, actors were regarded as disgraced and excommunicated (Council of Arles, 314, c. 5). It was for this reason that the parish priest of Saint-Sulpice refused to marry Talma. The letter addressed by the latter to the Constituent Assembly and read at the meeting of July 12, 1790, was the starting point of reforms with regard to marriage. In the same category of ideas let us recall those verses of Boileau attesting that they were refused religious burial:

"Avant qu'un peu de terre obtenu par prière
Pour jamais sous la tombe eut enfermé Molière."

Guyot, see "Comédien."

³ Pothier, no. 82. See Durand de Maillane, *Esmein*, I, 421.

⁴ "Matthew," xviii, 15; Durand, "Spéc.," 3, 1, 14. Verbal declaration without any forms: Fournier, "Officialités," 256.

⁵ Register of the Ecclesiastical Judge of Cerisy, "Oppositio" or "impeditio" (50b, 58, etc.).

⁶ "Confér. de Paris," I, 269; see Guyot, Ferrière, Descombes, "Recueil," 2.

promise of marriage; finally, it was granted to whoever was interested in preventing the marriage from taking place, and those who called themselves engaged or married were considered as such, as were parents with respect to the marriage of their children, guardians or trustees with respect to that of their minor wards. Injunction was by means of a writing, signed by the person offering opposition, and of which the parish priest was notified by the bailiff. However little foundation it seemed to have, although it might be without object, it prevented the parish priest from proceeding with the celebration of the marriage until withdrawal granted by the party or by the judge.¹ It was exceedingly inconvenient, because unjustified difficulties and delays prevented a great number of marriages from taking place.² It was not enough to punish vexatious oppositions with penances, as did the canon law, with damages, as did the parliaments. Following the regulating Order of April 28, 1778, the Law of September 20, 1792, IV, 3, was obliged to remedy the evil by limiting to a very small number of persons the right of claiming injunction (father, mother, etc.) and in compelling the judges to decide upon the question with little delay.

§ 120. **Dispensations.**³—From these all too numerous and unjustifiable impediments the Church found itself obliged to grant dispensations; so that certain of them, although qualified as invalidating impediments, could be removed; it was in their case a forerunner of abolition.

In olden times there were no dispensations, properly speaking; the Church only exercising a disciplinary power over marriage, it was for the ecclesiastical judge to uphold or to dissolve marriages according to circumstances. But, whilst the canon law constituted true legislation as far as matrimony was concerned, the "dispensatio" seemed like a prerogative belonging exclusively to

¹ Order of June 15, 1691: register of opposition and withdrawals to be kept by the parish priests. Penalties against the parish priest who celebrated a marriage in the face of opposition: Suspension for three years pronounced by the ecclesiastical judge, condemnation to pay damages by the secular judge.

² *Isamb.*, XXIV, 388. Opposition based upon a civil interest or a verbal promise of marriage could not be received (1777). Complaints of the clergy, 1760.

³ *Richter*, § 280 (bibl.); *Friedberg*, § 151; *Kreslinger*, "Dispens.," 1710; *De Justis*, "De Disp. Matr.," 1739; *Giovine*, *id.*, 1863; *Du Perray*, "Tr. des Disp. de M.," 1719; *Collet*, "Tr. des Disp.," 1777. Taxes in *Horry*, "Mar. Chrétien in F.," (1700); *Durand de Maillane*, see "Dict. de Dr. Canon," *Pothier*, no. 252; *Maultrot*, "Examen des Princ. s. les D.," (1789); *Caillaud*, "Man. des Dispenses," 1873; *Freisen*, 891; *Esmein*, II, 315; *Pompen*, "Tract. de Disp.," 1896; *Brandhuber*, "Disp.," 1838.

the legislator. In the twelfth century, at least, the general power of granting dispensations was reserved to the pope,¹ and very exact rules determined conditions under which they were applicable. Whilst the State disputed the right of the Church to legislate on the question of marriage, it did not fail to claim for itself the right of "dispensatio" for the impediments which it had itself created.²

It is admitted that the impediments of natural or divine law do not allow of any dispensations;³ only the impediments of human law could be removed⁴ by the Church⁵ (or by the State). For example: dispensations for marriages between uncles and nieces, first cousins, brothers-in-law and sisters-in-law,⁶ spiritual relations, etc. The Council of Trent decreed that they should only be granted on rare occasions for just cause, and that nothing should be demanded in return for them (Sec. 24, 5). Neither on the first nor on the second of these points were its limitations observed.⁷ As to just causes, they were multiplied to excess ("angustia loci," insufficiency of the marriage portion, widowhood with children, the age of twenty-five years for girls, the presence of secret heretics, a means of terminating an important lawsuit, the preservation of the property of an illustrious family).⁸ The procedure consists in addressing a petition to the pope; it is presented at

¹ The bishops have it only as an exception. — Marriage of King Robert with his cousin Bertha; Pope Sylvestre II. excommunicated the parties and the bishops who had granted the dispensations: *Stiegler*, "Arch. f. K. K.," 1897; "R. G. H.," 1898, 57.

² Cf. Rescript of the Prince at Rome (marriage between first cousins): "Cod. Théod.," "si nupt.," l. Ex.: "Edit.," 1680.

³ Insanity, impuberty, impotence, "ligamen," religious profession; relationship in the direct line between brothers; affinity to the first degree; adultery accompanied by murder; abduction; "dispar cultus."

⁴ Variation. From the time of the Council of Trent dispensations for marriages between first cousins. Uncle and niece: Philip II took as his fourth wife Anne of Austria, who was his brother's daughter.

⁵ The dispensation is given sometimes "in contrahendis matrim.," and sometimes "in contractis"; in the latter case it can compel a remarriage (rehabilitation) or else it validates the marriage retroactively ("Dispensatio in radice matrimonii"; reserved to the pope). Writ of the Penitentiary's Court; it is granted first of all in order to legitimize the children, and later in the interest of the spouses themselves, — for example, "sanatio in radice" of civil marriages contracted in France during the Revolution.

⁶ Rare in the Middle Ages, granted to princes for reasons of State (for example, for the pacifying of the Empire, Otto IV marries the daughter of his competitor, Philip, although she was his near relative); extended later on to mere citizens.

⁷ Dispensations "in forma pauperum," if the parties are unable to pay the customary tax.

⁸ Dispensations sometimes without a cause; the good use made of the sums given to obtain them, they say, is one cause for their being granted.

the Dataria, which issues the dispensations in the form of a commission; the official appointed verifies the facts to which their granting is subordinate and pronounces the dispensation.¹ Modern law has shown itself very stingy in this matter;² this was bound to be so from the moment when only the most necessary impediments were upheld.

§ 121. **Nullity of Marriage.**³ — In the case of the violation of an impediment, an action of an especially disciplinary or penal character, "**accusatio**," was open, first of all, to everybody ("**cuius ex populo**")⁴ against the spouses who had not conformed to the laws of the Church. The ecclesiastical judges dissolved the marriage every time that the impediment was sufficiently serious (invalidating), and let it subsist, excepting for the infliction of penances on the spouses, when it was of no importance. It was too easy to abuse these accusations for the right of making them not to be restrained in many cases.⁵ Thus, when to insist upon carrying out the marriage would not cause the spouses to sin, it is to them alone that the action was given (impotence, impuberty, defect or even absence of consent); it depended upon them whether the marriage should be allowed to subsist.⁶ On the other hand, the principle persisted,⁷ but only the relatives were allowed to take action ("**personæ proximæ et necessariae**");⁸ it is only when the latter are lacking that the action is granted to the "**vicini bonæ famæ**," and, if there are no neighbors, then to strangers.⁹ In case of "**diffamatio**" or public rumor, the judge may of his own accord pronounce the nullity, provided that the right of pleading should not be reserved to the spouses alone.¹⁰

¹ Sentence of the ecclesiastical judge after an investigation and communication with the datary.

² Cf. "Evangelical Church." *Friedberg*, § 152, II.

³ *Pothier*, no. 442; *Richter*, 205; *Walter*, 316; *Freidberg*, § 152 (bibl.); *Fischer*, "Ungültigkeit d. Ehe," ("Jahrb. f. Dogm.," 1889, 253); "Siete Part.," IV, 9; *Esmein*, I, 403; II, 290; *Stobbe*, 249; *Strykius*, "De Matr. Null.," 1739.

⁴ Cf. Roman procedure dealing with accusations: *Beaurepaire*, "Null. de M. en 1553," 1883.

⁵ One can be at the same time accuser and witness, contrary to principle, an exception which can be understood as applying to relatives on questions of relationship, and which was extended to every action for annulment.

⁶ The canon law does not admit of any relative nullity under pretext that marriage cannot be a lame contract. Thus the action can be brought by either spouse. French jurisprudence is contrary to this: *Pothier*, no. 444.

⁷ *Lancelot*, "Inst.," 2, 15.

⁸ "Cod. Théod.," 9, 7, 2; "Cod. Just.," 9, 9, 30 (adultery). Restriction again in certain cases: *Dig. X*, 4, 18, 5 and 6. As to collaterals: *Pothier*, no. 448.

⁹ *Durand*, "Spec.," 4, 4.

¹⁰ *Dig. X*, 4, 18, 2 and 6; 4, 11, 7.

In the fourteenth century the prosecutor of the ecclesiastical judges carried on the examination and brought the action of annulment. In this way absolute nullities came to be distinguished from relative nullities; although invalidating impediments had the same effects, they were not found to be placed under the same category. The jurisprudence of the parliaments contrasted absolute defects, of a public nature,¹ which every interested party² and the public minister himself³ had the right to plead, with relative defects,⁴ which did not have any effect upon public order, and which only gave the right of action to certain interested parties,⁵ such as the spouses, or, rather, one of them, their fathers and mothers, if the marriage was contracted without their consent, and to their guardians in analogous cases.

The actions for the annulment of marriage had, moreover, their own special rules. The canon law declared that the right to these actions could not be lost by expiration of time.⁶ Before the Courts of the Church their procedure was simple and summary.⁷ The testimony of relatives was admissible, but admissions and acquiescence were not allowed for fear of a fraudulent understanding.⁸

The ecclesiastical judges were competent when the annulment of the marriage was the direct object of the prosecution;⁹ if dam-

¹ Invalidating impediments and defects of essential form: lack of publicity and jurisdiction of the priest and absence of witnesses.

² Interest which exists at the time or which afterwards comes into existence.

³ Public scandal: the procurator of the king or the fiscal procurator act, and, if they do not act, then the datary. Declaration of June 15, 1697.

⁴ They covered themselves by means of a ratification: *Jul.*, "Elém. de Jur.," p. 22.

⁵ For example, the spouse who has undergone the violence is the only one allowed to attack the marriage. In the same way, it is only the spouse of the impotent party who can make complaint, and this defect is done away with by long cohabitation. — Collaterals were able (but only with difficulty) to attack a marriage affected by an absolute defect after the death of the spouse when they had an interest in its annulment (for example, to put outside of the inheritance children born of the marriage).

⁶ Innocent III in promulgating the decisions of the Council of Lateran, 1215, as to relationship, declares that the action cannot be lost by prescription in such a case as this. The "Glose" generalizes. Judgment in matrimonial actions has never the force of "res adjudicata" (endangering of souls), *Pothier*, no. 461; *Duperray*, "Dispenses," 1769, p. 320; *Guyot*, "Réc.," see "Impuissance." Prohibition of compounding and compromising in the matrimonial actions. Each party on appeal may suggest new reasons.

⁷ The oath of calumny is not demanded (spiritual causes).

⁸ Dig. X, 4, 13, 5; 4, 18, 3; 2, 27, 10; *Gratian*, c., 35, q. 6, c. 3; *Beaum.*, 18, 16; "Defensor Matrimonii" created in 1741 by the Constituent Assembly; "Dei Miseratione" of *Benoît XIV.*

⁹ Edict of Dec., 1606, 12; 1695, 34; *Bardet*, II, 5, 22.

ages were sought by reason of the annulment, it was necessary to apply to the civil judge;¹ also, the civil judge alone was the one to determine whether the marriage had been celebrated or not (possessory action); finally, as soon as the ordinances or the liberties of the Gallican Church had been violated, recourse was had to the parliaments by means of an appeal as for error.²

Certain marriages, without being annulled, were deprived of their civil effects (for example, the children could not inherit); secret marriages,³ marriages "in extremis;"⁴ and those of persons civilly dead.⁵

§ 122. **Rehabilitation and Repudiated Marriage.** — Marriages which had been annulled were looked upon as having had no existence. The ecclesiastical judges for a long time commanded the spouses to **re-establish** their union, so long as there was no possibility of obtaining dispensations or of the impediment having disappeared; by this was understood a new celebration of the marriage, which this time was regular.⁶ But the parliaments put an end to this abusive practice;⁷ the spouses could re-establish their marriage, but they were no longer compelled to do so. When repudiation was not possible, the spouses who had acted in good faith were first of all likened to spouses who had acted in bad faith; their marriage was of no more effect; thus, the children were looked upon as illegitimate,⁸ a crying injustice from the moment when all too numerous and scarcely known impediments degenerated into a snare for the best intentioned. At an early period (from the time of Peter Lombard), the Church found itself compelled to admit⁹ that, although annulled, the marriage would have the ef-

¹ Collaterals who only have a right to damages.

² Only way open to the father, mother, or guardian who has not given consent to the marriage.

³ Decl., Nov. 26, 1639, Arts. 5, 6 (*cf.* Civ. Cod., 25). The Declaration seems to confuse secret marriages and hidden marriages. But the canon law distinguishes between them. The former are regular, but are not necessarily public. They are entered in a register under seal which is distinct from the regular register: (*Benoît XIV*, 1741); *Mazzei*, "De Matrim. Conscientiæ," 1766; *Hertz*, *id.*, 1702.

⁴ *Boutaric*, "Inst.," 1, 10, 13; *Poullain du Parc*, "Principes," I, 121.

⁵ *Boutaric*, "Inst.," 1, 10, 10 and 13.

⁶ *Hertz*, "De Matr. Instaurato," 1702. *Cf. supra*, "Dispensation."

⁷ "Arr.," March 11, 1710; *cf.* Decl., June 15, 1697.

⁸ Oriental Church: "Petrus," I, 39 (they succeed if they have been in possession of the status for 30 years). *Gratian* does not recognize reputed marriages; *D.*, 35, q. 7.

⁹ No law was enacted, but practice admitted this restraint on the indefinite increase of causes of annulment, and it seems that one must give credit for it to the Gallican Church: *P. Lombard*, "Sent.," 1, 4; *D.*, 41, c., *Dig. X*, 4, 17, 2; 4, 3, 3; 4, 7, 8-14. *Cf.* Rescript of *Marcus Aurelius*, *D.*, 23, 2, 57, 1; "Cod.

fect of a valid marriage dissolved by death, provided that the spouses, or at least one of them, had acted in good faith, and that there had been a celebration "in facie Ecclesiæ";¹ from 1215 the banns were also required to have been published. These effects were at first merely due to the interests of the children (illegitimacy);² later,³ to those of the spouses who had acted in good faith (upholding of dower, etc.).

Just.," 5, 5, 4; *Hertz*, "De Matr. Put.," 1690; "Sachsensp.," 3, 27; *Bracton*, fo. 63; *Glanville*, 7, 12.

¹ Cf. *Viollet*, p. 439; *Stobbe*, 249.

² No legitimation for children born before the marriage: *Pothier*, 437.

³ *Parnormil.*, Dig. X, IV, 20, 2.

TOPIC 5. EFFECTS OF MARRIAGE

§ 123. The Legal Consequences.

§§ 125, 126. The Same: Penalties.

§ 124. Adultery.

§ 123. **The Legal Consequences** of marriage could be summed up formerly in the acquisition of the husband's power over the wife, which bears at the same time on the person and on the possessions of the wife, and in the acquisition of the paternal power. But this simple formula did not agree very well with more modern law. The power of the husband becomes less. Whereas in the primitive law the husband had scarcely anything but rights and the woman scarcely anything but duties, it now becomes a question of the rights and the duties of each one of the spouses. Thus, the canon law being based on a saying of St. Paul, bestows upon the wife as well as the husband the right to demand conjugal duties.¹ The system of possessions between spouses becomes complicated and may become a subject of study distinct from that of the power of the husband. The power of the father in its turn passes through the same evolution.

§ 124. **Adultery.**²—The violation of the duty of fidelity, especially on the part of the woman, has always had serious consequences. First of all, the punishment of the adulterous wife was left to the husband himself. Tacitus tells us that he drove her through the village armed with a whip; undoubtedly he means to say that he expelled her from his house and from the village itself, which was to condemn her to certain death, for she found herself deprived of all legal protection.³ It seems as though one could lay it down as a general rule that in barbarian legislation the husband has the right to kill his wife and her accomplice if he takes them in the act.⁴ Outside of cases of flagrant offense, the

¹ *Paul*, "1 Cor." vii, 3-5; excepting if the woman be enceinte ("Capit.," 829, 21; *Boret*, 2, 46), upon days of fasting, etc. Details in *Sanchez*, I, IX, "F. de Nav.," 4, 1, 3; *Héricourt*, "G.," VI, 27.

² *Fournel*, "Tr. de l'Adultere," 2d ed., 1783; *Rosenthal*, "Rechtsfolg. d. Ehebruchs," 1880; *Bennecke*, *id.*, 1884; "Dig. Ital.," V. — On adultery at Rome, cf. *Esmein*, "Mélanges"; *Meynial*, p. 46; *Mommsen*, "R. Strafrecht," 1900; *Starcke*, p. 55.

³ *Tacitus*, "Germ.," 19. Cf. "L. Burg.," 34. Cf. other terrible punishments in *Du Cange* (Anglo-Saxons, Poles). *Thonissen*, "L. Sal.," p. 300.

⁴ Cf. in Rome, *Paul*, II, 26 ("jus occidenti" for the "pater," penalty of murder against the husband); "Cod. Théod.," 9, 15, 1; *Paul*, 2, 27, 1 ("L.

tribunals inflicted upon her the penalty of death.¹ The Mosaic legislation, based upon the same ideas, ordered the stoning of the woman taken in adultery. We know the words of Christ upon this subject: "Let him who is without sin cast the first stone."² Reacting in the name of humanity against the old and obsolete customs,³ the Church was satisfied with inflicting penances on the guilty woman; at the same time, it severely condemned the adultery of the husband, which was formerly unpunished.⁴ While the woman may be excommunicated, the Penitentials show us the husband undergoing a penance of five years, or even a perpetual penance;⁵ his guilt has another result; it takes away from him the right to avail himself of that of his wife: "adulter adulteram dimittere non valet."

§ 125. **The Same: Penalties.** — If the Church passed judgment upon adultery,⁶ had its tribunals exclusive jurisdiction over it during the Feudal Period? Cugneres seems to admit it at the time of the Conference of Vincennes by the very fact that he protests against the abuses committed by the ecclesiastical judges in the prosecution of adultery. But the Customs give jurisdiction to the seigniorial or municipal justices, and the tribunals of the king in the end were substituted for all other jurisdiction. The usages and customs of the Middle Ages had upheld the not very Christian punishment of **running the gauntlet**; tragic as it was formerly, it turned into the obscene and burlesque,⁷ so much so that the pen-

Rom. Wis."); right of the husband to kill the wife taken in flagrant offense in his house: "Wis.," 3, 4, 3; "Bai.," 7, 1; "Burg.," 68; "Roth.," 212, 213; "Liut.," 130; "Ass. de Jérus.," "C. d. B.," 288; *Grimm*, "R. A.," 450, 742; *Brunner*, II, 662; *Zeithopf*, "De Jure Occid. Prehens in Adult.," 1667.

¹ "Rib.," 77. Proof by ordeals, the duel. — Cf. proof of the bitter waters among the Hebrews.

² "John," viii, 7. Cf. "L. de Constantin"; "sacrilegos nuptiarum gladio puniri oportet" (30, "Cod. Just.," "ad. l. Jul. de ad.,"); "Cod. Théod.," 9, 7, 2; *Meynial*, p. 52; "L. Rom. Wis.," "Cod. Théod.," 9, 6.

³ Outside of the power of the husband, of his quasi-ownership of the wife, which accounts for the harsh punishments, the latter are equally owing to religious ideas, such as ancestor worship, which legitimate children alone are capable of rendering; let us add that adultery with a stranger often implies a betrayal of the family; with a member of the family it is the ruination of all discipline.

⁴ *Gratian*, C., 32, q. 6. (St. Augustine: the husband, who is the master of the wife, should set her a good example; he is bound to pardon her, even for adultery, if she shows herself penitent). Cf. *Paul*, "Sent.," 26, 8.

⁵ *Van Espen*, "Jus. Eccles.," 3, 4; Register of the Ecclesiastical Judge of Cerisy, *passim*.

⁶ Cf. synodal circuits of the ninth century.

⁷ *Du Cange*, see "Adulterium" and "Trotari"; *Michelet*, "Orig.," p. 388. Flogging had disappeared for the most part (*Aigues-Mortes*, etc.). Martel, 1219, "trahetur per genitalia nudus" (the accomplice) "ab adultera nuda." *Joinville*, "Vie de Saint Louis," 99; *Larroque-Timbaud*, 1270, 59, and a great

alty was more scandalous than the offense itself. The fine which had sometimes been added to it at last held good. The accomplice was arbitrarily punished (banishment, castration, fine). The carrying out of these penalties was very rare, owing to the rules of the Customs on the subject of **proof**; thus, at Agen the guilty persons must be taken in flagrant offense by the bailiff and two consuls.¹ The day when the punishment of adultery became one of the attributes of the State² more severity was shown.³ The **monarchic decisions** substituted for the canonic penances, and the punishments drawn from local custom, a penalty borrowed from the "Novella," 134, 10, of Justinian, and from the Authentic "Sed Hodie," which was a commentary upon it: the woman convicted of adultery was shut up in a convent and lost the privileges of a married woman ("woman proven guilty").⁴

number of the other Customs of the South; there are none of them, so to speak, which do not provide for and punish adultery and rape: "Castelsagrat," 26; "Fossat," 49; "Montoussin," 6; "Agen," 19; "Toulouse," 156a; "Albi," 11; "Montpellier," 21; "Barcelone," 94, 110, 112; "Acad. Législ. Toulouse," IV, 196; *Le Palenc and Dognon*, "Lézat," p. 94, etc. — Note the progressive degradation of the punishments: running the gauntlet without being bound; authorization to keep on the shirt and the breeches; optional buying off for a fine; fine, which was sometimes not very heavy. The penalty of running the gauntlet is inflicted in other cases, — for example, the thief runs through the town with the stolen object tied to his neck: *Montégut de Bourjac*, 20; *Pradères*, 5. — Another disgracing punishment: the woman's dress was cut off above the knees: *Zypacus*, "Jus. Belg.," "ad. l.," Jul. 7. — *Glasson*, VI, 671; "F. de Nav.," 4, 3; "F. Real.," 4, 7; *Gui Pape*, q. 206. Disgracing punishments are frequent in the Middle Ages. *Grimm*, p. 711, gives a long list of them; carrying a dog or a saddle or dragging a cart; carrying a stone (by women); straddling a donkey, etc. At Spire one saw "in foro lapidum politum, catena ferrea alligatum, quem adulterium perpetrantes per civitatem ferre cogeantur."

¹ Under such conditions that it required a great deal of good will on their part to undergo the legal punishment: "Agen," 19; "Tonneins," 124. No penalty if they succeeded in escaping: *Lagrèze*, "Dr. dans les Pyrénées," p. 316.

² In the fifteenth century a Lord of Craon obtained permission from Louis XI to keep his wife shut up and walled in: *Viollet*, p. 505. Details as to this penalty in *Du Cange*, see "Adult." ("Aragon.")

³ *Zypacus*, *loc. cit.*, complains because this crime is punished "nimis molli-ter." *Damhoudre* does the same in his "Prat. Crim.," 91, 17. The old practice here corresponds with literature in which adultery is only something to be laughed at (tales and fabliaux). *Ægidius*, "De Appd.," 6, cites an old order "de uxoris scortatoribus," which takes jurisdiction of the crime of adultery away from the ecclesiastical judges: *Fournel*, p. 53 (bibl.).

⁴ "Glose" on "Le Couvent," 7, 5; C., 32, q. 1. She wore her secular clothing for two years (or for such other time as it pleased the courts to specify); the husband was free to visit her and even to take her back; if he did not do this before the expiration of the time which had been fixed, she was shaved, veiled, and she put on the religious costume of the house; however, the husband could always reclaim her, for she did not become a nun ("the coat does not make the monk"); it also resulted from this that she did not become civilly dead, she still remained able to bind herself, to make a gift, to make a will,

For the judicial procedure there was sometimes substituted the delivery of an order of arbitrary arrest,¹ with the object of avoiding scandalous trials, which might disgrace the family; trials which would be the more frequent as proof became more accessible, and at the same time more uncertain (official reports, writings, witnesses). In the latest stage of the law the husband alone is authorized to accuse his wife of adultery (excepting in cases of connivance and scandal),² but in theory he has lost the right of putting her to death if he surprises her in a flagrant offense, a right in which we must see a very persistent trace of the "jus vitæ necisque" of primitive times.³ As a matter of fact, if he does make use of it, it is not difficult for him to obtain a pardon.⁴

§ 126. **The Same.** — Civil legislation never treated **adultery of the husband** as it did that of the wife.⁵ The guilty husband is not subject to any penalty, is not liable to have the judicial separation pronounced against him because of this fact, and, finally,

etc. The adulterous wife was deprived of her dower, of her marriage portion and of her share in the community, which were conferred upon her husband, absolutely; she recovered all these rights when her husband took her back. As far as the accomplice was concerned, the punishment varied according to circumstances (public penance, banishment, galleys); he might be condemned to pay civil damages to the husband: *Fournel*, pp. 122, 362; *Guyot*, see "Rép." This was the work of jurisprudence: Order of 1522, etc.; *Bærius*, "Décis.," 279; *Papon*, I, 22, vol. 9. Death in case of aggravating circumstances (adultery with a man servant): "L. des Droiz," 435. In England the wife only lost her survivor's portion if there were children of the marriage: *Glisson*, *Lehr*, *op. cit.*; *Pollock and Mailland*, II, 392 (recent rule). *Contra*, German law: *Stobbe*, § 249, I, 2.

¹ *Merlin*, see "Adultère"; *Joly*, "Procès des Mirabeau," p. 104.

² *Fournel*, p. 66 (prosecution of both guilty parties necessary). Prescription of five years. The heirs of the husband could carry on the accusation that had been begun by him, but only with the object of obtaining confiscation of the marriage portion and of the property taken back by the wife.

³ "Schwabenspiegel," 2, 22 (confiscation of the person and possessions of the husband who takes the law into his own hands) *cf. Laboulaye*, p. 339. "Fuero Real": both guilty parties are turned over to the husband, who takes vengeance on them as he pleases: "For. de Tudèle": he could kill both of them, but he did not have the right to spare one of them; "Siete Part.," "Authentica Sed Hodie"; *Lagrèze*, "Navarre," II, 371; "For. de Nav.," 4, 3, 5 *et seq.*

⁴ *Cf.* "Nov.," 117, 15: three warnings addressed by the husband to the man whom he suspects of making an attempt upon the honor of his wife, and a right to kill him if after that he takes him unawares even in conversation with her. Italy, sixteenth century, *Nevisanus*, "Sylva Nuptialis," p. 59; "Bergerac," 89; *Beaumanoir*, c. 30; *Fournel*, p. 462 (complaints in actions based upon solicitation). If one wishes to have some idea of what the legislation which we have just been describing was really like, one should recall the speech of the husband of the eighteenth century who took his wife unawares: "What an indiscretion! Madame, suppose it had been anybody but me!" *Goncourt*, "La Femme au XVIII^e s.," p. 234.

⁵ Excepting in case of scandal and cruelty (for example, the husband keeps a mistress in his house: Order of 1543): *Fournel*, p. 19; "Cod. Théod.," 3, 16, 1; "Cod. Just.," 5, 17, 8; *Juvenal*, "Sat.," 2; *Montesquieu*, "Espr. des Lois," 26, 8.

does not lose the right to demand this measure against his wife in case she shall have committed the same fault; under such circumstances he is simply deprived of the attainment of the marriage portion and the privileges of a married man. Unjustifiable from the religious point of view, this inequality between the spouses was in conformity with tradition and had a bearing on social interests, because the adultery of the wife, thus differing from that of the husband, always carries with it the risk of stripping the family by causing their possessions to pass to strangers, and, by reason of the doubt which it throws upon paternity, it compromises the situation of the legitimate children themselves.

TOPIC 6. DISSOLUTION OF MARRIAGE

§ 127. The Death of one of the Spouses.	§ 132. The Jurisprudence of the Parliaments.
§ 128. Divorce. The Lower Empire.	§ 133. Reaction against Indissolubility. The Reformation.
§ 129. The Germanic Law.	§ 134. The Philosophers of the Eighteenth Century.
§ 130. Canon Law.	§ 135. Revolutionary Laws.
§ 131. Judicial Separation.	

§ 127. **The Death of one of the Spouses** is the only cause of the dissolution of marriage, at least in the conception which prevailed with regard to it. Absence, however prolonged it may be, does not sever the religious bond; the same as regards civil death;¹ the pecuniary effects of marriage may indeed cease, but the sacrament survives. The spouse whose status remains the same has not the power to take advantage of this situation in order to contract a fresh union.

§ 128. **Divorce. The Lower Empire.** — The indissolubility of marriage seems to have been unknown in primitive law. Rome made use of divorce under two forms: 1st, by mutual consent;² 2d, by repudiation on the part of one of the spouses, sometimes for just causes or causes determined by law, and sometimes for incompatibility of disposition. Forms were no more requisite in the case of divorce than they were in that of marriage. The "*Lex Julia, de adulteriis*" merely provided that a notification of the repudiation should be given before seven witnesses³ (ordinarily by the consent of the "*libellus repudii*"). As to the guilty spouse, it was sufficient to punish him by means of pecuniary penalties, less with the object of avoiding divorce than to make up for the unjust injury inflicted upon the other spouse. With the Christian emperors the law changed.⁴ Constantine in 331 inflicts the most

¹ As to absence, cf. *Fournel*, "*Tr. de l'Adult.*," 140; "*Jostice*," p. 182; Order of Aug. 4, 1670 (Jean Maillart absent 40 years); cf. "*Enoch Arden*" by *Tennyson*. Formalities for remarriage, Order of Feb. 9, 1740; *Cornu*, "*Thèse*," 1887.

² "*Cod. Théod.*," 3, 16, 1; "*Cod. Just.*," 5, 17, 8; "*Nov.*," 134, 11; 140; "*L. Rom.*," "*Wis.*," "*Int.*," "*Cod. Théod.*," 3, 16, 1; *Papien*, 21, 1 ("*Nov. Théod.*," 12); "*F. Sirm.*," 19; "*Andec.*," 56; *Lindenbrog*, 84; *Meynial*, p. 69.

³ *Drach*, "*Du Divorce dans la Synagogue*," 1840; *Selden*, "*Uxor Ebraica*," 1695; "*Deuter.*," xxiv, 1. If the wife does not find favor before her husband because he finds there is something disgraceful about her, he shall write her a letter of divorce.

⁴ *Ulp.*, "*Reg.*," 6, 10.

severe punishments upon the spouse who repudiates the other without just cause and limits these to three: if the husband is a homicide, a poisoner, or despoiler of graves; if the woman is an adulteress, a poisoner, or a procuress.¹ One can say that here we have the first Christian law against divorce. It is again to be found in the Breviary of Alaric and the Paphian.

§ 129. **The Germanic Law**² started from a more archaic condition, where the husband alone had the power to repudiate his wife, perhaps first of all without any cause, but evidently at a very early period with the danger of exposing himself to the vengeance of her relatives, if he sent her away without the customary motives³ (adultery, etc.).⁴ Divorce by mutual consent took its place in the Barbarian law, which felt the Roman influence,⁵ and one also finds therein, alongside of the repudiation for just cause⁶ on the part of the husband, as an exception, it is true, a corresponding repudiation of the husband by the wife; furthermore it seems that the inequality had not disappeared, for if the wife leaves her husband without cause⁷ she is subject to corporal punishment,⁸

¹ "Cod. Théod.," 3, 16, 1. The guilty spouse loses gifts made because of the marriage; and the other spouse can remarry. The spouse who repudiates the other without cause loses these same gifts; should it be the wife, her punishment is deportation; should it be the husband, he is not allowed to remarry, or, if he should do so, the wife has a right to take possession of the marriage portion of the second wife: "L. Rom. Wis.," 3, 16, 1, 2; *Papien*, 21; "Petrus," 3, 7. This law is slightly modified by c. 2, *ib.* (421); subsequent legislation (which does not seem to have been applied in Gaul?) reverted to less severe rules: "Cod. Just.," 5, 17, 8.

² *Heusler*, "Inst.," § 133; *Schroeder*, § 35 (p. 303); *Loening*, "Kirchenr.," II, 612 *et seq.*; *Grimm*, "R. A.," 454; *Michélet*, "Orig.," p. 57; *Daresté*, "Études," *passim*.

³ "Wis.," 3, 6; *Greg. T.*, 3, 27; 5, 3; "Frédég.," 5, 30; *Æthelb.*, 79 *et seq.*

⁴ Two systems sometimes practised simultaneously: (a) composition paid to the relatives of the wife; "Bai.," 7, 14; "Pactus Alam.," 3, 2; *Grimoald*, 6; "Burg.," 34 (to the wife). — (b) taking back of her personal possessions by the wife and right to demand her marriage portion (Germanic) or even pecuniary penalties for the benefit of the wife: *Ibid.* and "Wis.," 3, 6, 1. All the more so are gifts made by the wife to the husband cancelled. As to the legal share of the survivor, *cf. infra*. — Same pecuniary consequences when the wife leaves her husband for just cause, and the opposite consequences when the husband legally repudiates her.

⁵ "Burg.," 21, 34; "Alam.," 3, 2 (equal partition of the "lectaria"; the wife has what the law gives her); *Rozière*, 111–114; *Thévenin*, nos. 8, 23, 41; *Marculfe*, 2, 30; "Andec.," 56; "Sachsensp.," I, 25, 4 (vow of chastity).

⁶ Adultery: "Burh.," 34; "Bai.," 8, 14, 15; "Alam.," 3, 3; 53, 1; "Roth.," 262; "Liut.," 120, 190; "Wis.," 3, 6, 1. *Cf. Greg. T.*, 5, 33; 4, 26; 8, 27; 10, 8. Attempt upon the life of the husband: "Roth.," 202; "Burg.," 34, 3 (profanation of the grave, the preparing of poison).

⁷ "Wis.," 3, 5, 5; 6, 2: the husband has morals which are against nature (*cf. Noodkerk*, "De Matrim.," 1733), or wishes to prostitute his wife: "Roth.," 195 *et seq.*; or treats her as a sorceress, or makes an attempt upon her life, etc.: *Grimoald*, 6 and 8; bigamy.

⁸ "In luto necetur"; "Burg.," 34, 1; *Grimm*, 691; *Schroeder*, p. 330. The

whereas the husband under similar circumstances is merely exposed to pecuniary penalties.¹ If it was the custom to establish divorce by a writing,² it does not appear that this was an indispensable form, nor that there were any particular formalities other than the latter.

§ 130. **Canon Law.**³ — At the time of the appearance of Christ nothing foreshadowed the disappearance of an institution so widespread in all the ancient world (Jews, Greeks, Romans). But it was opposed to the spirit of Christianity and the triumph of the new religion must carry with it its suppression. The Gospel⁴ and the Epistles of the Apostles⁵ condemned it; they proclaimed the new principle of the indissolubility of marriage; the spouses should always be ready to pardon an injury which they have received at one another's hands; charity obliges them never to separate from one another without the hope of returning.⁶ One of the principal texts upon this question, the passage from St. Matthew, v, 31, 32, lent itself, however, to discussion, in setting aside repudiation caused by the adultery of the wife. The prevailing opinion among the Fathers of the Church⁷ is that even in this case divorce is prohibited; the husband should take back his wife who repents of her fault; he has the right and it is his duty to separate himself from the wife who persists, but he has no right to remarry.⁸ With St. Augustine⁹ it triumphed,

abduction of the married woman seems to have dissolved the marriage in the very old law: see "Betrothals"; "Alam." 51, 52; "Æthelbirt," 31.

¹ "Burg.," 34, 4: he leaves his house and his possessions to his wife and his children. Cf. "Cod. Théod.," 3, 16, 1; "Int.," § 2 of the "L. Burg." gives the previously existing law; "Wis.," 3, 6, 1; "Bai.," 8, 15.

² "Form. Andec.," 56, etc. Competence of the civil tribunals.

³ *Gratian*, c., 32, q. 7 *et seq.*; *Dig.* X, 4 19; *Richter*, § 286 (bibl.).

⁴ "Mark.," x, 11, 12; "Luke," xvi, 18 (absolute indissolubility); "Matth.," v, 31. Cf. *Selden*, "Uxor Ebraïca s. de Nupt. et Div.," 1695.

⁵ *Paul*, "Rom.," vii, 13; "1 Cor.," vii, 10-11, 39; "Ephes.," v, 21.

⁶ "Le Pasteur d'Hermas," "Mand.," IV, 1 (*Gratian*, c., 34, q. 1, c. 7).

⁷ *Perrone*, "De Matrim. Christ.," 1858, III, p. 243.

⁸ *Gratian*, c., 32, q. 7; *Tertullian*, "adv. Marcion . . .," 4, 34 (cf. *Pothier*, "Mariage," no. 489): right of the husband to repudiate his adulterous wife. *Origen*, "In Math.," 4, 22; *Chrysost.*, "De Libello Repudii." — *St. Epiphany*, "Adv. Hær.," 39 (59), 4; *Asterius*, "In Math.," 19, 3; *St. Augustine*, "De Adult. Conj.," 2, 2 (idea of the death of the adulterous spouse, cf. Mosaic law, death of the wife). The Eastern Church has kept divorce (as a necessary evil) but only for a determined cause (adultery of the wife, attempt by one of the spouses upon the life of the other, impotence of the husband, absence, the husband having a concubine, etc.): "Nov.," 117; *Zhisman*, 729; *Vering*, "Kirchenr.," p. 329; *Jovanovic*, "Bull. Soc. Lég. Comp.," 1885; "Acad. Lég. Toul.," 1892.

⁹ "Tr. de Adulterinis Conjugiis" (St. Matthew allows the husband to send away his wife who is an adulteress, but not to remarry, which would have been a violation of the Christian principle of equality between the spouses): "De

for the celebrated doctor had the ingenuity to connect it with the idea that marriage was a sacrament, an image of the union of Christ and the Church, and no less indissoluble than the latter: ¹ it became almost a dogma.

Before the ninth century ecclesiastical discipline is, however, not very firm (Decrees of Councils ² and Penitentials).³ Divorce is practiced in the Frankish State without the Church offering any opposition. In the ecclesiastical Capitularies, at the end of the eighth century, exceptions are still brought to bear upon the indissolubility.⁴ The principle laid down as absolute by the Capitularies of 789 and 829 ⁵ was not yet fully enough accepted ⁶ to provide against the serious difficulties which the divorce of Lothaire and Teutberge ⁷ encountered in 857; it required all the energies of the pope, Nicholas I, to make it respected. Moreover, the practice of divorce was so firmly rooted in the Customs that it has left traces in the final doctrine of the Church, as it was formulated by Gratian and the Decretals.⁸

Nuptiis," I, 10-21. However, "De Fide et Op.," 19, he admits that the husband who contracts a new union only commits a pardonable sin. But the "Tr. de Adult., C." is more recent.

¹ Cf. *Gratian*, c., 27, q. 2, c. 19 *et seq.*; c., 32, q. 7; 34, q. 1.

² *Élwire*, 305 (c. 9: no penalty against the man who remarries); "Arles," 314, c. 24; "Angers," 453; "Vannes," 465, etc.; *Loening*, II, 609. A more severe tendency in the letters of the popes: (*Greg. II* to *Boniface*, 726; *Jaffé*, "Monum. Mogunt.," p. 89; *Innocent I* to *Exupère* of Toulouse, 405; *Labbe*, 2, 1254) and in the Council of the eighteenth century ("Frioul," 796; "Paris," 829; "Nantes," "Tribur," 895).

³ Some of them tolerate divorce by mutual consent: "Théod.," 2, 12, 7; "Can. Greg.," 65; others, repudiation with just cause (adultery of the wife, impotence of the husband, captivity of one of the spouses, etc.): *Hinschius*, "Z. f. Kirch.," 20, 66; *Wasserschleben*, "Bussordn.," 214, 401.

⁴ Exceptions: adultery of the wife, or even lack of virginity; leprosy or impotence of the husband; entering a monastery by one of the spouses; slavery; complicity in an attempt upon the life of the husband; the wife does not follow the husband when he leaves the province: "Soissons," 744; "Compiègne," 757; *Verberie*, 758 or 768; *Viollet*, 445; "Ass. Jérus.," "C. des B.," 172 (175): leprosy, or "li put trop fièrement le nez" or "pisse aucune nuit au lit." The invalid should enter religion, the other spouse remarries: "F. de Morlaas," 357; cf. "Deuter.," xxiv, 1. These decisions, which are found in *Gratian*, have given rise to annulment of marriage for impotence and mistake as to condition.

⁵ "Cap.," 789, 43; 829, 3 and c. 21; *Boret*, I, 56; II, 18, 46; "Capit.," I, 42; VI, 87, 235 (whether the husband remains single or whether he forgives in case of adultery of his wife). — Sanction: (a) religious, — excommunication, public penance; (b) civil: the count puts the offender in irons and in prison until the matter shall be carried before the emperor.

⁶ *Sdralek*, "Hincmar," 126; *Scherer*, 34, 50; *Freisen*, 801.

⁷ *Guizot*, "Hist. de la Civilis. en France," 27; *I. Isambert*, I, 150 (Louis VII and Aliénor); *Lot*, "Les Dern. Carol.," p. 366 (Adelaide, wife of Louis V "le Fainéant" and William of Arles); *Quinquet de Monjour*, "L'Indissolubilité du Mariage," Thèse, 1901; *Dumas*, *id.*, 1902.

⁸ *Gratian*, c., 32, q. 7; Dig. X, "de Divort"; *P. Lombard*, "Sent.," 4, 35. Cf. marriage contracted, but not consummated: "Trent," s. 24, c. 7, does

§ 131. **Judicial Separation.**¹ — The word “*divortium*” did not disappear from the language of the law and served to designate: 1st. The separation of the spouses in the case of annulment of the marriage.² 2d. Judicial separation or separation of domicile,³ pronounced by the ecclesiastical judge⁴ in certain settled cases: adultery of the wife, serious ill-treatment on the part of the husband, and, finally, apostasy or heresy of one of the spouses (spiritual fornication). The adultery of the husband excused that of the wife, and it carried with it separation, if the wife, without blame on her part, demanded it. Cohabitation and the conjugal duty ceased to be obligatory, but reconciliation was possible.⁵

§ 132. **The Jurisprudence of the Parliaments** during the monarchic period regulated the separation of domicile.⁶ The causes were left, as a general thing, to the opinion of the judge (for example, bad treatment, refusal of the necessities of life).⁷ At the same time, the adultery of the wife always had the effect of carrying with it separation, if it were asked for by the husband; it was not the same thing in the case of that of the husband.⁸ “Much should a wise woman suffer and endure,” says Beaumanoir, “before she puts herself away from the society of her husband.”

From the moment when the separation takes place only for certain causes the intervention of the judge is necessary, and it was the secular judge who here, as in many other cases, took the

not anathematize those who profess that marriage is not indissoluble (Greeks). Cf. annulment of marriage.

¹ *Cosci*, “De Separ. Thori,” 1856; *Bard*, “Thèse,” 1874.

² “*Sachsensp.*,” III, 74; *Pollock and Mailland*, II, 391; *Lattes*, p. 237; “*Siete Part.*,” IV, 10; “*F. de Morlaas*,” 357.

³ “*Quoad torum et mensam*,” but not “*quoad fœdus et vinculum*”: *Hos-tiensis*, IV, “De Div.”; *Sanchez*, I, X; *Van Espen*, 2, 15.

⁴ *Viollet*, 446, 4, cites an Order of the year 1378 (“*Arch. Nat.*,” XI^{1a}, 27, fo. 11^{ro}) dealing with a separation by mutual consent; this is an anomaly: *Luchaire*, “*Louis le Gros*,” no. 430; *Beaum.*, 57; “*Siete Part.*,” VI, 12.

⁵ The husband may even compel the wife who commits adultery to once more take up their life together: *Héricourt*, “*Loix Ecclés.*,” G. VI; *Lancelot*, “*Inst.*,” 2, 13; *Sanchez*, I, X.

⁶ *Louet*, s. 643; *Ferrière*, see *Guyot* (and bibl.); *Pothier*, “*Tr. du Contrat de Mariage*,” 6, 3. England: the Courts of the Church only lost jurisdiction of testimonial and testamentary actions in 1857.

⁷ But not the illness or dementia of one spouse.

⁸ *Beaumanoir*, 57, 4, only considers the fact of the husband's maintaining a concubine in the conjugal home to the knowledge of his neighbors as a cause for separation: “*Jostice*,” p. 196; “*L. des Droiz*,” 773; *Gautier*, “*Chevalerie*,” p. 360. Cf. in this sense the English law (which, however, admits of compensation for torts committed by one spouse upon the other): *Glasson*, “*Inst. Anglet.*,” VI, 180.

place of the ecclesiastical judge. The sworn statement of a spouse was not looked upon as a sufficient proof; except for this, voluntary separations would have been too easy a matter. Separation does not dissolve the tie of marriage; it frees the spouse from the duty of cohabitation,¹ but not from the duty of fidelity; the husband even retains a part of the husband's power. Separate maintenance is a compulsory consequence of judicial separation.²

§ 133. **Reaction against Indissolubility. The Reformation.** — The indissolubility of marriage is the result of religious ideas: Christian charity, texts of Scripture, conception of the sacrament. Once it had passed to the stage of an official doctrine, the theologians bethought themselves to justify it by reasons drawn from natural law.³ A most idle assumption, if one considers the ancient law, but one which is inspired by a very high ideal, by the thought that a single union is compatible with the dignity of life ("unum corpus, una vita"). There is no doubt that divorce is an evil for the spouses themselves, and still more so for their children; but the question is whether there are not circumstances under which it is a lesser evil than cohabitation in a hypocritical manner, or discord and contempt on both sides, or the judicial separation accompanied by a life of irregularities. The Catholic Church itself, in spite of its intolerance, has had to make concessions, because, according to its doctrine, the indissolubility is not perfect unless the marriage is consummated,⁴ and because the annulment of the marriage sometimes degenerates into a divorce in disguise.⁵ The Reformed Church, as a consequence of its adherence to the Bible in preference to the New Testament, and by force of practical necessity, reacted against the excess which had come about.

¹ Children born after separation: *Beaumanoir*, 18, 6.

² "Olim," III, 152 (1304). As to capacity of the wife who has been separated, cf. *infra*, "System of Possessions as between Spouses," "Power of the Husband."

³ "Trente," sess. 24, c. 7; "Catéch. Rom.," "De Matrim.," 1, 11; Syllabus "Err. de Matr.," 8, 67; Encycl. "Arcan. Div." of Leo XIII, Feb. 10, 1880. Also motives of positive divine law; "Gen.," ii, 23 ("erunt duo in carne una"); Dig. X, 1, 36, 11, 4, 19, 8; "in VI," 3, 15, 1; but if it had been based on this idea they would have recognized the fact that marriage among the infidels was indissoluble; also, how account for divorce among the Hebrews? *St. Thomas*, "Summ. Th.," 2 a, 2 ae, q. 154, 2 c.

⁴ *Schling*, p. 98, Dig. X, 4, 13, 2. Cases which were rather numerous at first, but which were actually restricted: vow of chastity by one spouse ("Conc. Trente," 24, 6; cf. "Cod. Just.," 1, 3, 52, 3), dispensation of the Pope (*Richter and Schulte*, "Conc. Trid.," 251; "Acta S. Sedis," 17, 353; 18, 196; 22, 262; 23, 476); marriage of infidels (Dig. X, 4, 19, 7; 3, 22, 6; 3, 33, 1).

⁵ Especially for the benefit of those in power; cf. Napoleon's divorce: "B. Ch.," 1896, 197 (Louis XII).

It admitted of divorce,¹ at least in cases of adultery;² in conformity with the passage from St. Matthew, and when one of the spouses deserted the other³ or was guilty of cruelty to the other.⁴ A very widespread opinion even came to be maintained that divorce was lawful every time the union between the spouses was broken because their affections had ceased, for it was no longer an image of the union of Christ and the Church. The legislation of Protestant countries conformed more or less absolutely to these theories.⁵

§ 134. The Philosophers of the Eighteenth Century⁶ attacked

¹ *Friedberg*, § 160 (bibl.); *Richter*, "Z. Gesch. d. Ehescheid. in Ev. K.," 1858; *Grübner*, "Ueb. Desertio," 1882; *Mossdorf*, 1740.

² *Th. de Bèze*, "De Repudiis," 1566-1610; "Tr. du Divorce par l'Adultère," 1586; *Luther*, "Mémoires," trans. by *Michelet*, II, 60 and *passim*; "V. Ehel Leben," 1522; cf. *Strampff*, *op. cit.*, 364; *Richter*, "Kirchenordn.," I, 29. Milton sent away his wife soon after his marriage in 1643 because "he had discovered that she was stupid," and, in order to justify himself, he wrote a book upon the subject of divorce, which the Presbyterians wanted to burn. He then defended his conduct by two new treatises, "Tetrachordon" and "Colasterion," 1645. Cf. Divorces of Henry VIII. Furthermore, a statute of this sovereign still proclaimed indissolubility. Divorce did not enter into English legislation until later on, without there being any general law to establish it; in 1666 Parliament granted to Lord Ross, who was judicially separated from his wife, permission to marry again; henceforth it required an act of Parliament, — that is to say, a special law to obtain a divorce. The expenses of this procedure were so great that divorce was a privilege of the aristocracy. The Law of 1857 placed it within the reach of everybody by the institution of the Divorce Court, which took the place of the ecclesiastical tribunals and Parliament at one and the same time: *Glasson*, "Inst. Angl.," V, 90; VI, 177; *Lehr*, "Dr. Angl.," 58; *Albrecht*, "Verbrechen u. Strafen als Ehescheidungsgrund," 1903 (in the "Kirchenrechtl. Abhandl." by *Stutz*); *De Maulde*, "Procès politiques sous Louis XII," 1885 (unpublished).

³ "Cor.," vii, 15. *Luther*; fraudulent abandonment outside of any religious motive (*Strampff*, 354, 381, 386, 399). He also admits of divorce for serious causes: *Bossuet*, "Hist. des Variations."

⁴ *Melanchthon*, "De Conjug.," 1551; cf. *Schneidewin*, "Tract. Connub.," p. 468.

⁵ *Struve*, "De Jure Divort.," 1724.

⁶ Before them in the sixteenth century: *Montaigne*, "Essais," 2, 15; *Charon*, "Sagesse," 1, 6; *Bodin*, "Républ.," 1, 3; in the seventeenth century *Grotius*, *Puffendorff*, *Locke*, and *Milton* in his vigorous pamphlets, and *Quevedo*, in his satirical writings. In the eighteenth century the partisans of divorce increased in number: *Montesquieu*, "L. Pers.," 116; "Esp. des Lois," 23, 2; *Voltaire*, "Dict. Philos.," see "Mariage, Droit Canonique"; "Mém. d'un Magistrat écrit vers 1764"; *Toussaint*, "Les Mœurs," 1748; *Lavie*, "Des Corps Politiques," 1764, c. 8; *d'Holbach*, *Helvetius*, etc. *Diderot* in his "Supplément au Voyage de Bougainville," 1773, goes further than this and extols a sort of marriage for a term, about which the *Maréchal de Saxe* had also thought ("Reflexions sur la Propagation de l'Espèce Humaine, Rêveries," 1754); cf. the consequences of "Rêve de d'Alembert." *Helvetius*, "De l'Homme," sec. 8: suppression of marriage and education of children by the State, at least for the benefit of the best, the most industrious, and the most intelligent of them. Cf. pamphlets, which seem to be like preparatory work for the Revolutionary laws, and the best known of which is "Cri d'un Honnête Homme," 1768; the author, *Philibert*, who was *Prætor* at Landau, demands divorce by showing that it is not contrary to the Catholic religion, that it is favorable to good morals and useful to the State. Reproduced in

indissolubility in the name of individual liberty and natural law.¹ According to them marriage is only a contract, which can be dissolved like any other (reciprocal agreement); it is a good policy to favor divorce, because ill-assorted unions, when people persist in continuing them, remain sterile.² The relaxing³ of morals and the examples of the Protestant countries⁴ contributed more than any argument to the propagation of these doctrines.⁵

§ 135. **Revolutionary Laws.**⁶ — The Revolution,⁷ in secularizing marriage and declaring that it constituted merely a civil contract,⁸ independent of the sacrament which was applicable to various religious beliefs, some admitting and others rejecting divorce, could not fail to break with the Catholic principle of indissolubility.⁹ One must also admit that it was influenced in this by the philosophical notions of the eighteenth century.¹⁰

Cerfvol, "Législ. du Divorce," 1769. See to the same effect: "Mém. s. la Population," 1768 (reproduced in "Entretiens sur le Div.," by de V. . ., 1770); "Cri d'une Honnête Femme," 1770; "Intérêt des Femmes au Rétablissement du Divorce," 1777 ("Le Sc. des Maisons"); "Contrat Conjugal," 1781. Cf. "Code de l'Humanité," 1778 (see "Divorce"); *D. Calmet*, "Sainte Bible," III, 62, 1779.

¹ *Montaigne*, 2, 15; *Montesquieu*, "Lett. Pers.," 16; *Voltaire*, "Dict. Philos.," see "Mariage," "Divorce."

² *Ibid.*, *Voltaire*, "Dict. Philos.," see "Adultère."

³ Italy: "patiti," "cavaleiri serventi"; *Salvioli*, no. 180. Lavie asks himself if divorce corrupts morals, or if it is corrupt morals that are responsible for an increase in divorce. *Goncourt*, "La Femme au XVIII^e s."; "Hist. de la Société Fr. pend. la Révolution, pend. le Directoire."

⁴ To which de Bonald replies with Mme. Necker that Protestant countries do not have divorce; to attribute the good morals of these countries to the ability to get divorces is the same thing as giving the credit for the good health of the inhabitants of a country to a doctor who has never been called in.

⁵ However, there are only two "Cahiers" which demanded divorce in 1798. ("Théatins" at Paris, *Fleury-Mérogis*).

⁶ *M. d'Anteuille*, "Rev. de la Révol.," II, 206, 473 (1883); *Sagnac*, 282; *Damas*, "Thèse," 1897; *Mallet*, 1900; cf. *Naquet*, *op. cit.*; "Religion Propriété, Famille," 1869.

⁷ *Matigny*, "Tr. de la Loi du Divorce," 1789; *Hennet*, "Du Divorce," 1789-1792 (also: "Pétition à l'Ass. Nationale par Montaigne, Charron, etc.," 1791, extracts from authors favorable to divorce, with bibliography); *Linguet*, "Légitim. du Div.," 1789; "Obs.," by *Comte d'Antraigues*, 1789; by *Bouchotte*, 1790. In almost all these writings the lawfulness of divorce is discussed and maintained from the religious point of view. See, as being *contra* to this: *Chapt de Rastignac*, "Accord de la Révél. et de la Raison contre le Divorce," 1790; *Barruel*, "Lettres s. le Divorce," 1790; *Mme. Necker*, "Réflexions s. le Divorce," 1794; *D. Hume*, 18th Essay.

⁸ The Decree of Sept. 20, 1792, maintains that "a number of spouses have not waited for the enjoyment of the advantages given by the constitutional provision according to which marriage is only a civil contract, until the law should have regulated the method and the effect of divorce."

⁹ *Faulcon*, "Précis Hist. de l'Etabliss. du Divorce," 1800.

¹⁰ In arguing, as was done, upon the inalienability of the liberty of the individual and the natural inconstancy of man, they should have admitted of marriage for a term, polygamy, etc. Cf. *Diderot*, the marriage of Saxe, the Landgrave of Hesse (in the time of Luther, "Mémoires," II, 60).

Following various propositions or speeches which produced no effect, and after a lengthy discussion,¹ the principle of divorce was sanctioned by the Legislative Assembly.² It was by implication contained in the Constitution of 1791, which declared that marriage was but a civil contract. The Decree of September 20, 1792, carried out the new constitution. Divorce was allowed in three cases: for specified causes, by mutual consent, and for incompatibility of disposition.³ In these two latter cases the procedure became complicated; it allowed of delays and attempts at reconciliation, so as to permit of the spouses reconsidering their determination. The Decree of the 4th Floreal, year II (April 22, 1794),

¹ And not to a certain extent by surprise. It was a mistake to qualify the Decree of 1792 as an act of the Legislative Assembly "in extremis," meaning to say by this that it had not been very carefully thought over.

² Upon the motion of Aubert-Dubayet (Aug. 30, 1792) cf. the fraternal exhortation of citizen Chaumette, President of the Commune, to married people, among whom there were two couples who had been separated whom the divorce law reunited ("Moniteur," 1792, no. 297).

³ (A) The "just causes of divorce" can be reduced to two: (a) impossibility of cohabiting, — that is to say, of fulfilling the object of marriage; dementia; abandonment for 6 years; absence without any news for 5 years; emigration (merely attested by an act that is generally known!) (Decree of April, 8, 1792); (b) a serious infringement of these conjugal duties by one of the spouses; generally known irregularity of morals, serious cruelty or insults, abandonment. In cases of this sort the thing to do was to inflict a penalty upon the guilty spouse or to give the innocent spouse who was the victim of the accident his freedom; no delay for proof was required; an arbitrary tribunal verified the facts, decided to which of the spouses the care of the children should be intrusted, and sent the parties before the officer of civil status who was charged with pronouncing the divorce. (B) The "mutual consent" which had formed the marriage dissolved it, just like any other contract, to which it was mistakenly likened; it was also a means of the spouses avoiding scandalous contests when there were reasons for divorce; however, the officer of the civil status did not register the divorce until after an attempt at reconciliation had been made before an assembly of the family (six relatives or friends) and a delay of from two to four months, according as there were or were not children. (C) Divorce was also possible upon the request of only one of the spouses by reason of "incompatibility of disposition"; the spouse who was not willing to disclose the motives that made him seek a separation could have recourse to this, so as to protect the honor of the family; and, as there is not, in fact, any means of preventing the spouse who is tired of the marriage from leaving the other, this situation which existed in fact was made lawful by permitting the other spouse to found a new family. But, as it was to be feared that separation might take place on slight pretexts, proofs were increased in number, as were delays; after three attempts at reconciliation, at intervals of 1, 2, and 3 months, before the family assembly, the officer of the civil status pronounced the divorce within a week. — Judicial separation was abolished because all the disadvantages and none of the advantages of divorce were found in it.

The English law admits of judicial separation and divorce at one and the same time; the only legal cause of divorce is adultery, — simple adultery in the case of the woman, with aggravating circumstances in the case of the husband (abduction, incest, cruelty towards the wife, etc.). The judicial separation was more easily obtained, but it could not take place through mutual consent (at least, not lawfully): *Glasson, Lehr, op. cit.*

did away with every security against heedless rupture; divorce was permitted simply upon the production of some public proof that the spouses had lived separate from one another for six months at least, or that one of them had forsaken the other for the same period of time (for example, the husband is doing military service).¹

Spouses who had been divorced could remarry with any person, even with the accomplice of the adultery,² even with each other. A delay of widowhood lasting a year was imposed upon them as a general rule, so as to avoid uncertainty in the case of the woman, and for both of the spouses so as to prevent immediate marriage for a second time from being the determining cause of their separation (rather a brief period!). Their possessions were divided, as in the case of one predeceasing the other, excepting forfeitures declared against the guilty spouse in certain cases of divorce for specified reasons, and excepting the loss of the advantages given by the contract of marriage by one of them to the other. The arbitrating members of the family had always the power to allow to the destitute spouse a life annuity out of the possessions of the other. Each one of them contributed according to the means possessed to the expense of keeping and educating the children. The daughters of all ages, and the boys who were less than seven years old, were confided to the mother; the boys more than seven years old, to the father; at the same time the spouses were free to decide this question in some other manner. In the case of divorce for specified reasons it was for the assembly of the family to decide the question.³

The manner in which these laws were applied is not of such a nature as to recommend the institution of divorce. One might say that the French people of that period attempted to show the excellence of the Catholic indissolubility by the very absurdity of their own practice. In towns, where the evil was almost exclusively felt, marriage was dissolved for a whim, as easily as though it were a mere matter of the hiring of service; in Paris, if we are to believe the preliminary work on the Civil Code, there took place in the year IX one thousand divorces for three thousand marriages.⁴ By

¹ Cf. Decree of the 23 Vend., year II (Oct. 14, 1793); 8 Niv., year II (Dec. 28, 1793); 4 Flor., year II (Apr. 22, 1794); 24 Vend., year III (Oct. 15, 1794).

² Thus in English law: *Glasson*, VI, 181. A man is looked upon as not having any honor when, after having seduced a married woman, he does not repair the injury by marrying her. The canon law was contrary to this. They feared that the possibility of marriage might be an encouragement to adultery. It is perhaps just the contrary that ought to be feared: *Starche*, p. 65.

³ Cf. *Lehr*, "Dr. Angl.," p. 65.

⁴ *Treilhard*, in *Fenet*, IX, 562. Speech of Carrion-Nisas in the Legislature: in the year IX the number of marriages in Paris was 4000; that of

1795 protestations were heard in the Convention. This assembly was compelled to suspend the carrying out of the Decrees of the 2d Nivose and the 4th Floreal, year II ("disastrous laws, which let loose a torrent of immorality"). Under the Directory the abolition of divorce for incompatibility of disposition was demanded and discussed on several occasions; but the only result of this was a Decree of the first complementary day of the year V, by the terms of which the legal delays in such cases were prolonged for another six months.

Although discredited, divorce still kept for itself many partisans;¹ it found a place in the Civil Code in spite of the criticisms of the Catholics, such as de Bonald;² but the new legislation took a step in advance, in the direction of reaction, by doing away with divorce for incompatibility of disposition, and by re-establishing the judicial separation which had not been in existence since 1792 (divorce of Catholics).

Rarely met with under the Empire,³ divorce disappeared from our laws in 1816,⁴ only to reappear once again in 1884.⁵

divorces, 700; in the year X the number of marriages was only 3000, and the number of divorces 900. — From Jan. 1, 1793, to June 17, 1795, there were 5984 divorces in Paris; in 1897 there were almost 3000 divorces in Paris and from 9000 to 10,000 in the whole of France.

¹ Its maintenance was asked for by almost every court of appeal.

² In his book upon "Divorce," 1801, *de Bonald* reasons more like a politician than a logician. He maintains that divorce is injurious to the children and the spouses themselves, especially the wife; that marriage is not an ordinary contract; and, finally, that if there are intolerable situations where divorce seems to be indispensable, these are unfortunate exceptions which the legislator cannot very well take into account. Divorce, successive polygamy, is just as bad in the eyes of Bonald as simultaneous polygamy. — Nothing could be more untrue; the law or Customs can prevent the abuse of divorce: *cf. Legrand*, "Le Mar. et les Mœurs en France," 1880. *Starcke*, p. 99, shows the opposed views on this subject between the Latin race and the Germanic race. Divorce would be a benefit in Germany, an evil in France.

³ The divorce of Napoleon and Josephine by the Senate Decree of Dec. 16, 1809, — rather an amusing thing, the Statute of March 30, 1806, Art. 7, forbade divorce for the members of the Imperial family. See *F. Masson*, "Josephine Divorcée," 1901, in the bibliography of *Viollet*, 449, 1; *Welschinger*, "Le Div. de Napoléon," 1889; *Dolhagaray*, "R. d. Sc. Ecclésiast.," 1889, IX, 534 *et seq.*; *Schling*, "Z. f. Kirchenr.," 1885, 1; *Duhr*, "Z. f. Kath. Theol.," 1888. Two motives were invoked before the Council of the Ecclesiastical Judges of Paris in order to annul the religious marriage which had been secretly celebrated before the coronation by Cardinal Fesch: 1st, lack of publicity, absence of the proper parish priest and witnesses demanded by the Church; 2d, lack of consent, Napoleon only having given a pretended consent in order to please Josephine, — mere pretexts, which nobody took seriously (*cf. details in Welschinger*). The pope alone would have been competent, but Napoleon kept him prisoner at Savone.

⁴ Without public opinion, which had acclaimed it with enthusiasm in 1792, being affected in any way: *Chrestien de Poly*, "Divorce," 1815.

⁵ Note from the Holy See, "Arch. f. Kath. Kirch.," 54, 166, and *Encycl. "Arcanum Divinæ,"* Feb. 10, 1880.

TOPIC 7. SECOND MARRIAGES

§ 136. Barbarian Law.
 § 137. The "Reipus."
 § 138. The "Achasius."

§ 139. Canon Law.
 § 140. Protection of the Children of
 the First Marriage.

§ 136. **Barbarian Law.** — The repugnance felt for second marriages, but merely for the second marriages of widows, is frequently found in the old legislations wherever the family adopted the patriarchal type,¹ as it did in Germania.² The widow did not leave the house of her husband; she passed under the power of the new head of the family (her son; the brother of her husband); her condition differed little from that of an unmarried woman.³ But it was not rare to see her alone or with young children without any protector. Sometimes her own family took her back,⁴ sometimes she remained alone, then becoming a true head of the family, at least in fact.⁵

§ 137. **The "Reipus."**⁶ — This exceptional situation will perhaps enable us to understand the puzzling provision of the Salic Law on the marriage of widows. It contained and sanctioned a regulation introduced in practice, but still contested: the parties present themselves before the "mallus"; there the new spouse gives three sous and one denier, as the purchase price (symbolic), to the maternal relatives of the widow,⁷ and, if there are not any, then

¹ Animist beliefs: Indian widow: *Grimm*, 451; *Procope*, "De B. G.," 2, 14 ("Herules"); *Michelet*, "Orig.," 54. Cf. Jewish levirate: *Flach*, "Lévirat," 190. In many localities charivari ("concerade" at Naples). Fourteenth century: *Faber*, "Inst. de Jug.," § "Injuria"; *Fréminville*, see "Dict. de Police," (punished by the Ordinances and Orders); *Salvioli*, 336; *Pertile*, III, 365, n. 23.

² *Tacitus*, "Germ.," 19.

³ "L. Sax.," 7, 3. Cf. "Rothar.," 182; "Capit.," ed. *Bor.*, I, 13, c. 25 *et seq.*; *Amira*, "Erbenfolge," 32. As to Frankish law, cf. *post*, "Guardianship."

⁴ "Sax.," 7, 3; "Roth.," 182. The widow who cannot or will not remarry remains under the "mundium" of the relatives of the husband, but if they maltreat her she can return to her own people, and, if there are none of her own people, place herself under the "mundium" of the king.

⁵ *Kovalewsky*, p. 174; *Dareste*, "Études," p. 90.

⁶ "L. Sal.," 44. Cf. Lombard Formula: *Thévenin*, "Textes," no. 47; "Burg.," 24, 60; "Wis.," 3, 2, 1; "Sax.," 42; "Roth.," 182; *Laboulaye*, "Cond. des Femmes," 160; *Pardessus*, "L. Sal.," 687; *Schroeder*, "Gesch. d. Ehel. Güter," I, 56; "D. R. G.," 299; *Sohm*, "Eheschl.," 63; "R. u. Ger.," 67, 370; *Amira*, "Erbenf.," 30; *Dargun*, "Mutterrecht," 141; *Lamprecht*, "D. Wirthschafts l.," I, 32; *Peters*, "De Reipus," 1830; *Weinhold*, "Z. f. Deut. R.," 1849, 539; *Dareste*, "Études," 409; *Habicht*, 16; *Glasson*, III, 29; *Brissaud*, "Rech. s. la Tutelle des Femmes," p. 18; *Ficker*, "Erbenf.," III, 525.

⁷ And not the husband of the deceased. The question is one which has

to the relatives of her first husband, *provided that they are not the heirs of the latter*.¹ This peculiar institution of the "reipus"² seems to be less a trace of the primitive matriarchate³ than an imitation of ordinary marriage, arranged in such a manner as to leave the widow independent. A fictitious "mundoaldus" to proceed with the betrothals and receive the symbolic purchase price was selected for her; at the same time care was taken to choose him from among those who could not exercise an actual "mundium" over her; the real "mundoaldus" might not be willing to agree to the marriage of the widow for fear of losing the advantages to be gained from her marriage portion.⁴ The Capitulary of 819, Chap. 8, made widows subject to the common law by compelling them to provide themselves with the consent of their relatives (natural family).⁵

§ 138. The "Achasius." — In the capitularies which were added to the Salic Law, the regulations for the marriage of widows, which were already sufficiently difficult, became still more complicated. It was not enough that the new husband should pay the "reipus"; the widow must furthermore negotiate with the relatives of her first husband "ut pacem habeat" and give up to

been very much discussed: *Geffcken*, p. 171. In the other direction they argue about the words "superiores nominati," § 9, and the mention of the husband, § 8, would be accounted for by the contrast with the "frater" of § 7.

¹ In the absence of these formalities a composition of 63 "sous" is due to the creditors of the "reipus," but the marriage is not annulled.

² Etymology: "Reif," "Ring," "Anneau," and by extension "argent" (money). According to *Meyer*, "Badisch. Hochzeitsbrauch," 1896, "Reipus" equals "Seilgeld." "Z. S. S.," 1898; G. A., 195. Cf. as to this word and as to "Achasius," *Kern*, in *Hessels*, § 270; see *Geffcken*.

³ *Dargun*, "Mutterrecht," pp. 141-151. According to this opinion why pay the "reipus" to the relatives of the husband?

⁴ *Sohm*, "Eheschl.," 63, sees in the "reipus" a penalty against second marriages. Cf. *Heusler*, II, 208, 307; *Ficker*, "Erbenfolge," I, 512; III, 531. But why pay this fine, if it is one, to the relatives enumerated by the law? *Habicht*, "Verlob.," 19. One can scarcely see in this, with *Amira* and *Lamprecht*, a composition for the loss of the "Gerade," for the "Gerade" came from other relatives. — A remarkable analogy with the Theodosian Code, 3, 7, 1 (shown us by *Brunner*): the consent of the relatives who would inherit from widows was not required for their entering into second marriages. But there is no question of any payment analogous to the "reipus," nor of the classifying of the relatives like that found in the Salic Law. The celebrated Lombard formula of the eleventh century (*Canciani*, "L. Barb.," II, 476) assumes contrarily to the Salic Law, a "reparius" (of the name of Seneca) having a "mundium" over the widow (Sempronia, widow of Thersitus, and daughter of Cicero); this is a conceit of an erudite notary: *Laboulaye*, p. 162. Cf. *Rotch*, 182; *Thévenin*, no. 48.

⁵ Edict of Chilperic, c. 2, seems to do away with the "reipus," which would account for the fact that the formulæ do not mention it (any more than they do the "achasius"), but they would render useless the Capitulary of 819; it is true that it does not make any innovation.

them, as an "achasius,"¹ about a tenth of the marriage portion which had been set aside for her by him, and, furthermore, if she has no children, a bed with bedding, the bedding of a quality corresponding to this bed, an upholstered stool, and chairs which she took with her from the house of her father; in default of these, she loses two-thirds of her marriage portion and pays sixty-three sous to the treasury.² The marriage of a widower for the second time gave rise to a regulation of the same sort: he keeps the marriage portion until the children come of age; if he has no children he gives up two-thirds to the nearest relatives of the wife in return for a portion of the furniture; assuming that they refuse to give up the furniture to him, they are only allowed one-third of the marriage portion.³ Concerning the interests of the children by the first wife, the law forbids the spouse who has married a second time, either widower or widow, to alienate the (Germanic) marriage portion of the wife to their prejudice.⁴ The Edict of Chilperic, Chap. 4, simply divides the marriage portion in half between the widow or the widower and the relatives of the deceased husband or of the predeceased wife, when there are no children.⁵

§ 139. **Canon Law.** — On the question of second marriages the Christian Church is found to be rather in accord with the spirit of the Germanic law than with the Roman legislation of the Empire, which drove citizens to marriage.⁶ Without going so far as to condemn them, it looked upon them with disfavor.⁷ Marriage "cum unica et virgine" alone symbolizes in its eyes the union of Christ with the Church, and, furthermore, it was a state inferior to that of celibacy. Second marriages were tolerated as a sort of second offense, and were punished by means of certain

¹ *Pardessus*, "L. Sal.," *Geffcken*, *id.*, p. 239 (bibl.).

² It takes away from the enjoyment of the marriage portion: "inde iræ."

³ Except there be an agreement to the contrary made previous to it by "adfatimus."

⁴ *Cf. infra*, "Dower" (rights of the children), "Forfeiture."

⁵ "Sal.," 72; "Alam.," 55; "Bai.," 15, 8; *cf.* "Roth.," 182; "M. G. H.," "L. L.," IV, 333; *Thévenin*, no. 48; "Wis.," 4, 2, 14; *Papien*, 19; "Burg.," 24, 62, 69, 42; "Alam.," 55.

⁶ Reaction already under the Lower Empire, owing to the influence of Christian ideas, but especially with the object of guaranteeing the pecuniary interests of children: *Meynial*, p. 63; *Boissonade*, "Hist. des Droits de l'Epoux Surv.," 1874.

⁷ *Paul*, "1 Cor.," vii; "Nicée", 325, c. 8; *Goffredus*, "Summa," p. 194 (cites St. Jerome); *Hostiensis*, "Summa," IV, sec. n. The Eastern Church forbade fourth marriages, and even third marriages between persons who were more than forty years old and who had children by their first marriages: *Zachariæ*, "Jus Græco-Rom.," III, 227; *Zhisman*, pp. 308, 449; *Perrone*, III, 98.

penalties: (a) penances;¹ (b) incapacity to receive sacred orders;² (c) no nuptial benediction.³ But if the canon law discouraged them from marrying, the Feudal law, which was more in harmony with their natural inclinations, made it a duty for widows to remarry in their own interest, in order that they should not be despoiled of their possessions, and in the interests of the Feudal lord, so that the service of the fief should remain assured.⁴ Perhaps it is as a consequence of this conflict between the Feudal customs and the Christian spirit that the Church, in a manner contrary to the Roman law, did not compel the widow to await the expiration of the year of mourning under penalty of disgrace before she should marry a second time.⁵ The Parliament of Paris was of opinion that the Decretals had not only abolished the disgrace, but the other penalties attached to second marriages,⁶ whereas, in **countries of written law** they did not cease to be applied:⁷ 1st. The woman who remarries (or misappropriates) within the year of mourning loses all the privileges of the married woman and all the gifts given her by her husband.⁸ 2d. If there are no children by the first marriage, the woman cannot give her second husband, by way of marriage portion, or bequeath to him by will, more than one-third of her possessions. 3d. The wife is incapable of inheriting "ab intestat." from her collateral relatives beyond the third degree, and of receiving any gifts "causa mortis" from strangers.⁹ These were the penalties for marriage within the year of mourning;¹⁰ the widow who marries a second time after the year of mourning, is simply deprived of the ownership of the portion of the survivor which came to her from her first husband

¹ C., 31, q. 1. c. 8 (*Gratian*). — Cf. "Orient," "Néocésarée," c. 3; "Laodicée," c. 1; "Nov.," 90 of Leo. — *Van Espen*, 2, 15; *Sanchez*, 7, 81-91.

² As for the man who remarries, and the man who marries a widow or a young girl who is not a virgin, they are qualified as bigamists: *Gratian*, D. 33, c. 2 (a. 490); 34, 9; Dig. X, 1, 21, 2; "VI," 3, 2, 1.

³ "Faux Capit.," 2, 130, 408; Dig. X, 4, 26, 1, 3.

⁴ It is the same thing with widows of artisans and peasants: *Stobbe*, § 248.

⁵ Dig. 3, 2, 10 and 11; "Petrus," 1, 38; "Pœnitent. Theod.," 12, 9. — In the nineteenth century the Roman rule had fallen into disuse: *Anségise*, IV, 17; "Cap.," V, 106, 233, 222; Dig. X, 4, 221, 4; Italy: "Const. Leg. Pis.," 23, "Const. Amalf.," 10. — As to proof of the death of the spouse, see Dig. X, 4, 1, 19; 4, 21, 2; C., 34, q. 1, c. 2; *Beaumanoir*, 57, 11; "Jost.," 220.

⁶ *Laur.* on *Loysel*, 175; bibl. in *Garonis*, "De Pœnis 2 Nub."

⁷ Motives of public honesty, fiction of the marriage continued during the year of mourning: "Ass. de Jérus.," "C. d. B.," 166.

⁸ "Cod. Théod.," 3, 8, 1. Loss of the poor person's share and of the right of inheritance: "F. de Nav.," 4, 3, 6.

⁹ Gifts "inter vivos"? "Glose," s. 1, 1; "Cod. Just.," "De Sec. Nupt.," *Cujas*, "S. Nov.," 22, c. 22.

¹⁰ Cf. Law of Sept. 20, 1792, 3, 2.

(or of gifts and legacies made on condition of not marrying again).

§ 140. **Protection of the Children of the First Marriage.**¹ — To these penalties were added in countries of written law, provisions drawn in the interests of the children by the first marriage, from the laws "*Feminæ quæ*," "*Generaliter*" and "*Hac edictali*."² The Edict of July, 1560, made them apply to the whole kingdom, because, as is said in the preamble, widows who have children, not acknowledging that they are sought after rather for their possessions than for their persons, give their new husband enormous gifts.³ These scandalous gifts were formerly more difficult to make in countries where Customary law was in force; it is for this reason, undoubtedly, that jurisprudence had not felt the need of re-enacting the Roman laws. **First clause of the Edict.**⁴ Widows are forbidden to give their personal possessions⁵ to their new husband⁶ beyond the amount of the share of a child whose share is smallest,⁷ under penalty of having them restored.⁸ **Second clause of the Edict.** Nullity of the grant, if possessions acquired from the predeceased spouse are given by widows or widowers to the advantage of their new spouse;⁹ these possessions should be reserved

¹ *Guyot, Ferrière*, see "*Noces*" (bibl.); *Boucher d'Argis*, "*Tr. des gains Nuptiaux*," 1738; *Dupin*, "*Peines des Secondes Noces*," 1743; *Astruc*, *id.* 1750; *Cambolas*, *id.* (cited by *Astruc*, p. 7); *Champagne*, "*Tr. des Secondes Noces*," 1720; *Launoy*, "*Inst.*," 2, 7; *Lebrun*, "*Succ.*," 2, 6; *Ricard*, 3, 9; *Pothier*, VI and VIII; *D'Aguesseau*, ed. 1772, IV, 25; *Boissonade*, "*Dr. du Conj. Surv.*" (bibl.); "*Thèse*," 1887; *Stobbe*, § 248; *Britz*, "*Cod. Belg.*," 552; *Bourjon*, 11, 191.

² "*Cod. Just.*," 5, 9, 3, 5, 6; cf. "*Cod. Théod.*," 2, 21, 1, 2 (358); 3, 8, 2 (832); "*Nov.*" 7 (469).

³ The Edict was enacted on the occasion of the marriage of Catherine d'Aligre.

⁴ "*L. Hac Edictali*" ("*Cod. Just.*," "*De Sec. Nupt.*," 6), in 469; Civil Code, 1098. — The Orders applied this rule to widowers, who were not mentioned in the Edict because it had been enacted with reference to the marriage of a widow.

⁵ Even by contract of marriage (clauses of conversion of real property into personal property, etc.): *Denisart*, see "*Noces*"; Order of Jan. 29, 1658; Civil Code, 1496.

⁶ Either directly or by means of persons interposed (such are presumed to be the descendants or ascendants of the new spouse): *Denisart*, see "*Noces*," no. 20. The old law does not distinguish between gifts made by persons interposed and indirect gifts; a reduction of them took place in both cases: cf. Civil Code, 1099.

⁷ *Louet*, "*N.*," 3, 22 (Order of 1651). Several marriages; all the new husbands together only have a right to the share of one child: *Pothier*, no. 566.

⁸ The reduction affects third parties and is for the benefit of the children of the second marriage. In countries of Customs they follow the "*Lex Quoniam*," "*Cod. Just.*," "*De Sec.*" no. 9, rather than the "*Nov.*," 22, c. 27, which is applied in countries of written law.

⁹ "*Lex Feminæ Quæ*," "*Cod. Just.*," "*De Sec. Nupt.*," 3 (in 382) and

for the children of the first marriage.¹ These provisions were perfected by Art. 279 of the Custom of Paris,² which decided that acquisitions of property made jointly with the first husband could not be given by widows to their next husbands; and by Art. 182 of the Ordinance of Blois, enacting penalties against widows who should remarry with persons who were unworthy of them, such as their men servants.³ Of this legislation only the first clause of the Edict of 1560 remains.⁴

Another effect of second marriages was to restrict the rights of parents over the persons of their children; this will be dealt with later on in connection with paternal power and guardianship.

"Generaliter," *ibid.*, 5 (in 444). Cf. "Nov.," 2, 1, and "Nov.," 22, 25. Cf. rights of children with regard to dower; "F. de Béarn," Art. 270; *Pothier*, nos. 605 *et seq.*; *Sanchez*, 7, 89.

¹ Substitution in trust for the benefit of all the children of the first marriage without any distinction and without any favoring of any one of them.

² "Orléans," 203. Extended to include the husband (March 4, 1697, Order of the Parliament of Paris). The children of the second marriage took a share in this jointly acquired property with those of the first marriage.

³ Cancelling of the direct or indirect advantages given by widows to their new husbands; prohibition of these advantages from the time of the contract of marriage: "Bretagne, N. C.," 54; *Cambolas*, "Décis.," 2, 38 ("Arr. Toulouse," 1597).

⁴ Civil Code, 1098. Law of the 17th Niv., year II, Arts. 13 and 61, impliedly repealed the Edict of 1560. Cf. *Chabot*, "Quest. Transit.," see "Noces."

TOPIC 8. UNION OTHER THAN MARRIAGE

§ 141. In General.

§ 142. Concubinage.

| § 143. Morganatic Marriages.

§ 141. **In General.** — Our law only knows one kind of marriage, the same for everybody. In the old legislations, alongside of marriage properly so called, it is not a rare thing for unions of a lower order to exist. Thus it is that we are able to distinguish in the Barbarian law: marriage between free-born people of an equal station in life, with or without “mundium,” concubinage, and union with slaves.¹ Between slaves the Roman “contubernium” gave way to a true marriage,² subject for a long time, however, to the intervention of the master.³ The union of free persons with slaves was treated in a different manner, according to circumstances. (a) The intercourse of a free man with the slave of another was punished (attempt upon property), excepting if the master gave his consent.⁴ The free man lost his liberty: “servus trahit ad se francum.”⁵ (b) The intercourse of a free woman with the slave of another was also punishable;⁶ loss of property was the usual consequence, as is shown by the formulæ of the “Epistolæ conculatoriæ”⁷ by means of which the master gives up the right of

¹ Köhne, “Geschlechtsverbindungen der Unfreien im Fränk. R.,” 1888 (“Unters.” by Gierke); V. Sacher, “Personenstand u. Ehschliess.,” 1879; “Sachsensp.,” 51.

² Excepting effects which were incompatible with the status of slavery: “Bai.,” 8, 12; Rozière, 399; Pardessus, “Dipl.,” I, 198. Commonly used expressions: “matrimonia,” “conjugia,” “uxor.” “Orléans,” IV, 541, c. 24; “Capit.,” ed. Bor., I, 36, c. 15; Köhne, p. 9.

³ Required for a long time by the Church (“Orléans,” IV, 541, c. 24) under penalty of annulment of the marriage. The Church is compelled to prevent the master from separating his slaves after they have been *validly* married: “Châlons,” 813, c. 30: formal prohibition; “Edit Pist.,” c. 31; cf. “Cap. Héristal,” 779, c. 19.

⁴ “Sal.,” 13 and 25 (notes by Geffcken); Köhne, p. 25; “Rib.,” 58, 12, 13. Annulment of marriage as in the preceding case for lack of the master’s consent: “Edit Pist.,” 31. Mistake as to station, see: “Impediments”; “Cap.,” I, 38 and 40, c. 7 and 6. Case where one of the spouses becomes a slave. Cf. “Divorce,” “Cap.” 803, c. 8 (I, 114): the husband who sells his liberty by giving himself as a pledge does not by this means affect the liberty of his wife or children.

⁵ “Rib.,” 58, 14, 15; “Cap.” 819, c. 3. But not at Saint-Germain des Prés: Guérard, “Polypt.,” I, 392, 969. Cf. Köhne, p. 32.

⁶ “Sal.,” 13, 7; “Cod. Théod.,” 4, 11, 1 (“Ad sc. Claudianum”).

⁷ Rozière, “Form.,” 101 *et seq.*; “Rib.,” 58, 16; Geffcken, “L. Sal.,” 135.

treating the woman and her children as slaves. (c) The free woman who marries her own slave is severely punished.¹ (d) The man who contracts a permanent union with his own slave thereby contracts a sort of inferior marriage, which differs very little from concubinage.²

§ 142. **Concubinage**,³ practised at Rome and in the majority of the old legislations, was not unknown in Germanic law.⁴ Properly speaking, it consisted in the union of the free man with a woman who was also free, but of lower condition, especially with a freed-woman. It was to be distinguished from marriage, in that it could be more easily dissolved,⁵ and in that the concubine did not acquire the rank of her husband. In Rome the concubine was ordinarily recognized by the absence of "libellus dotis";⁶ in the same way, in Barbarian law, the "pretium nuptiale" or Germanic marriage portion is lacking in the case of concubinage, which is entered into without any of the solemnities which are customary in the case of marriage;⁷ neither the wife nor the children have the same rank as the father.⁸ It was allowable in olden times, even for married men,⁹ but this Constantine forbade in

¹ "Sal.," 13, 7 *et seq.* Loss of freedom, "Cap." 5: confiscation of all her property; she shall be "aspellis" ("wargus"), outside of the law. The slave shall perish upon the wheel; "Cap." 819, c. 3. — "Rib.," 58, 18 (*Köhne*, p. 15): a sword and a distaff are offered to the woman; if she takes the sword she must kill the slave, if she chooses the distaff she must share his fate. This alternative is only possible when asked for by the relatives.

² "Roth.," 222; "Liut.," 106; *Fr. de Gaudenzi*, 8 (*Zeumer*, "Leges Wisigoth.," p. 317); *Köhne*, p. 25; *Amira*, p. 161, contrasts the "Friede" with the "Kebse" kept in the house, and both of these with the lawful wife.

³ *Du Cange*, see "Concubina"; *Guyot*, see "Concubinage"; *Lutkens*, "Polygamie u. Konkubinat.," 1723; *Thorlacius*, "Boreal. vet. Matrim.," 1784; *Stobbe*, § 212; *Pertile*, § 114. As to the "Massipia" of the Béarnese law *cf.* *Lagrèze*, "Dr. dans les Pyrénées," p. 375.

⁴ *Fr. de Gaudenzi*, 8; "Roth.," 154 *et seq.*; "Grim.," 5; "Liut.," 106; *Rozière*, 130.

⁵ *Brunner*, "Z. S. S.," 1896, "G. A.," 12. A union which is public and lasting, but the maintaining of it depends upon the husband ("Kebsehe," allusion to the fact that the wife was a serf or only semi-free); *Kovalevsky*, "Cout. Contemp.," 155.

⁶ *Girard*, "Manuel," 151; *Esmein*, I, 108; "Cod. Just.," 5, 26, 1; *Paul*, 2, 20, 1; "Cod. Just.," 7, 15, 3; "Nov. Just.," 18 and 89.

⁷ In 869 Charles the Bald caused Richilde, sister of Count Boson, to be brought to him and "in concubinam accepit"; in 870, "concubinam suam Richildem desponsatam atque dotatam in conjugem accepit"; "M. G. H., S. S.," I, 486. William Long-Sword marries his wife "more danico," that is to say, without solemnities, "usu": *Darceste*, "Etudes," pp. 309, 326.

⁸ Letter of Leo I to Rusticus, 458: *Gratian*, C., 32, q. 2, cap. 12.

⁹ Contrary argument of the ecclesiastical prohibitions. Scandinavians: *Amira*, "Recht," pp. 162, 165; "Saga de Nial." Oppositions established by Ficker between the law of the Western Alemanni and that of the Eastern Alemanni, the latter being the only ones who admitted concubinage. Opposed to this view: *Brunner*, *op. cit.*, 31: *cf.* *Salvioli*, § 183; *Schroeder*, 302.

Rome.¹ Christianity condemned both the concubinage of married people² and that of unmarried people,³ a frail liaison, where the man and the woman were too far apart, owing to their condition, to be a realization of the image of the mystical marriage of Christ and the Church; and it rejected every union between the sexes outside of marriage itself.⁴ But concubinage had become so firmly rooted in the Customs that it persisted in many localities, and was even tolerated by the civil law. This accounts for the fact that it is found organized in the "Siete Partidas" under the name of "barraganía."⁵ Against priests who practised concubinage the Church had need of the efforts of its greatest pontiffs.⁶ In the sixteenth century legal concubinage had almost everywhere disappeared; there remained nothing but concubinage as a simple union in fact, against which the Council of Trent let loose its austerity,⁷ commanding the bishop to give three admonitions to the man and the woman who live together without being married, after which they shall be excommunicated by the ordinary.⁸ Secular jurisdiction, which is more indulgent, does not inflict any

¹ "Capitul.," I, 202, c. 5; 376, c. 37; II, 45, c. 35; 189, c. 12; 190, c. 15. — As to the Roman law of the barbarian period, cf. "Cod. Théod.," 4, 6, 4 and 6; "L. Wisig.," ed. Zeumer, p. 318, c. 3; "Cod. Just.," 5, 27, 2 (½ ounce to the concubine); *Papien*, 37, 4 (one ounce and ½ ounce); "Int. Nov. Théod.," c. 1. The constitution to which reference is made has not come down to us: "L. Wis. Rec.," 3, 5, 5; "Z. S. S.," 1886; "G. A.," 30.

² "Capit.," 790, c. 5 (I, 202).

³ Not without some hesitation. The celibate who has only one concubine is not excluded from the communion, according to the First Council of Toledo: *Bruns*, I, 206; *Gratian*, D., 34, c. 4; *Tribur*, 895, c. 36 (*Mansi*, 18, 151): that he who is not married shall content himself with a single concubine: "Mayence," 851, c. 15.

⁴ "Const. Apost.," 8, 32; *Gratian*, D., 34, c. 5; *Augustine*, "Serm.," 289, 4; *Gratian*, C., 32, q. 2, c. 11-12 (letter of Pope St. Leo in 458 to Rusticus of Narbonne). — Moreover, from the day when the theory of marriage by mutual consent triumphed the majority of unions with concubines became true marriages: *Michelet*, "Origines," p. 41; *P. Fournier*, "B. Ch.," 1900, p. 89 *et seq.* The register of the ecclesiastical judge of Cerisy, however, shows us many relations of concubinage which were transformed into marriages.

⁵ IV, 14 (duty of fidelity, paternal filiation legally established, only one concubine, no impediment to the marriage of people living in a state of concubinage). Cf. "massipia" or concubines taken before a notary in Navarre: *Cujas*, "Cod.," 5, 26; *Giraud*, I, 233, 113; *Lagrèze*, "Hist. du Dr. de Nav.," II, 188. Italian Statutes of the thirteenth and fourteenth centuries: *Salvioli*, § 183; *Muñoz*, "Fueros," p. 536, etc.

⁶ Dig. X, "de fil. Presbyt.," *Guyot*, see "Célibat." In the literary documents of the twelfth and thirteenth centuries the priest is shown as living with a "priestess," e.g., Fable of Constant Duhamel: *Luchaire*, "Acad. Sc. Mort.," 1901, 581.

⁷ *Esmein*, II, 310.

⁸ Register of the ecclesiastical judge of Cerisy, *passim*; *Benedicti*, "Index," see "Concubina"; *Héricourt*, "E.," 24, 25; *Van Espen*, I, 497; II, 65.

penalty upon them; this sin does no wrong to anybody, says Ferrière. It was deemed sufficient to annul gifts between people living in concubinage,¹ without which they would have had an advantage over married people.²

§ 143. **Morganatic Marriages.**³ — The idea that marriage with all its effects is possible only between persons of the same position persisted in the Customs after it had disappeared from legislation. Combined with motives of a political nature, such as the indivisibility of fiefs or of States,⁴ and with the prohibition of concubinage by the Church, it gave rise to the morganatic marriage, that is to say, to a union which in its essential characteristics does not differ from ordinary marriage (monogamy, indissolubility, legitimate filiation, etc.), but wherein neither the women nor the children hold the same social rank as the husband.⁵

In Germany,⁶ from the thirteenth century, it is permitted only among the upper nobility, and to-day in the families of princes only. The wife is only the equal of her husband if she is "ebenbürtig," that is, of equal birth. With any other woman a marriage, however regular it may be, is a misalliance, a "disparagium," a morganatic⁷ or left-handed marriage.⁸ The wife does not take her place in the family of the husband and has over his possessions only the rights specified in the contract of marriage;⁹ thus, she has no dower rights. No more than their mother do the children attain to the rank of their father and inherit the

¹ "Tour.," 246; "Anjou," 342, etc. "Ord." of 1629, 132; *Ferrière*, see bibl.

² However, they kept up gifts for sustenance in a case where the concubine was worthy of having some interest taken in her.

³ *Stobbe*, § 213, 214 (bibl.); *Pütter*, "Missheiraten," 1796; *Zoepl*, *id.*, 1853; *Göhrum*, "Lehre d. Ebenbürtigkeit," 1846; *Heffler*, "Sonderrechte," 1871; *Schulze*, "Preuss. Staatsr.," I, 185; *Niebschütz*, "De Matrim. ad. Morganaticam," 1851; *D'Haucour*, "R. Crit. de Lég.," 24, 579; *Culmann*, "Stud. Üb. de Morg. Ehe.," 1880; *Béranger (Fernand)*, "De Matrim. ad. Morganat." Cf. Prussian "Landrecht," II, 1, 835; II, 2, 555 (contrary to practice); *Schulte*, §§ 142, 174.

⁴ A prince who is a widower takes a morganatic wife, so as to keep the throne for the children of the first marriage and avoid a vexatious rivalry. Cf. the position of the prince consort in countries where the crown belongs to the queen.

⁵ "L. Feud.," 2, 29 (Milan: "accipere ad morganaticam"; elsewhere they say: "lege Salica"). Cf. 2, 26, 16.

⁶ "Sachsensp.," I, 16, 2: no "Ebenbürtigkeit" between those who are free and those who are not free (the children then take the lower rank); "Schwabenspiegel," 60 b; between "Semperfreie" and "Mittelfreie," "a fortiori" between nobles and commoners: *Schroeder*, § 42, 7; *Heusler*, § 37.

⁷ By reason of the "Morgengabe" stipulated for at the time of the marriage.

⁸ The husband took the right hand of the lawful wife. Cf. *Martène*, *op. cit.*

⁹ "L. Feud.," 2, 29.

possessions of the family; they are only recognized as having a right to be supported.¹ The effects of the misalliance can be done away with if all the male descendants who are capable of inheriting² give their consent. In the same way, if the family dies out, the children born of the morganatic marriage carry it on.

¹ For each family one must consult the laws or "Hausgesetze" which govern it, as well for cases of "Ebenbürtigkeit" as for the effects which can be connected with a misalliance.

² Can an imperial privilege take away the succession from the agnates and confer it upon the children? Capitularies of 1658, 1742, 1792.

TOPIC 9. POWER OF THE HUSBAND

§§ 144, 145. Foundations of the Power of the Husband.	§ 150. Supplementary Authorization Given by Law.
§ 146. Right of Correction.	§ 151. Effects of Authorization.
§ 147. The Husband's Authority.	§ 152. Lack of Authorization. — Beau- manoir's System.
§ 148. The Incapacity of the Wife is General.	§ 153. Rights of Third Parties.
§ 149. How is the Authorization Given?	

§ 144. **Foundations of the Power of the Husband.**¹ — In the early Customary law the Germanic "mundium" is continued under the name of power or authority of the husband, including at the same time both the person and the possessions of the wife;²

¹ Terminology. Barbarian period: "mundium," "mundeburdium," "po-testas," etc. Period of Customs: "mainbournie," "mainplévie" (Liège), "coverture" (England), "bail," "garde," "avouerie," etc. *Post*, "Guardianship of Women," "System of Possessions between Spouses," "Power of the Father." *Loysel*, 176. — On the unity of the domestic power or "mundium," on its character of power and not of protection: *Heusler*, § 23.

² Against this opinion, which is commonly admitted, cf. *Lefebvre, op. cit.*, p. 397, according to whom the "mundium" existed only among the Lombards, the Saxons and the Scandinavians. The origin of the husband's power in Customary law would be found especially in the Christian ideas, for which the way had been prepared by the Germanic Customs; among the Franks the wife would have been free *at law*, subject *in fact*, for the most part. — This system, which we do not pretend to discuss thoroughly in a mere note, at least calls for a few observations. 1st. If the husband's power is a juridical production of the Christian spirit, is it not extraordinary that the Church, which has given us so much legislation on the subject of marriage, did not find a place in its law for an institution of so much importance? Perhaps one will say that the Christian teaching and penances were sufficient; but, as far as that goes, what was the use of legislation on the subject of marriage? 2d. It is almost a miracle to see this power being established over the barbarian woman, while the Roman woman escapes it. At the same time, both of them were submitted to the influence of Christianity. According to the logic of things, it is in the case of the former of these women that the reform should have had its inception. If this was not so, then we can say "spiritus fiat ubi vult." 3d. It is quite possible that the "mundium" did not operate among the Franks with the same harshness as among the Lombards; at a very early period it was weakened and modified. But, if one denies its existence, the appearance of the husband's power during the feudal period is an enigma which cannot be solved. It is not arbitrary to argue from the Lombard law, for, aside from the general relationship of the barbarian laws, the Lombard Customs of the Middle Ages resemble the French Customs. The same power of the husband would have been created here by the Christian spirit and there by the Germanic law. 4th. It is difficult to draw from Christian teaching the right to beat a wife; also, they derived it from the responsibility of the husband because of the offenses of his wife. But this responsibility surely existed during the Frankish period. Therefore, the right of correction also existed, and this essential attribute of the "mundium" carries with it almost all the others. 5th. Negative arguments: (a) The silence

according to the formula in the "Schwabenspiegel," 72, "der Mann ist des Weibes Vogt und Meister." Assuming the quasi-military organization of the family, the necessity for command by an individual, the woman was found to be subordinate to the husband; her physical weakness during a period of violence relegated her to this inferior rôle.¹ As soon as social conditions became less disturbed, it was not long before the civil emancipation of unmarried women, young girls, or widows was introduced. This change had its reciprocal effect on the condition of the married woman herself, in spite of the force of tradition and the constant presence at her side of one stronger than she; it was difficult to ascribe radical incapacity, the day following her marriage, to the woman who the day before was in possession of her full capacity. She had the enjoyment of rights, but she was not allowed the exercise of them.² One can say that when she married she condemned herself to a perpetual minority. Although reduced, the power of the

of the Frankish laws leads one to suppose that the law of the family was not codified in them. I admit that the formulæ and statutes might have been more explicit, but how many omissions do we not find? (b) It is time wasted to seek in the Frankish statutes for a procedure dealing with the annulment of a contract entered into by the wife, if this contract, as we know, could not be pleaded against the husband. 6th. Positive reasons. The experience of Berthegonde, who fled from her husband to take refuge in churches or monasteries, bears witness to the authority of the bishops and brings into play the right of sanctuary; against this right the domestic power wrecks itself as well as the social power (*Gregory of Tours*, IX, 33). The case of Frédégonde giving her daughter a marriage portion of gold, money, and clothing, is not of much consequence; in the first place, at a very early time the "ornamenta muliebria" were left to women as their own special property; and then, again, the husband's "mundium" must have been very slight over a queen, whom it cost so little to have her husband assassinated (*Gregory of Tours*, VI, 45). Cf. "Acad. Lég. Toulouse," 1900 ("Le Mariage par Achat") and "Acad. Sciences Toulouse," 1895 ("Tutelle des Femmes"). Let us add that, if the Frankish Customs dealing with the family were not of the same consistency as codified laws, — a consistency which cannot be expected from even the codes of that period, — they none the less constituted juridical rules. The confusion and the obscurity which existed with regard to them are, however, not an absolute obstacle to one's perceiving a predominating tendency, as it were, and logical connections; a rough outline of this law of the family may thus be accurate, while at the same time it too often preserves a systematic character.

¹ With very rare exceptions women are not capable of bearing arms, and civil capacity is measured by physical force: *post*, "Guardianship of Women." *Heusler*, § 25, objects that the weakness of woman has always remained the same, whereas her capacity has increased. Undoubtedly, a woman is not physically incapable like a child of tender age; but her weakness has prevented her becoming head of the family. Cf. with regard to the Scandinavian woman, whose situation in the family has been presented under too favorable an aspect, *Gide*, p. 219; *Daresté*, pp. 289, 307; "Lég.," "Sues Goth.," IV, 9 (the husband strikes his wife so violently that she dies from the effects of it).

² Cf. *post*, "Participation in the Exercise of the Power of the Husband," "System of Possessions between Spouses." *Mertian de Muller*, "Cond. de la Mère," 1878.

husband thus persisted, differing in this from the guardianship of minors, in the interests of peace in the household, so that it might assure the unity of direction of the conjugal companionship.¹ By way of compensation the woman received certain securities and privileges.² Owing to a contradiction which is more apparent than real, in this authority of the husband there was seen a safeguard for the woman herself, who was considered as being weak and inexperienced by nature (*cf.* Roman law: "imbecillitas sexus," the Velleianum Decree of the Senate).³ This was a contradiction, as the interest of the husband, who was the representative of the family, might be in opposition to that of the wife; but a contradiction which has not given much offense, because the wife would be protected, if not against her husband, at least against third persons. At the same time, the power of the husband was deprived of its despotic character; the State penetrated into the circle of family affairs, which until that time had been closed to it, controlled its administration, and constituted itself, in default of the husband, the guardian of the wife.⁴ If one considers this customary theory in its later developments it seems to us like a composite system wherein various conceptions come to light: giving of the Germanic "mundium," unity of direction in the management of the moral and material inheritance created by the marriage, physical incapacity and inexperience of the woman.⁵ This theory found a support in the Christian ideas: the axiom "Vir caput est mulieris" seemed like the religious formula of the civil law; ⁶ the theologians maintained that the woman who

¹ If one can compare the husband to a guardian, one should not forget that he does not have to furnish any surety or render any account, and that he cannot be removed. Formula in *Grimm*, "Weisth.," II, 836.

² *Aristotle*, "Polit.," 3, 2, 10 (*cf.* *Auguste Comte*, "Catéchisme Positiviste"): "Man is concerned with acquiring, woman with preserving." This remark of Aristotle's is not so true in our day. But for a long time the wife was restricted to the household management and the husband was responsible for external relations.

³ As to the bad opinion which jurists and theologians have of women, see *post*, "Guardianship of Women." "Le Songe du Verger," I, 147, makes a regular prosecutor's speech against them. *D'Argentré*, on "Bret.," 410, classes them, as we would say, among the impulsive people (outbursts of emotion, lack of caution, ungovernable pride): *Bédier*, "Fabliaux," p. 318. In the time of *Chassaneus*, "Catal. Glor. Mundi," 2, 12, when a married woman passed near a man, custom demanded that she should conceal half of her face.

⁴ *Proudhon*, "Tr. des Personnes," I, p. 468.

⁵ *Pothier*, no. 1: The need which the wife has for the authorization of the husband is not based upon the weakness of her reason.

⁶ *Paul*, "Ephes.," v, 21. According to the theologians, woman was originally the equal of man, but Eve's fault caused her to descend to the rank of an

disobeyed her husband committed a mortal sin. However, that which shows us very clearly that we must not attach too much importance to these religious ideas, is that they have been powerless to compel the acceptance of the principle of the incapacity of the married woman in the countries of written law:¹ "by custom, the wife is under the power of her husband; it is otherwise in written law."² The measures of the Revolutionary law,³ inspired by the idea that the power of the husband is "a creation of despotic governments,"⁴ and the modern woman's rights doctrine,⁵ had precedents in the jurisprudence of the parliaments of the written law; to which one may liken the English Statute of the 18th of August, 1882, giving her freedom to the married woman.⁶ But the framers of the Civil Code extended to the whole of France the power of the husband which was in force in countries of Customary law. Instead of the contrast between the two French systems as once existing, what we now have is an antithesis between the condition of the French woman and that of the Anglo-Saxon woman; an antithesis which custom has under-

inferior; she became the accomplice of the serpent; she is unworthy to receive the Eucharist with bare hands and to touch the "palla altaris" ("Conc. d'Auxerre," 36), etc. The clergy is not recruited from among women. Cf. *St. Thomas*, "Summ. Theol.," 1a, q. 92; *Esmein*, "Mariage," I, 60; *Malo*, "R. d. Frau. in Christ. K.," 1896; *Pontas*, "Dict. des Cas de Consc.," 1741, see "Femme Mariée." The common opinion is that the domestic power, whether of the husband or of the father, became milder under the influence of Christianity: *Gengler*, "Einfluss. d. Christ. auf das Altgerm. Rechtsleben." *Contra: Lefebvre*, *op. cit.*

¹ *Julian*, I, 3; *Serres*, I, 8; *Boutaric*, *id.* Let us observe that certain Customs of the South admit the power of the husband, just as the Italian statutes do. At Genoa marriages according to the local Custom are distinguished from marriages according to the Roman law: "Bordeaux," 64, 80, 82, 112 ("Etabl.," 34); "F. de Béarn," 261.

² *Desmares*, 35; "Petrus," I, 32; *Meynial*, "N. R. H.," 1901, 268.

³ "Premier Projet de Cod. Civ.," I, 3, 11 *et seq.* (1793) (equality of the spouses in that which concerns the administration of their possessions; consent of both spouses to the alienation of the possessions of the husband or of the wife); *Condorcet*, "Progrès de l'Esprit Humain," "Œuvres," X, p. 121. Mirabeau and Robespierre fought against the emancipation of woman (woman should reign in the interior of her house; everywhere else she is out of place).

⁴ *Montesquieu*, "Espr. des Lois," 19, 14 (harmony between the political system and the constitution of the family).

⁵ Systems of *Saint-Simon* and of *Fournier: Michelet*, "La Femme," *Stuart Mill*, "Subjection of Women," 1859 (French trans., 1869); *Bridel*, "Le Droit des Femmes," 1893; *Secrétan*, "Le Dr. de la F.," 1888; *Fouilleé*, "R. D. M.," Sept. 15, 1895; *P. Lacombe*, "Le Mariage Libre," 1895; *Varigny*, "La Femme aux Etats-Unis," 1893; bibl. in the "Rev. Encyclop. Larousse," Nov. 28, 1896; *Desmaret*, "La Femme Future," 1900; cf. *Laurent* in his "Cours de Code Civil" and in his projected revision of this code.

⁶ *Lehr*, *op. cit.*; *Glasson*, "Rap. s. les Prix du Budget," 1898, and a recent enactment (1901) for Norway, according to which a woman may or may not promise obedience to her husband when she is married. — Why not also release her from the duty of fidelity?

taken to correct by giving to the former the liberty which the law refused her, and by preventing the latter from abusing her legal rights.¹

§ 145. **The Same.**—The Germanic “mundium” (from “munt,” meaning hand)² recalls, feature by feature, by its name and by its effects, the Roman “manus,”³ or, if one prefers it, the power of the husband among the Gauls in the time of Cæsar.⁴ It implies as a first condition the **change of family**. In passing from her natural family into that of her husband the woman ceases to be subject to the paternal power;⁵ she takes the name of her husband,⁶ lives according to his station,⁷ acquires his nationality, and still more so his domicile.⁸ Formerly she also lost all right of inheriting from her relatives. But it does not seem that the tie of solidarity which united her to the latter was ever entirely broken; they helped her in time of need and protected her.⁹ In the last stage of the law, it has for a long time been admitted that the woman, at the same time as she enters the family of her husband, does not cease to belong to her natural family.

§ 146. **Right of Correction.**¹⁰—The disciplinary power of the head of the family over the entire house naturally included the wife.¹¹ In primitive times it was undoubtedly limited only by

¹ *Starcke, op. cit.*

² *Heusler, § 22 et seq.; Simonnet, “Thèse,” 1898.* As to the Lombard law cf. *Schupfer, “Arch. Giur.,” I, 139; Bluhme, “Z. R. G.,” XI; Gaudenzi, “Arch. Stor. p. l. Prov. Napoletane,” 1888, XIII, 1.*

³ Many of the old authors cause the husband's power to be derived from the Roman “manus,”—for example, *Loyseau, “Offices,” 5, 2, 26;* with this meaning *Van Wetter, “Le Dr. Romain et le Droit Celtique.”* But the “manus” had disappeared at the time of the establishing of the barbarians.

⁴ “*Acad. Lég. Toulouse,*” 1900 (“*Le Mariage par Achat*”); cf. *Meynial, p. 92,* who explains *Tacitus, c. 20, etc.,* by means of the Eddas and the *Nibelungen* (Brunhild has possessions, disposes of her treasures when she dies, can leave her husband at her will; Gudrun is protected by her brothers; *Dargun, “Mutterrecht,” passim,* traces of the matriarchate), and who believes that the subjection of the woman is a later fact resulting from the savage life which followed the Invasions (p. 102). See also *Lefebvre, op. cit. and loc. cit.*

⁵ Cf., however, countries of written law: “*Gr. C. Norm.,*” 31, 14 (marriage is equivalent to majority); *post, “Power of the Father.”*

⁶ Before there were any patronymic names the married woman was designated by her baptismal name followed by the qualification “uxor N.” . . ., the wife of so and so.

⁷ The plebeian woman who married a nobleman became a noble, and vice versa. At the same time, the serf who married a nobleman did not become a noblewoman, excepting when the lord married his own serf.

⁸ She should follow the husband wherever he goes to reside (excepting if he goes abroad, says Pothier).

⁹ *Meynial, p. 83; post, “Correction.”*

¹⁰ *Dubrunle, “Dr. du Mari sur la Pers. de la Femme,” 1879.*

¹¹ “*Priv. de Barèges*” (a. 1404), Art. 7: every master of the house can punish his wife and his family without anybody being able to prevent him. — But it

the fear which the husband had of the relatives of the wife.¹ Although Tacitus does not say so, there is reason to believe that the Germanic husband, who did not hesitate to gamble with his own person, gave as a stake his wife and his children before pledging his property. At any rate, the old traditions agree in authorizing him to sell them in case of necessity.² The formula interpreting the Edict of Rotharis declares that the husband cannot kill his wife "ad libitum," but only if there is a valid motive ("rationabiliter");³ this is to recognize the "jus vitæ necisque," and leads us to believe that in the past this right was almost absolute. The Edict calls upon the relatives of the woman and the State to punish illegal murder. Of this ancient state of things the law which had so long been in force in many countries, of killing the wife caught in flagrant adultery, still remained. There also remained the right to beat her for lesser faults, to give her the whip, to strike her with rods and the stick.⁴ In the twelfth and thirteenth centuries the Customs show that "it is allowable for the man to beat his wife, as long as he does not kill her or mutilate her."⁵ To this formula of Beaumanoir one may liken that of

is probable that this right could not be exercised over the heiress who was mistress of the house, and who had married the younger son of some other family; the latter was, in fact, reduced to about the same rôle as that of the first servitor. D'Arbois de Jubainville also shows us that in Ireland the condition of the wife varied according to her wealth; if she were rich she lorded it over her husband; if she were poor she became his servant.

¹ Tacitus, "Germ.," 19; cf. Grimoald, 6; "Liut.," 120, 130; Greg. T., 10, 22; Kraus, I, 40; Rosin, "Formvorschrift," 1880.

² Tacitus, "Ann.," 4, 72 ("Frisians"); "Bai.," 1, 80; "Alam.," 51, 1; "Acad. Législ. Toulouse," 1900 ("Mar. par Achat"); Grimm, "R. A.," 450; "Roth.," 203; "Cap.," 803, c. 8 (I, 114); Richtofen, "Z. Lex Saxon," p. 293; "T. A. C. Bret.," 314 (no imprisonment for her husband).

³ "Roth.," 200 *et seq.*, and "Form.," cf. "Wis.," 3, 4, 1 *et seq.*

⁴ Wife "sub virga" (English expression): Michelet, "Orig.," p. 48; "Liut.," 121; "Cap.," 829, c. 3; Burchard, "Dec.," 1, 93. The Custom of Ardenburg, in Zealand (twelfth century), according to which the wife is "a chattel of the husband," formulates this right with a savage humor: Art. 9, "The husband may beat and wound his wife, may gash and slash her from top to toe, may warm his feet in the blood of his wife, and sew up the wounds, without offending his lord, provided she does not die from the effects" (cited by Van Wetter, p. 35). "Hamburg," 1270, 3, 8; "Riga," 6, 4, 3; Viollet, p. 504; R. Foelix, 8, 672: in 1841 an English peasant led his wife to the market and sold her to the highest bidder (in 1884, also, according to Viollet).

⁵ Beaumanoir, 57, 6: "Quand elle meffet," he says, and he gives four examples: she is about to "fere folie de son cors," she lies to her baron, she curses, she does not wish to obey his reasonable commands: "Gr. Cout. Norm.," 85, 100 (to put out the eyes, to break the arms, to be in the habit of giving blows, often and without reason, "enormi percussione," this is not a mere correction): "F. de Béarn," 266; "Bergerac," 1322, Art. 82. Analogous formulæ in the Italian statutes of the fourteenth and fifteenth centuries: Pertile, III, 308. Cf. the Russian "domostroi" or Economist (sixteenth century); story of Griselidis. This law is hardly the expression of customs such as are

d'Argentré in the sixteenth century:¹ "marito licet castigare uxorum sicut puerum infra ætatum."²

The Church allowed the woman to ask for a separation of domicile in cases of ill-treatment on the part of her husband ("si tanta sit viri sævitia ut mulieri trepidanti non possit sufficiens securitas provideri," says Innocent III).³ It even gave her a true independence in matters of religion. The submission of the wife to the husband was limited by her duties towards God.⁴ With this exception, the wife owed obedience to the husband, who was the sole judge of her relations and her acts.⁵ We have already seen what means the monarchic law gave the husband to suppress dissensions on the part of the wife.⁶

shown us in literary documents like the "Dit de Bigorne et de Chicheface" and the fabliaux where the husbands are the playthings of their wives. To the English formula: "Cui ipsa in vita sua contradicere non potuit," cf. "Sire Hain" and "Dame Anieuse"; see, however, *Pasquier*, "Inst.," p. 65.

Against this abandonment of the old law the popular instinct reacted by means of burlesque ceremonies, a species of disgracing punishments, some of which have been preserved even to our day, and which have as their object the ridiculing of husbands who are too weak. If he allows himself to be beaten by his wife, the husband shall straddle a donkey with his face turned towards the tail in the midst of the laughter and jests of the whole village: *Du Cange*, see "Asinus"; *Michelet*, p. 48; "Rev. des Pyrénées," 1900; "La Couvade, en France."

¹ "Sur Bretagne," 410; *Chassaneus*, on "Bourg," c. "Droits des Gens Mariés": "Æquiparantur pater et filius, maritus et uxor"; *Loyseau*, "Offices," 5, 2, 26. A very widespread custom, according to which the women eat standing up or sitting near the hearth and waiting on the men seated at table: *Viолlet*, p. 503; "R. des Pyr.," 1900, *ib.*; *Lehuérrou*, "Caroling.," p. 39.

² To punish his wife is a right and a duty of the husband, for he is responsible for her offenses, not that he will have to undergo the corporal punishment that she deserves, but because he must pay the fine and the damages: *Beaumanoir*, 56, 6; "Cout. de Norm.," 544; Rollo, according to *Wace*, circa 1236, punishes a husband for the offense of his wife: *LeFebvre*, "Cout. Fr. du Mar.," p. 20.

³ Dig. X, "de Rest. Spol.," 13; *Jaffé*, "Reg.," 2845 (Nicholas I); *Mesangère*, "Dict. des Proverbes": "A battre faut l'amour." *Brunner*, "Schoeffenb.," 511: the husband should act with respect to his wife "potius bonis affatibus et virgæ disciplina quam turpibus alloquiis, flagellis et violentis castigationibus." At Breslau in 1451 a husband promises to strike his wife only with rods, as is proper, and as a wise man should do and in an altogether honorable manner: *Stobbe*, § 215. Cf. servants, children: *Daresté*, 326; *Per-tile*, III, 309; "Ass. de Jér.," "C. de B.," 181.

⁴ *Glanville*, 6, 3; "Morlaas," 335: the wife cannot release her husband from excommunication (they are but one flesh, but the offense is personal): "T. A. C. Bret.," 222 (hierarchy of duties).

⁵ Bonaparte to the Council of State (according to *Thibaudeau*, "Mém. sur le Consulat," p. 426): "Nature has made of our wives our slaves. The husband has a right to say to his wife: 'Madame, you shall not go out! Madame, you shall not go to the theatre! Madame, you shall not see such and such a person!'—which is as much as to say, 'Madame, you belong to me, body and soul!'" This brutal formula is recommended to the attention of the framer of the future Code dealing with women, the drawing up of which so many right-minded people await with impatience.

⁶ Regular way and extraordinary way or order of arbitrary arrest (*Funk-Brentano*, "R. D. M.," 1892, 113, 839).

§ 147. **The Husband's Authority.** — In the primitive law the personality of the wife is absorbed by that of the husband;¹ she has no possessions of her own² and cannot accomplish any juridical act;³ it is for the husband alone to act.⁴ This state of law seems to have been abandoned among the Franks, but one finds traces of it among other barbarian peoples, for example, among the Anglo-Saxons.⁵ When her personality begins to free itself, when she has possessions of her own, the husband is none the less, as far as these possessions themselves are concerned, always in charge of the external affairs of the family; or else, he acts himself by reason of his "mundium," of his quality of head;⁶ but from an owner he has descended to the rank of a manager or a

¹ In the English law the husband and wife are one. *Post*, "System of Possessions between Spouses." The power of the husband is called "coverture" ("feme covert de baron," "femina viro cooperta," as contrasted with the "feme sole"). Cf. Roman wife "in manu marit": *Du Cange*, see "Cooperire."

² Without going so far as this, people ordinarily recognize the fact that the husband's "mundium" results in giving him the administration and the use of the possessions of his wife, the right of disposing of her movables, and the right to represent her at law; finally, that the wife must be incapable of acting without authorization. The principle of the unity of inheritance seems to us to have had more radical consequences; we must take it as being the starting point of evolution: *post*, "System of Possessions between Spouses." — "Burg.," 100; "Wis.," 4, 2, 15 (the citation of Scripture is a justification given as an afterthought for a rule of the pagan period). The law of the Burgundians, 100, is drawn, according to *Heusler*, from the Germanic foundation; it would be, on the contrary, inspired by Christianity, according to *Lefebvre*, *op. cit.*, p. 442; we do not find a single trace of this last tendency. At the time when the wife came to have considerable possessions it must have been asked if the husband's power affected them to the same degree as it did when she brought with her to her husband nothing or almost nothing; the laws clung to the old rule and extended this power to the Roman wives.

³ "Roth.," 205; "Rib.," 74 (likening the wife to a slave): "F. de Léon," 1020, Art. 42; *Muñoz*, p. 71, 496; Liège (*Van Welter*, *op. cit.*, 28): the husband is absolute lord and master of all the present and future possessions of his wife; he has the right to dispose of them, even by will (until the seventeenth century): "Const. de Messine," 27; "Aoste," 1253, 5, 12 (*Contra*, Venice: independence); *Loysel*, 122, 178, 290.

⁴ "Summa Norm.," 100, 2; 14, 5; "Cout. d'Ardenbourg," *loc. cit.*: the wife is the husband's chattel.

⁵ *Post*, "System of Possessions between Spouses." Cf. "Cart.," "de Redon," "de Cluny," etc.

⁶ He claims the compositions due for offenses of which his wife is a victim, or, conversely, is responsible for the offenses which she has committed. Formulae upon the Lombard laws: "Roth.," 26, 28, 139, 258; "Liut.," 92, s. The compositions which he is paid belong absolutely to him, because it was for him to take vengeance for the offense: "Roth.," 195 *et seq.*; "Liut.," 12, 31; *Heusler*, § 27. He pays the "launegild" for gifts made to her: "Roth.," 184. He defends her if she is called upon to take part in a judicial duel: "Ass. de Jér.," "J. d'Ibelin," 75; "Gr. Cout. Norm.," 77; English *common law*. Cf., however, "Wis.," 2, 3, 6 (writ of the wife). Let us not forget that we also see the wife giving her consent to the alienation of the possessions of the husband and authorizing it: "Jostice," p. 169, 225; *Boutillier*, I, 99.

usufructuary;¹ or else, instead of acting for her, he acts with her, he authorizes her to accomplish an act;² in one way or another the interests of the family are preserved. We have already seen that the authorization of the husband, having become the safeguard of the woman, constituted in case of Customary law the equivalent of the Velleianum Decree of the Senate which was in force in countries of written law,³ and that the authority given by law limited the rights of the husband and made absolute the protection of the woman.⁴

§ 148. **The Incapacity of the Wife is General;**⁵ it exists⁶ with relation to every act of civil life, and it is not possible to alter it by the contract of marriage.⁷ At the same time, from the time of the thirteenth century, the wife who is a **tradeswoman**, that is to say, who carries on a separate business, with her husband's knowledge, has capacity as far as her own business is concerned.⁸ (I) In order to **appear in court**, the woman must⁹ be attended by her

¹ It is even said that he represents his wife; this is a conception that is relatively recent; originally, he only represented the family, he acted in his capacity as head of the family.

² "Lib. Pap. Roth.," 233 *et seq.*, 204, 170; "Liut.," 58.

³ *Post*, "Guardianship of Women."

⁴ It is ordinarily taught that the power of the husband was the same under every matrimonial system. This is the theory of the jurists, but not of the historians: each reign shows us, on the contrary, a different phase in the history of the husband's power.

⁵ Although the texts proceed by means of enumeration: *Desmares*, 289; "Paris, N. C.," 223; "Orl.," 194; "Gr. Cout. Norm.," 77; *Beaumanoir*, 43, 22-26, 44, 19; 34, 56; "Fribourg i. U.," 1219, 20; "Schwabenspiegel," 72; *Alost*, 17, 6; *Loysel*, 122; *Ferrière*, s. 223; "Paris" (customs and bibl.); "T. A. C. Bret.," 205; *J. d'Idelin*, 105; *cf.* Civ. Code, 217.

⁶ Dating: 1st. From the betrothals, "Artois," 87, etc.; explanation of *Mail-lard*, *cf.* Civ. Code, 1404. In reality this is due to the nature of the betrothals in the old law. *Dumoulin* no longer understands this: "hoc ineptum quum possit majus, scilicet discedere a sponsalibus." 2d. From the celebration of the marriage (common law): "Nivern," 29, 1, etc. 3d. "Bourg.," 4, 1: from the consummation.

⁷ See, however, "Separate maintenance formed by contract" (of recent date); "Sondergut" in German law, Separate estate in English law.

⁸ Practical necessity. In allowing her to carry on trade the husband authorizes her in advance to do all the things that are required for this trade: "Et. de St. Louis," I, 153; II, 147; "Jostice," p. 131; "Stat. d'Erfurth," 1305; *cf.* "Fribourg i. U.," 1219, 20; "Royer," 1183, 17; "St.-Quentin," 1195, 20 ("Ord.," XI, 229, 272); *Beaumanoir*, 43, 28; 44, 19; *Desmares*, 76; she can be summoned without her husband. *Cf.* 289, "Ass. de Jér.," "C. d. B.," 131; "Poitou," 3, 126; "Anjou," 510; "Orl., A. C.," 200, etc.; *Pothier*, no. 62. She cannot appear in court without authorization, even in matters relating to her merchandise: "Argou.," 3, 19; *Merlin*, 7, etc.; *Loysel*, 57. *Cf.* system of the "peculium" in Roman law: *Stobbe*, § 220, 18; "T. A. C. Bret.," 205; "Paris," 224.

⁹ "Et. de St. Louis," I, 153. *J. Faure* believes that she can act without authorization in the courts of the Church (s. I, 1, "Cod. Just.," "de bon mat.," no. 3); *Dumoulin*, *Laurière* (*Viollet*, "Et. de St. Louis." *loc.*

husband;¹ undoubtedly, in the beginning she appeared with her husband,² and finally, the latter merely played the part of an assistant, of a qualifier, a part which implied his presence in court as it had done in the past; he figured at the trial in the quality of husband jointly with the wife, and the judgment could be executed against him; there is an exception as far as criminal actions are concerned, when the wife is prosecuted for something done by her.³ (II) **Extrajudicial Acts.** Acts "inter vivos" (sale, gift, mortgage) are forbidden the wife who has not the authority of her husband,⁴ with the exception of acts done for the needs of the household.⁵ As far as *wills* are concerned, the old law was divided. Certain Customs,⁶ which undoubtedly were representative of the primitive law, hold the woman as being incapable of making a will without the authorization of her husband. Though domestic discipline was scarcely involved, as the will has no effect until after the dissolution of the marriage, the husband formerly had

cit.). *Answer* would here be understood to apply to both the complaint and the defense, according to *Laurière*: "Jostice," p. 131; *Beaumanoir*, 63, 1; the wife cannot appeal without the permission of her baron, but she can be appealed against: "Olim," III, 124, 14.

¹ A previous authorization is not sufficient: *Aubert*, "Hist. du Parl.," I, 209; "Le Parl.," I, 237; "Const. du Châtelet," 39.

² "Ass. de Jérus.," "C. d. B.," 90, 122, 153 (ed. *Beugnot*); "Paris," 224.

³ "Et. de St. Louis," *loc. cit.*; "Jostice," 131. *Contra*, "Gr. C. Norm.," 74, 100 (proof of the hot iron, "juisium" formerly). She can act alone if she is insulted (*cf. filius* at Rome): "Norm.," 543; "Lorris," 199; "Montarg.," 2, 7, or for recovery of possession if her husband is absent: *cf. Pothier*, 65; *Britz*, "Dr. Belg.," p. 550.

⁴ "Jostice," 131; *Beaumanoir*, 43, 22; 34, 56; 70, 7. *Post*, "Insane Husband," etc. The wife can validly bind herself in order to get her husband out of prison: "Norm.," 541; "Ord. s. Marine," 1681, 3, 6, 12, in order to appoint a marriage portion for her daughter. *Pothier* demands for this the authorization of the judge. According to *Louet*, "M.," 147, the lack of authorization only annuls contracts which are to the prejudice of the wife; thus she could receive a gift from a third party or a mutual gift. *Contra*, "Ord.," 1731, Art. 9 (*cf. Civ. Cod.*, 934); *P. de La Janès*, "Princ.," II, 18; "Arr.," Aug. 27, 1564, and April 12, 1595. Commands, testamentary execution: "The moral interest of the family may be affected." *Beaumanoir*, 41, 26 (cannot be an arbitrator).

⁵ *Pothier*, 49: an implied command of the husband. From whence it would follow that the wife is not bound. The consequence would be just the opposite if one assumed that the wife had received an implied authorization, or that she were capable of binding her husband in the interest of the household without having been authorized: *Chaisemartin*, p. 324; *Britz*, p. 551; *Lamoignon*, "Arr. Comm.," 69; *Merlin*, 7, 7.

⁶ English common law: *Glanville*, 7, 5; *Bracton*, I, 60; *Pollock and Maitland*, II, 426; "Hainaut," 29, 5; "Norm.," 417; "Bret.," 519; "Beaune," "Pers.," 530.

⁷ Tournay, Louvain: authorization if there were children (*Britz*, p. 551). At Liège, it is the husband who makes the will: *cf. "Bourg.,"* 4, 1; "Niv.," 23, 1; *Merlin*, "Rép.," see "Testament F. de Béarn," 261. *Post*, "Gifts or Legacies between Spouses."

rights over the possessions of the wife which were hard to reconcile with the making of a will by the latter (acquisition of the marriage portion, for example).¹ As these rights in time disappeared, or became very much weakened, the common law of the Customs of the twelfth century allowed the woman to make a will by herself; the interest of the family is necessarily sacrificed to the desire to make the will a deed of the woman herself, and not of her husband.²

§ 149. **How is the Authorization Given?**—As far as the old law is concerned, it would undoubtedly be more accurate to speak of the intervention rather than the authorization of the husband. The act of the wife had either to be performed or warranted by the husband himself, as it was not valid in itself. In time the husband no longer has any need to indorse the act and to make it his own; the wife is capable, but the husband should cease to set up the interest of the household against that of third parties. Intervention on the part of the husband degenerates into a simple “consensus,” in establishing that the act is not injurious to him. The progress of the law has not, however, been so simple as these notions might lead one to suppose. — (A) The authorization always had to be **Special**;³ a general authorization would be nothing less than an abdication of the husband’s power, the complete upsetting of the old system.⁴ — (B) **Judicial Acts**. The husband figures at the trial in this capacity: he is a party to the proceedings in conformity with the old rule. — (C) **Extrajudicial Acts**. Originally, no particular form was prescribed; the co-operation of the husband in the act undoubtedly was sufficient,⁵ and it was the same as to

¹ Cf. English law, according to which the wife’s will is revoked of absolute right by her marriage.

² *Loysel*, 123; “Poitou,” 275; “Auxerre,” 238; “Reims,” 12; *Pothier*, no. 43. In countries of written law the wife may make a will without being authorized to do so by her father, evidently because marriage has emancipated her. The jurisprudence of countries of Customs was perhaps inspired by this practice: *Automne*, “Confér.,” II, p. 293 (“ad tit. qui testam.”).

³ *Lebrun*, 2, 1, 4, 8; *D’Aguesseau*, *op. cit.* and *loc. cit.*; *Valin*, on “La Roch.,” 23; *Lamoignon*, 66, allows a special or general obtaining of authority previous to the contract.

⁴ Moreover, several of the Customs have gone as far as this — (“Artois,” “Flandre,” “La Roch.”). The “Coutume de Berry,” 1, 21, only allows a general authorization to be given by means of the marriage contract. One can say that the common Customary law tolerates rather than permits a general authorization under the form of a separate maintenance stipulated for by contract (with limited effects). Cf. *post*, “Sondergut,” “Separate Estate.” It is the same with an authorization to carry on business: *Duplessis*, “Commun.,” 1, 5; *Lebrun*, 2, 1, 6; *Bourjon*, I, 588; *Merlin*, 6, 2, 2.

⁵ Various expressions in the old authors, “congé,” “octroi,” “consentement,” etc.

his express or implied permission.¹ In the eighteenth century, perhaps under the influence of the Roman writings on guardianship, an express authorization, with terms which are decisive or nearly so, "authorize," "enable,"² is required: an unjustifiable strictness at first glance, but one which is due, undoubtedly, to a desire to avoid the difficulties of proof on the subject of the true part played by the husband.

§ 150. **Supplementary Authorization Given by Law.** — (I) *Absence*³ or *Illness of the Husband*.⁴ The wife, changed into a provisional head of the family, became capable of acting in his stead and place, according to Beaumanoir.⁵ But this solution was abandoned, for fear she might enter into rash undertakings and compromise the fortunes of the children. She was obliged to furnish herself with a legal authorization. This latter came into existence very naturally as an incident of trials;⁶ by allowing the woman to plead, and there were cases where it was difficult not to do so, the courts placed her in the same situation as though she had been aided by her husband. In the case of extrajudicial acts, also, it was easy for the courts to acquire supervision; the wife asserts that her husband is absent or prevented from appearing; if she does not prove it in court, frauds would be too easy a matter; thus she is compelled to do so, and, having once taken cognizance of the matter, the courts pass upon the act itself, supervise the deeds of the wife, and become her guardians. It is thus that the general rule was arrived at that the authorization given by law supplements that of the husband.⁷ — (II) *The minority of the husband* might have been looked upon as an obstacle to the exercise of the husband's power in the same way as illness; the wife who was of age would then have acted for her husband until he should have attained his majority. But this was not so at all.

¹ "Flandre," "Bourgogne," etc.

² *Pothier, op. cit.* Details and discussion in *Merlin*, "Autor.," 6, 1; *Louet*, "A.," 31 (influence of Bartolus upon the law "Cum lex," D., "de Fidej.").

³ "Gr. Cout.," II, 32 (p. 323); "Ass. de Jér.," "C. des B.," 131; *Beaumanoir*, 44, 19; 43, 28, "Summa de leg. Norm.," 100, 97 (as an exception, when her husband is absent she can make use of the writ of novel disseisin).

⁴ *Dementia: Beaumanoir*, 43, 28. *Cf.* civil death. *Merlin*, 7; wife can act without being authorized, for the marriage is dissolved. *Contra*, Civil Code, 221.

⁵ *Beaumanoir*, 43, 28; 44, 19; "T. A. C., Bret.," 83.

⁶ The "Gr. Cout.," II, 32, contemplates this very case: *Buche*, "N. R. H.," 1884, 645.

⁷ *Cf.* as to the old procedure, *Buche*, "N. R. H.," 1884, 645. Royal letters in the sixteenth century, because the authorization of law seems like a favor. Afterwards these letters are not necessary.

There is a wavering between the two solutions: either to declare that the husband who was a minor was capable of authorizing his wife who had arrived at her majority, for the unity of purpose was thus protected;¹ or else to require the authorization given by law, under the pretext that the husband could not give a suitable authorization, and that the wife had to be protected.² — (III) *Refusal of the husband to authorize his wife.*³ According to the ancient principles, whatever interest she might have had, she was not permitted to act nor to petition any court against a provision which might be prejudicial to her (Beaumanoir).⁴ In the sixteenth century the law changed; Loysel, 124,⁵ declares that the law gives the wife power to appear in lawsuits; in the eighteenth century it gives her authority to make contracts and to alienate property.⁶

The wife who had legal **separate property**⁷ escaped the power of her husband and was treated as a widow, according to an ancient doctrine upheld by Dumoulin in the sixteenth century;⁸ not only did she administer her inheritance alone, but she had the right to execute all acts of disposal. This opinion did not prevail; it was contrary to the idea of the "imbecillitas sexus," and to the consideration that the separate estate gives way to common interest, that it can cease, because the marriage is not dissolved. The woman with separate property was only held as emancipated in that which concerned the administration of her possessions; she was left free to dispose by herself of her movables and the income of her immovables, but every act of disposal bearing on im-

¹ *Auzanet, Tronçon, Ferrière* (on 223, "Paris"); *Loysel*, 125; "Plaid de Corbin," 118 (Order of 1608). This opinion prevailed: *Pothier*, no. 29.

² *Dumoulin, Chopin, ib.*; *Tiraqueau*, "De Leg. Conn.," 8, 41; cf. Civil Code, 224; *Beaumanoir*, 15, 30; "T. A. C., Bret.," 81.

³ *D'Aguesseau*, ed. 1772, II, 54.

⁴ *Beaumanoir*, 65, 17.

⁵ At least, such is its meaning according to Davot.

⁶ **Contracts between Spouses.** *Pothier*, 42: the husband can authorize his wife to contract with him (mutual gift). *Le Brun* and *Ricard* are of a different opinion: "nemo potest esse auctor in rem suam," the lack of authorization cannot be pleaded against the husband because it is only set up in his own interest. As to conflicts of interest between husband and wife, cf. *Stobbe*, IV, 51; "Sachsensp.," I, 44 (special guardian if the husband disposes of her marriage portion). Cf. "The Guardianship of Women." As to the English law, cf. *Lehr*, p. 76: the wife who has been authorized can dispose of her immovables on condition of *recognizing* the act at law, which is a means of securing her freedom. Same procedure when the wife acts alone, her husband being absent or prevented.

⁷ As to the date of separate maintenance, cf. *post*, "Contract of Marriage." The "Schwabensp.," I, 73, admits of it; cf. 148.

⁸ "Sur Bourb.," 170, 232; "Orl., A. C.," 171; "Lorris," 198; "Montargis," 8, 9.

movables was forbidden her without the authorization of her husband (or of the law).¹ The giving of a separate estate by contract was only accepted under the influence of the Roman law, and does not seem to have been practised very much. Still less could the woman reserve by the contract of marriage separate property, savings, or paraphernalia, with respect to which she would have full capacity.²

§ 151. **Effects of Authorization.** — According to the old conception, the husband who gives his authority obligates himself thereby, contrary to the Roman custom: "qui autor est non se obligat." The more recent law tends to relieve him of his responsibility, although the community of interests produced by the marriage does not always permit of this.³ Still less does the authorization of the law bind the husband. The woman who has been authorized becomes as fully capable as the widow or the unmarried woman who has attained her majority; she can execute acts which compromise her to the greatest extent, for example, she can become surety for her husband or a third party, or give up her dower rights.⁴

§ 152. **Lack of Authorization. — Beaumanoir's System.** — The act done without authorization can be objected to as against neither the husband nor the wife during the marriage, but it can be objected to as against the wife once the marriage is dissolved. The authorization is thus not required in the interests of the wife; it has no other object excepting to assure a unity of direction of the household, a thing which is no longer of any concern when the marriage has ceased to exist.⁵ — **Sixteenth century.** The conception of the protection of the wife has gained ground. It is admitted that she can invoke the nullity of the act after the dissolution of the marriage.⁶ This nullity cannot be counteracted by

¹ Order of 1623; *L'Hommeau*, III, 138; *Louet*, "F," 30; "Paris," 224, 234; *Pothier*, no. 62 (she can appear in court for the administration of her possessions); *Argou*, II, 202; *Loysel*, 126.

² It is otherwise with the German law of the thirteenth century: "Sondergut." English law: "Separate Estate" with a "Trustee" (Court of Equity). *Post*, "Contract of Marriage." Son of the family and "peculium" at Rome.

³ *Post*, "Conjugal Community." "Le tablier de la femme oblige le mari." *Pothier*, no. 76.

⁴ *Cf. post*, the Velleianum Decree of the Senate. As to renunciation of dower, *cf. Beaumanoir*, 13, 5; "Jost.," p. 169; *post*, "System of Possessions between Spouses."

⁵ *Beaumanoir*, 43, 22-27; 34, 56; 70, 7; "Bayonne," 9, 39. The question was an open one during the sixteenth century: *Charondas*, on "Paris," 223, etc.

⁶ "Paris, A. C.," 105 (silent), "N. C.," 223: nullity with respect to the wife

a later ratification, any more by the husband during the marriage than by the wife who has become a widow.¹

§ 153. **Rights of Third Parties.** — Those who deal with the woman who has not been authorized have no right to avail themselves of the nullity of the act, in the opinion of Beaumanoir, for it is not meant in their interest. According to the new theory, this point is not settled. If the majority of the old authors continue to refuse to allow the action of annulment to third parties by reason of the lack of interest,² Pothier and Merlin concede it to them.³ Relative nullity and absolute nullity each have their partisans.⁴

as well as the husband; and she cannot be prosecuted, nor can her heirs, after the death of the husband: cf. Civil Code, 225 (*their* heirs). Motives: *D'Argentré*, on "Bret.," 424: fear lest the husband succeed in stripping his wife by compelling her to bind herself fraudulently, — that is to say, without his being under the responsibility which results from authorization (at least, under the system of community); *Charondas*, on "Paris," 223 (1, 29, D., "de Reg. Jur.," absolute nullity); *Meynial*, "N. R. H.," 1901, 270, 1.

¹ *Pothier*, 5, 74 (authorization given afterwards validated the act "ex nunc"): Orders of 1557, 1598, 1626. *Charondas*, on "Paris," 237; *Ferrière*, on *id.*, 225; *Le Prestre*, II, 16; *Lamoignon*, "Arr. Commun.," 66 (Controversy).

² *D'Argentré*, on "Bret.," 424; *Lebrun*, *Ferrière*, *Bourjon*, etc. *Argou*, III, 19, to end: the third party cannot have the contract broken, provided the husband and wife offer to give him security and to make up for this lack of formality by an authorization made afterwards with the consent of the wife.

³ *Pothier*, *op. cit.*, no. 5, 74; *Merlin*, "Rép.," see "Autoris. Marit." In this sense one might have said that general interest would not admit of the fate of the act being left entirely to one of the parties alone; but Pothier, contrasting the wife with the minor, starts with the idea that the wife is absolutely incapable, which was entirely correct formerly, and an idea to which the doctrine of "imbecillitas sexus" gives a new lease of life: *Lamoignon*, 65.

⁴ The nullity of the acts of the wife which are not authorized could be alleged without any letters of rescission (thus differing from acts of a minor) and, consequently, at any time within 30 years, for the limitation of the action of rescission was the only one limited to 10 years by the Ordinance of 1510.

TOPIC 10. THE PATERNAL POWER

§ 154. Sources of the Paternal Power.	§ 160. Customary "Mainbournie."
§ 155. Origin.	§ 161. Rights over the Person. Correction.
§ 156. "Mundium" and "Patria Potestas."	§ 162. The Duties of Parents.
§ 157. The Same. — (I) The limited duration of the "mundium" in contrast to the perpetuity of the "patria potestas."	§ 163. Rights over Possessions.
§ 158. The Same. — (II) The conception of family joint ownership.	§ 164. Capacity of the Child under Authority.
§ 159. Transformation of the "Mundium."	§ 165. Right of the Mother.
	§ 166. Emancipation.
	§ 167. Emancipating Majority.
	§ 168. Revolutionary Law.

§ 154. **Sources of the Paternal Power.** — In the old Germanic law the rights over the children were not exactly derived from the fact of paternity; they rather related to the possession of the "mundium" over the mother. The husband whose wife "in mundio" has been taken away from him, and has had a child during the period she was away, preserves his power over the mother and the child, although it is quite certain that he is not the father of the latter, and, conversely, in the case of marriage without "mundium," he has no authority over the children, who, however, are surely his own.¹ — The later law, starting with the canonic theories of marriage, connects the paternal power, on principle, with legitimate filiation, and, as an exception, with two facts which will be discussed later on, legitimacy and adoption. By legitimate children² are understood those who are conceived and born in a genuine marriage;³ or else those who have simply been conceived during the marriage and are born after it is dissolved; or even those who are born during the marriage but conceived before it.⁴

The jurisdiction over cases of the annulment of marriage and,

¹ "Alam.," 51; "Liut.," 126. — *Stobbe*, § 47, n. 23 and § 251; *Maurer*, "Münch. Akad.," 1883, 68; *Wilda*, "Z. D. R.," IV, 288.

² *Beaumanoir*, c. 18 (legal heirs and bastards); "Schwabensp.," II, 63; "Siete Part.," IV, 13. *Deghewiet*, p. 52 (Belgium); *Aimable*, "R. h. Dr.," VIII, 559; *Hostiensis*, p. 313.

³ Or following a reputed marriage: *Beaumanoir*, 18, 7; *Desmares*, 11.

⁴ As to this last point, however, there are difficulties: *Ferrière*, see "Naissance, Filiation, Légitime, Question d'Etat," etc.; *Guyot*, *id.*; *Bourjon*, I, p. 19; *Beaum.*, 18, 2 (he is a bastard, but he becomes a legal heir by virtue of the marriage. Cf. *post*, repugnance for legitimizing: "Sachsensp.," I, 36.

as a consequence, of filiation, belongs to the Church.¹ We have seen with regard to marriage what becomes of this jurisdiction. It is the jurisprudence of the Courts of the Church which, taking its inspiration from the Roman legislation, fixed the law in these matters.² Longest and shortest period³ of pregnancy, the presumption⁴ "pater is est quem nuptiæ demonstrant," disavowal by the father,⁵ contesting of legitimacy by the relatives,⁶ in all these the general lines of modern law are almost fixed from the thirteenth century.⁷ From the sixteenth the proof of filiation is simple enough; it results from the production of the certificate of baptism of the child, to which is attached the marriage certificate of its parents; proof by witnesses is only admitted if the loss of the registers is first of all established; on the contrary, the possession of the status of a legitimate child makes up for the lack of the certificate.

§ 155. **Origin.** — The barbarian "**mundium**,"⁸ in its application

¹ Dig. X, 17, "qui filii sint legitimi." And on this subject cf. *Hostiensis*, *Panormitanus*, etc.; *Freisen*, p. 858.

² The canon law, following the Roman law in too servile a manner, made the mistake of not strictly limiting cases of disowning.

³ *Beaumanoir*, 18, 2: 39 weeks and 1 day at the most, 7 months at least; "Jostice," p. 55; "Schwabensp.," 41. At least 41 weeks for a boy and 40 for a girl: *Chaisemartin*, 66, 67; "Brünn. Stadr.," 349; *Domat*, "Lois Civ.," 2, 2, 1 (estimation of the judge). As to the longest duration there was considerable doubt in the old jurisprudence: gestation of 13, 15 and even 23 months. Cf. in "Lucina sine Concubitu" (s. d.) the pretended Order of Grenoble in 1637 deciding that a child had been conceived in the absence of the husband through the strength of the mother's imagination. — Finally, they were *ordinarily* quite satisfied with the following rules: (a) the child born 10 months after the death of the husband is not legitimate; (b) the child born at the beginning of the 7th month is legitimate; (c) the child born before the 7th month is also presumed to be legitimate, but proof to the contrary is admitted, whereas it would not be admitted in the other cases; *Ferrière*, *Guyot*, *sup. cit.*

⁴ *Bernhöft*, "Z. V. R.," IV, 227; *Sicherer*, "Personenstand u. Eheschl.," 1879.

⁵ The juriconsults took advantage of the fact that the canon law, following the example of the Roman law, did not strictly limit cases of disowning to try to do away with the presumption "pater is est" (declaration of the mother that the child is born of an adulterous union, previous barrenness of the wife, the child who is lame or blind is regarded as being born of sin): *Coste*, "Thèse," 1884; "Cod. Max. Bav.," I, 4, 9. *Beaumanoir* only admits of disowning in three cases: 18, 14, absence of the husband; 15, impotence; 6, judicial separation; "Jostice," p. 58. The same strict tendency is found in the jurisprudence of our parliaments. Cf., however, as to the moral impossibility of cohabitation: Order of the Parliament of Paris, 1745, 1758; Civil Code, 325; *Merlin*, "Rép.," "Add. Jostice," p. 210; *Glasson*, III, 185; *Pollock*, II, 316.

⁶ *Beaumanoir*, 18, 1; *Gregory of Tours*, 8, 9.

⁷ Cf. *Ferrière*, *Guyot*, etc. (bibl.). *Post*, "Certificates of Civil Status"; *Bourjon*, I, p. 19.

⁸ "Mundium," a Latinized form of the Germanic word "Munt," meaning

to children, or, as it can be called, the paternal power of the Germanic law, did not differ essentially from the Roman "patria potestas."¹ It belonged to the same persons and carried with it the same consequences. Thus, the father alone exercised it, to the exclusion of the mother;² he alone was (to make use of an expression from the Lombardian laws) "selbmund," under his own "mundium" (*cf.* the Roman contrast between the "sui juris" and the "alieni juris").³ It implied the "jus vitæ necisque."⁴ The

"manus," "potestas." Other forms: "mundeburdium," "mundeburdis," (*cf.* "Vormundschaft," guardianship). They also use the word "potestas." ("Wis.," etc.); "Alam.," 51, 3; 54, 2; "Rib.," 35, 58; "Capit.," ed. *Bor.*, see Table; *Du Cange*, see "Mundiburdus." As to the meaning of mouth, "os," "verbum," which has often been given to "Mund," *cf.* *Viollet*, p. 493. By "mundium" is understood the power not only over the people making up the household, but also over those in his care: *Heusler*, § 22 *et seq.* The one to whom the "mundium" belongs is called the "mundoaldus," particularly in the Lombard laws: see *Du Cange* (guardian, husband, etc.). In the thirteenth century they say: "mainbournie," "mainburnia," "vouerie," "gouvernement," "garde," etc., and he who exercises this domestic power is called the "mainbour," "mambour," "mainburnissière," "avoué," "régent," "gouverneur," etc. See *Ragueau*; *Loysel*, 176. In the German "Mirrors": "Pflege," "Vormundschaft."

¹ *Heusler*, I, 105, 431; *Brunner*, I, 71; *Zoepl.*, "D. Rechtsg.," II, 31; *Amira*, § 58; *Richthofen*, "Untersuch. üb. Fries. Rechtsg.," I, 407.

² The expression *parents*, which is found in certain texts, must not make one think that both possess this power. *Cf.*, however, *Viollet*, p. 507. The mother does not exercise the paternal power; when she becomes a widow she passes under the authority of her son. *Post*, "Guardianship of Women": "Roth.," 204; "Sax.," 42; *Rozière*, no. 103; "Capit. Kiersy," 877, c. 6. The Anglo-Saxon laws only confer upon the mother the custody of the children and appoint a guardian for the property to act with her: "Hloth.," 6. The laws of the "Wis.," 3, 1, 7; 3, 2; 4, 3, 3, 13 *et seq.*; and of the "Burg.," 52, 58, 85, 62, 74, confide the guardianship of the children to the widow upon her request and under conditions which betray the Roman origin of these provisions; she even has a certain right of enjoyment. *Cf. post*, "Portion of the Survivor." Even according to these laws, it is very doubtful whether the rights of the mother are the same as those of the father. A second marriage causes her to lose her guardianship: *cf. Walter*, "Corp. Jur. Germ.," I, p. 665; "Wis.," 4, 2, 13; "Bai.," 15, 7; "Reg. Farf.," 167. As to the rights of the mother who is a widow, *cf. Heusler*, II, 433, 450 ("Beisitz der Wittve").

³ "Roth.," 204 (*post*, "Guardianship of Women"). The head of the family alone has the "potestas de se ipso disponendi"; he disposes of his life and of his liberty (*Tacitus*, "Germ.," 24), reduces himself to slavery to pay his debts, condemns himself to death in advance in case he shall not fulfill his obligations, promises a pound of his flesh in return for a sum of money, as in "The Merchant of Venice." He who is not "Selbmund" has no right to do any of these things. To have an absolute power of disposal over oneself is the first condition requisite for the exercise of domestic authority over others. And this authority has analogous effects; the "Selbmund" deals with others as he does with himself: *post*, "Hostage," etc.; *Kohler*, "Shakespeare vor dem Forum d. Jurispr.," 1884.

⁴ When he says that voluntary sterility and abortion ("numerus liberorum finire") as well as infanticide ("quemquam ex agnatis necare") are unknown to the Alemanni, *Tacitus*, 19, does not mean to deny the existence of this right; he limits himself to showing that these scourges of old and rich societies have not reached them; the coarseness of their customs kept them

old traditions show him pronouncing himself upon the fate of his newborn children. By taking them up in his arms he shows his willingness to allow them to live; otherwise, it is customary to expose them. Neither the relatives nor the State trouble themselves over this kind of infanticide.¹ If we are to believe Tacitus, 30, the education of the young Germans was of the coarsest: "Dirty and naked, the child grew haphazard, pell-mell in with the animals and the slaves." If he had to be chastised, the disciplinary authority of the father seems to have had no limits; ² he gives his wife and his children as hostages; ³ he sells them as slaves.⁴

from the two former; as to the third, they escaped it without difficulty, the rigor of the climate and the lack of care killing so many children that their great concern was to save those that remained to them.

¹ As to the exposure of children, (a) "Legislation of the Lower Empire," cf. *Du Plessis*, p. 157 and authors cited; (b) Frankish Period: *Grimm*, 455, 488; *Michelet*, "Orig.," p. 2; *Maurer*, "Münch. Akad.," 1880, 5; *Platz*, "Gesch. d. Aussetzung," 1876; *Friedberg*, "Bussbücher," 39; *Du Plessis*, pp. 201, 342. The pagan religion forbade exposure if the child had touched the sacred water or taken nourishment. The same rule during the Christian period for the child who had been baptized: *Du Cange*, see "Sal." Outside of poverty, which was the most frequent cause for exposure of children, various prejudices drove parents to pursue this course. Children who were deformed were looked upon as not belonging to the human race (cf. "Siete Part.," IV, 23, 5); of twins they thought that one was born in adultery, cf. the Celts; exposure of children on the banks of the Rhine when their legitimacy was doubted: *D. Bouquet*, I, 754. Foundlings: "Burg.," 100; *Pardessus*, "L. Sal.," p. 449: the "nutritor" can treat them like slaves or free men, and in the latter case he is looked upon as their father: *post*, "Adoption," "Cone. Vaison," 9, 10; "Arles," 452, c. 51; Dig. X, 5, 11; "Cod. Just.," 8, 52, 3. The custom of exposing children at the doors of churches was introduced at an early period: "Form. Andec.," 48; "Turon.," 11; "Siete Part.," 20. It was a natural transition from this to the leaving of them in charitable institutions (turning-box, etc.), which is the law of the seventeenth and eighteenth centuries: the parents place in the swaddling clothes a note giving the name of the child, so that they can find it again. As to foundlings, cf. *Lallemant*, *op. cit.*, see *Fréminville*. With *P. Viollet*, p. 501, we think that our legislation in doing away with these turning-boxes, in showing itself more severe than the old practice, drives people to abortion and infanticide; and it is all the more efficacious as these two crimes have, so to speak, ceased to be punished: *Du Plessis*, p. 342.

² "Roth.," 189, 200, 201, 222; "Liut.," 120; "Wis.," 4, 5, 1; 3, 2, 3; 3, 4, 5; "Burg.," 35; "Sal.," "Cap. Extrav.," 5; "L. Rom. Cur.," 3, 3, 18, 10. This law is summed up in the formula of the "Lib. Papiensis," with regard to the wife. Is the participation of near relatives, or sort of family council, necessary? Cf. *Tacitus*, "Germ.," 19; *Chaisemartin*, 59: the father judges the child. Roman law: *Girard*, p. 11. As to crimes against relatives, cf. *Du Plessis*, p. 212. In the old law of the Vestrogoths the murder of one relative by another was not punished, a striking proof of the independence of the family as far as the State was concerned.

³ *Post*, "Hostage," "Bord.," 43.

⁴ Sales of newborn children under the Lower Empire ("Cod. Just.," 4, 43, 1); Constantine allows them only immediately after the children are born ("sanguinolenti"), "Cod. Théod.," 5, 8, 1 ("L. Rom. Wis."), but it was always possible to buy them back. Valentinian III facilitated the buying back by deciding that it would be sufficient to pay back the purchase price

"A fortiori," has he the right to marry his daughters without their consent,¹ and to pledge his sons to the monastic life,² to force upon them a profession. He transmits to them his domicile, his nationality, his station in life,³ and his religious belief. He is responsible for their offenses,⁴ and, conversely, he takes vengeance on those who injure them;⁵ he alone can sue and be sued. The children are incapable of binding themselves by contract,⁶ incapable of appear-

and one-fifth more: "Nov." XI ("L. Rom. Wis."); "Ed. Pistes," 34. During the Frankish period, frequency of these sales of children: *Rozière*, "Form.," 43 *et seq.*; *Thévenin*, nos. 12, 156, 157, etc.; *Greg. Tours*, 7, 45; "Fris.," XI, 1; "Bai.," 7, 4. Motives: poverty, famine, debts. One sells oneself either alone or with one's wife and children. Cf. "Condition of Persons," "Frankish Period," "Restrictions." "Ed. Théodoric," 94, 95 (*Paul*, "Sent.," 5, 1, 1; "Cod. Théod.," 3, 3, 1; "Int. Wis.," 5, 4, 12 ("Ant. Interd.")). The Penitentials oblige the Christian who sells his child to buy it back and fix an age after which the father can no longer sell it: *Wasserschleben*, "Poen., Th.," II, 12, etc.; *Lallemant*, p. 94; "Capit.," (I, 114, 293), 803, c. 8; 819, c. 6 ("Buying back"); "Petrus," I, 14 (cf. "Cod. Just.," 4, 43, 2). As to sales as serfs: "Bordeaux, A. C.," 43; *Du Cange*, see "Oblati, Schwab. Emp.," 357; Act of 1440 ("Acad. Lég. Toulouse," VI, 169); *Bazas*, 1489, 171 ("Arch. Hist. Gironde," XV, 83); "Toulouse," 155a; "Schwabenspiegel," 357; *Muratori*, "Script.," V, 556 (in 1058); "R. h. Dr.," 1859, 129; *Grotius*, II, 5, 5 (the natural law allows parents to sell their children); "Siete Part.," IV, 17, 8; the father besieged in a castle may eat his son rather than surrender without being ordered to do so by his lord.

¹ *Du Plessis*, p. 227; "Capit. Remedii," 5; "Burg.," 100; "Wis.," 3, 3, 11; 3, 1, 4 and 3, 4; "Liut.," 120; *Kowalewsky*, p. 193.

² "Conc. Tolède," 633, c. 49; cf. *id.*, 665, c. 6 (up to the age of 10 years); "Worms," 868, c. 22, 23. But from this period on there are decisions to the contrary: *Thomassin*, "Discipl. de l'Eglise," I, 1765; *St. Leo to Rusticus*, "Ev. de Narbonne" (in 458); "Nov. Major.," 8; *Gratian*, C., 20, q. 1, c. 1; "Pseudo Isidor.," p. 352; *Du Plessis*, p. 225. And, finally (twelfth, thirteenth centuries) the Church ended by demanding a ratification by the child when he was of an age to understand the meaning of an entry into religious orders: "Capit.," 817, c. 36 (I, 346); *Dig. X*, III, 31, 14; "Sachsensp.," I, 25, 2; "Liut.," 30.

³ Cf., however, "Condition of Persons."

⁴ "Sal.," 24, 5; *Geffcken*, "h. t. Roth.," 263; "Alb.," II, 55; and Lombard Forms cited by *Heusler*. Prohibition at law: "Sachsensp.," II, 18, 2; "T. A. C., Bret.," 204. Was a giving up of the child causing an injury to the person injured possible? *Girard*, "N. R. H.," 1888, 47; *Leseur*, *ib.*, 18. The father who did not have the wherewithal to pay the composition which was due because of an offense committed by his son had undoubtedly the power to deliver up the latter as a slave in payment. But the texts do not mention a giving up of the child causing an injury to the person injured, properly so called, resulting in the allowing of the exercise of the right of vengeance and a release of the father, although the pecuniary value of the son might be very much less than the amount of the composition: "Roth.," 142; "Sal.," 40; "Sax.," 18, 50; "Schwabenspiegel," II, 3; *Kraut*, I, 346 (traces in the Middle Ages).

⁵ Offenses against a son are a violation of the paternal "mundium." Therefore, the father alone benefits by the composition, and the child, although he be a victim of the offense, has no right to even a fraction of it. Cf., however: "Wis.," 3, 3, 11; 8, 5, 3; "Bai.," 4, 28; 5, 9; 8, 10 and 9, 4; "Sal.," 39, 24, 5, 40; "Sax.," 20; "Roth.," 26, 201, 129; "Liut.," 146; "Cod. Lauresch.," n. 95 (in 1023); *Roz.*, 467 *et seq.*; *Heusler*, I, 124.

⁶ "Rib.," 74; "Burg.," 87; "L. Pap.," 22, 170; cf. "L. Pap.," "Roth.,"

ing in court; it is with the father alone that third parties have to deal.

The inheritance of the family absorbs the acquisitions which they make, so much so that they possess nothing of their own.¹ It is thus true to say that, body and possessions, the children are in the hand of the father; the logic of the patriarchal family requires this to be so. Their personality is absorbed in the abstract being of which the father is the only legal representative.

§ 156. "**Mundium**" and "**Patria Potestas**." — An opinion formerly widespread contrasted the Germanic "**mundium**" with the "**patria potestas**," as being two institutions of a contrary nature; the "**mundium**" would be looked upon as a tutelary power established simply in the interest of the child, whereas the "**patria potestas**" seemed to be created for the advantage of the father.² One can only invoke in support of this thesis, outside of the texts which at an early period modified the old law under the influence of Roman and Christian customs,³ two facts:

§ 157. **The Same.** — (I) *The limited duration of the "mundium" in contrast to the perpetuity of the "patria potestas."*⁴ But nothing proves, as is maintained, that the "**mundium**" ceases as a matter of law on the coming of age of the son:⁵ on the con-

139 ("Women"); *Greg. Tours*, VIII ("Son in Flight"); "Cap.," 819 (I, 293); 829, c. 4.

¹ In the Lombard laws the son is likened to the slave in this respect: the father is not held to be bound by the contracts of either one of them: "Roth.," 170, 200, 204 *et seq.*; 233 *et seq.*; 262; "Liut.," 78, 87 (*cf.* "Lib. Pap. Expositio"); "Wis.," 4, 2, 13 ("Ant."); 4, 5, 5; "L. Rom. Cur.," 24, 8; "Cap. Extr. Sal.," 8; "Rib.," 74.

² *Pardessus*, "L. Sal.," p. 451; *Glasson*, *op. cit.*

³ We know that the Roman "**patria potestas**" had become modified during the pagan period and under the Lower Empire; the movement in this direction was carried on, although there was no thought of limiting its duration: *Cornil*, "N. R. H.," 1897.

⁴ Controversy: *Heusler*, II, 437; *Kraut*, II, 591; *Pardessus*, p. 455; *Pertile*, p. 376; *Freund*, "Was in der Were Verstirbt," 1880.

⁵ *Tacitus*, "Germ.," 13. — **Taking up Arms** in the Public Assembly does not carry with it civil emancipation. The young man, who is thereby recognized as being fit to bear arms, becomes "**pars civitatis**" (political rights) without ceasing to be "**pars domus**": "Sachsensp.," I, 2, 1. The youth who has attained majority presents himself before the court. *Cf.* Roman law. *Post*, "Adoption by Means of Arms." *Cassiod.*, "Var.," II, 38 ("Gothis ætatem legitimam virtus facit"); "Roth.," 204; "Capit." (I, 285), c. 21; "Wis.," 4, 2, 13. *Pardessus*, "L. Sal.," p. 454, sees in the **Cutting of the Hair** an act of emancipation, a ceremony bearing witness to "the passing from childhood to majority." The gifts which were made on this occasion to children consisted in objects intended for their personal use, which were of little value: "Sal." (*Hessels*), 100, 24, 69; *Geffcken*, "L. Sal.," pp. 134, 235, 253 (bibl.); *Potkanski*, "Haarschur," 1896; *Du Cange*, see "Capillus," "Lombard Laws" daughters "in capillo" who were unmarried). The right to "tundere" the "**puer crinitus**" only belongs, according to the Salic Law, to the

trary, that which we know with regard to the constitution of the family and the later law leads us to believe that it lasts as long as the latter continues to live with his father. If emancipation does not take place as a consequence of age,¹ it can take place as the consequence of the establishment of a separate home; and this comes about in three instances: 1st, the father drives the son away from the house;² 2d, the son goes away with his father's consent;³ 3d, finally, without being formally emancipated, without having the authority to do so, the son leaves the paternal home, in the rather rare cases where he can find some advantage in so doing.⁴ The absence of exact texts scarcely admits of a positive statement, but such is the social condition of ancient Germany that these three suppositions must have been looked upon as being legal. There is no need to look anywhere else for the origin of the Customary rule: "paternal power does not exist."

"parentes" (that is to say, to the father, or, if there is no father, to the nearest agnate) and no doubt to any person to whom the "parentes" might delegate it (case of adoption). The first cutting of the hair was thenceforth a private ceremony, previous to and preparatory for the public taking up of arms. The wearing of long hair being the distinctive indication of those who were freeborn, the hair should not be cut close to the head like that of a slave, but trimmed in a certain fashion: *Du Plessis*, p. 107.

¹ Controversy: *Kraut*, II, 590, etc. Having attained majority, the child is sufficiently strong to dispense with a protector; if the "mundium" persists it is because it relates especially to the formation of the family. Cf., however, *Gide*, p. 199. Giving up by the father as a consequence of old age among the Scandinavians: *Ozanam*, "Etudes German.," I, 120. The Herules cast their sick and their old men into the flames. In Sweden fathers who lived too long avoided the impatience of their sons by throwing themselves from the rocks: *Grimm*, I, 669-675, 4th ed.

² Cf. "Adulterous Wife": expulsion "coram propinquis": "For de Morlaas," 345; *Masuer*, 40, 5 (refusal of maintenance).

³ Analogies drawn from the Slav family: *Demelic*, "Dr. Cout. des Slaves," p. 56.

⁴ The Roman "pater" is furnished with the means of bringing back by force his son who runs away. But that which was possible in a well-ordered society like that of Rome was scarcely possible among the Germanic tribes. Cf. "Abdicatio parentetæ," "L. Sal.," 63; *Glasson*, III, 56; *Geffcken*, on this text; "L. Henri," I, 88. See, however, *Demelic*, pp. 48, 133; *Daresté*, "Etudes," 138, 242; *Maine*, "Cout. Prim.," 165. To break off every tie with one's relatives was an extreme measure, to which one could only make up one's mind with difficulty. All the more was this so because the son who had attained majority and who had left his father without being authorized to do so, undoubtedly lost all right to those partitions "inter vivos" to which allusion is made in the "L. Burg.," 51; "Bai.," 1; *post*, "Inheritance."—The service after apprenticeship, carrying with it a change of "mundium," was bound to emancipate a man from the paternal power: "L. Rom. Cur.," 22, 6; 23, 7; 24, 8; *Schupfer*, "Stud. s. l. Udin.," 50; *Béguélin*, "Les Fondements du Rég. Féodal dans la L. Rom. Cur.," 1893, p. 53; *Zanetti*, "La. L. Romana Retica Coirese," 1900; *Heusler*, II, 435; *Du Plessis*, p. 100 *et seq.* Cf. on abduction, "Roth.," 186.

§ 158. **The Same.**—(II) *The conception of family joint ownership*, almost extinguished in Rome before the absolute power of the “pater,” persists, on the other hand, in the barbarian society; witness the intervention of the children in alienations made by the father,¹ and the partitions of the inheritance of the family carried out during his lifetime.² These restrictions upon the paternal power, however remarkable they may be, did not change its essential character, especially if one admit that it depends upon the father as to whether he shall emancipate his children by force, and thus deprive them of all these rights.³

§ 159. **Transformation of the “Mundium.”**—The gradual disintegration of the patriarchal family caused the “mundium” to lose some of its harshness. Christianity, with its conceptions of charity and the spiritual independence of the members of the family, having this object in view, became the ally of the individualistic tendency;⁴ it maintained alongside of the duties of the children towards their parents the reciprocal duties of the parents towards their children;⁵ it likened the mother to the father, it made no distinction between the sons and the daughters.⁶ After having contributed to the softening of the Roman “patria potestas,”⁷ according to the custom set by the pagan emperors, it had to attack the barbarian “mundium” in order to restrain its effects.⁸

¹ Numerous examples in the Cartularies, “Cap. Kiersy,” 5 (II, 357); “Liut.,” 149. If given by a minor, this consent is worth nothing, or, rather, can be annulled: *Heusler*, II, 445.

² “Burg.,” 24, 51, 75, 78; “Bai.,” 1; “Roth.,” 168; “Expos. ad Liut.,” 113; “Sax.,” 62; “Wis.,” 4, 2, 13; *Schroeder*, p. 320; *Grimm*, p. 486; *post*, “Inheritances.” Italian Statutes cited by *Pertile*, III, 380; *Brünneck*, p. 51; “St. de Corse,” 1571, I, 46; “Schwabensp.,” 61. Many of these texts seemed to refer to the case in which the mother is dead or her possessions have been mingled with those of the father: see already in the “L. Sal.,” “Capit. Extrav.,” 8. With respect to these possessions the law of Upland makes the nearest relative of the predeceased wife a joint owner with the husband: *Rive*, I, 59.

³ Cf. in Rome, “patria potestas” and “querela inoff. test.” Obligation of giving the daughter a marriage portion: *Papien*, 37, 1; “Wis.,” 3, 1, 9. — As to disinheritance during the barbarian period: see “Wis.,” 4, 5, 1; “Alam.,” 1, and n. 2.

⁴ To the saying of St. Thomas: “Sent.,” 2, 33, 1, 1: “Non est parentis sed ipsius Dei” (“quantum ad animam”) let us liken the Revolutionary doctrine: “The child belongs to the State rather than to his parents.” *Bourjon*, I, 5, 1, 1, already expressly says so.

⁵ *St. Paul*, “Coloss.,” iii, 10, 21; “Ephes.,” vi, 1, 3, 4; “1 Tim.,” v, 4, 8; *St. Augustine*, “Serm.,” 356, no. 5; “Jostice,” p. 210.

⁶ *St. Paul*, “Galat.,” iii, 26.

⁷ The death penalty for infanticide, abortion and exposure of children: *Lactant*, “Inst. Div.,” VI, 20; “Cod. Théod.,” XI, 27, 1, etc. Details, as well as those on the sale of children, in *Du Plessis*, *op. cit.*

⁸ Exaggerations, for example, with respect to the children of the Jews:

§ 160. Customary "Mainbournie"¹ (guardianship) is nothing more than the old "mundium" reduced, little by little, so as to allow of no rights excepting those necessary to the protection of the child; it is a power of protection, according to a current expression, entirely in the interest of the children,² a true guardianship, ending when they come of age, that is to say, at the time when they no longer have any need of protection exercised, if need be, by the mother when the father is dead, absent, or incapacitated, allowing the child to have separate possessions distinct from those of the parents. There are the same number of characteristics which distinguish it from the Roman "patria potestas" of the countries of written law. This latter lasts during the life of the father; if the grandfather is alive, it is he who has authority over his grandsons, as well as over his sons; it never belongs to the mother; the father has the profits of possessions which the son may happen to receive; finally, although he has capacity to bind himself, the son can neither make a will nor borrow money (Macedonian Decree of the Senate). The contrast between the two legislations which governed France is that on this point they say: in countries of Custom, the power of the father has no existence;³ the children are vowed to or under the guardianship of their parents.⁴ One must take care, however, not to exaggerate this contrast. The Roman "patria potestas" often comes to an end by means of a formal emancipation; jurisprudence also introduced

"Conc. de Tolède," IV, 59; "Meaux," 845, c. 75; Dig. X, 28, 1, 11; The Mortara Case under Pius IX.

¹ "Jost.," p. 57, 158; *Beaumanoir*, c. 15; "Et. de Saint Louis," I, 73; IV, 270 (ed. *Viollot*); "Navarre," 24 ("De Pay et Filz"); "Siete Part.," IV, 17; *Lamoignon*, "Arrêtés," p. 5; *Deghewiet*, p. 59; "Gr. Encyclop.," see "Mainbour." Cf. various writings, such as the "Castoiment d'un Père à son Fils" (in imitation of a Latin poem of the twelfth century). The child always acquires the station of the father ("Jostice," p. 56), his nationality, his domicile, even his name, so long as there existed patronymic names: *Lallier*, "Prop. des Noms et des Titres," 1890.

² *Coquille*, "Inst.," p. 106: the paternal power is imaginary, for the parents have scarcely any more rights over the person and the possessions of their child than guardians have with respect to their wards; *Du Vair* (cited by *Ferrière*, see "Puiss. Pat."): this absolute sway (which fathers had over their children at Rome) is changed on their behalf into a kindly affection, and this slavery on the part of the children into an honorable relation; *Boutaric*, "Inst.," 9, 2, compares the father to a guardian. According to Blackstone, the power of the father over his children is derived from his duties towards them. *Heusler*, II, 449, remarks that the power of the father has, however, kept more of its old characteristics than guardianship has.

³ *Loysel*, 55. This gibe is the translation of the Commentary on the "Inst. de Pat. Pot.," *Pertile*, § 115.

⁴ *Loysel*, 177; *Desmares*, 248; *Boerius*, q. 167; 13, 14; *Gui Pape*, 410; *Brodeau*, "M.," 18; *D'Argentré*, on "Bret.," 498; *Henrys*, "Qu.," 127.

tacit emancipation, for example, when it resulted from marriage;¹ the possessions of the son who is not emancipated which appertain to the camp are his exclusive property; in relation to these possessions he has a right to make a will, and, as far as his other possessions are concerned, he can give them "causa mortis." Thus the condition of the son of good family in the South is like that of the elder son in countries of Customs, and, on the other hand, we shall see that the latter is far from always having enjoyed the independence which one is in the habit of crediting him with.²

§ 161. **Rights over the Person.**³ **Correction.** — The paternal power gives the father the right to have the custody of the child,⁴ to bring him up,⁵ and, secondly, to choose his religion,⁶ to designate his teachers, and, finally, to correct him,⁷ without which the preceding rights would have very little effect. The father's authority to discipline is still very extended in the feudal period.⁸ He could thrash the child,⁹ provided he does not seriously wound him: an important restriction which permits the son to call upon the law

¹ "Navarre," 24, 8: the heirs and heiresses who are married in the house become joint owners with their relatives both of the house and the acquired and inherited possessions.

² Children of 25 who have attained majority and have been sent into the country upon the request of their fathers, as late as 1673, ought not to think the paternal power an empty form.

³ Traces of the old law. For example, in Normandy (*Marnier*, "Etabl.," 26), the death penalty is not inflicted upon the father who kills his child: "Bergerac," 82; cf. *Bout.*, I, 18; II, 40; "Et. de Saint Louis," I, 39; *Viollet*, *ib.*, I, 249; *Vitry*, 100, 148; "Bord.," 43 (pledging); *Meslé*, *op. cit. passim*. As to testamentary guardianship, cf. *post*.

⁴ After the age of 16 years one can bind oneself without authorization in the king's army: "Beaune," 543; *Isambert*, see Table, "Armée Recrutement."

⁵ *Post*. Custom for vassals to send their sons to the court of the lord: *Gautier*, "Chevalerie." "Atalikat" in the Caucasus: *Kowalewsky*, p. 190.

⁶ As to religious education, *Schulte*, "Eherecht," 320, 535. Against Protestants, legislation which overthrows the paternal power: Decl., June 17, 1681 (they are allowed to renounce after the age of 7 years). Edict of Revocation of 1685, Art. 8. The Edict of January, 1686, orders that children from 5 to 16 years old shall be taken away from their parents when the latter are heretics (e. g., children of the Duke of La Force). Decl., Dec. 13, 1698; May 13, 1724. In 1686 parents who had emigrated lost the right to consent to the marriage of their children who had remained in France: *Néron*, II, 964. The Edict of 1787 cancelled these provisions: *Du Plessis*, p. 375. England: provisions against the Catholics: *Blackstone*, *op. cit.*, II, p. 172; *Lehr*, p. 115.

⁷ Right to receive respect: the testimony of the son is not admitted against the father (*Dig.*, 22, 5, 4, 9; "Petrus," IV, 40; "L. d. Droiz," 224; "Ord.," 1667, 22, 2, and reciprocally); the son cannot act against the father without the authorization of the law: *Dig.*, 2, 4, 4; "Petrus," III, 63; "Justice," 2, 4, 3; "Siete Part.," IV, 17, 11: cf. *Howard*, "Dictionn.," see "Enfants."

⁸ "Kl. Kaiserrecht," II, 7.

⁹ Corporal punishment was for a long time made use of in schools and families. Henry IV had often had the whip, and he recommended that it be given to his son (Louis XIII). Harshness in education, coldness in its

in the case of ill-treatment on the part of his father.¹ He, the father, could keep the child shut up in a room, or cause him to be incarcerated in a convent or a public prison, after private sequestration had gone out of use.² Prison was a step in advance over the latter, and the despotism of the head of the family then found itself limited by the necessity of appealing to public authority.³ The jurisprudence of the monarchic period regulated the exercise of the paternal power in cases of this sort:⁴ the father was able upon his own authority to cause his child of less than twenty-five to be shut up in a house of correction; but, if the father had remarried, an order of the judge, given ordinarily upon notice by the parents, was required. As to the mother, she could never obtain the incarceration of her son without the authorization of law, "the weakness of woman's judgment, and the characteristic of being carried away which is common enough in the case of this sex," says Pothier, "prevents one from being able to rely upon

relations, — that was the old family. Cf. *Bodin*, "Républ.," I, 4; *Montaigne*, I, 25: "Away with violence and force; there is nothing in my opinion which so degrades and stupefies a well-born nature." The advice would be good if there were none but well-born natures. As a consequence of having followed it, our time has made of many children hateful little tyrants.

¹ "Montpellier," 64; cf. "Jostice," 2, 15, 2 (p. 59). In the sixteenth century a recourse to the law is the rule if there is any cruelty: *Pasquier*, "Inst.," p. 64; *Chaisemartin*, 60.

² "Liège" (cited by *Couilland*, "Thèse," p. 181): the parents can beat and correct their children without being liable to pay any fine at law, excepting in case they wound them. They can shut them up in a room for a short time, but they cannot have them imprisoned, especially outside of the country, without a decree from the ecclesiastical judge of Liège or the ordinary judge of the locality, which they should obtain and show to the jailor within three days of the imprisonment: "Schwabenspiegel," I, 190 (right of the master to beat the child which is entrusted to him); II, 26; *Stobbe*, § 252. — "Montpellier," 64; "Agen," 22. Corporal correction in English law, but not imprisonment. It is otherwise in Italy: *Pertile*, III, 378; "Ivrée": banishment; "Frioul": expulsion from the house. Under such conditions as these *reverential fear* is not an idle term.

³ Limited to a very slight extent at first, the State accepting the penalties decreed by the father of the family with its eyes shut. We must wait until 1673 to be sure of an energetic exercise of public powers: *Merlin*, see "Correction"; *Brillon*, see "Débauche."

⁴ In Paris, in 1673, men 30 years old, priests, were thus held in custody by way of paternal correction. A regulating order (March 9, 1673) was necessary in order to restrict the exercise of this right to the age of 25 years. And even after this the father could still resort to the obtaining of an order of arbitrary arrest against his son who was of age (e. g., *Mirabeau* was incarcerated in the Château d'If in 1774: *Joly*, "Procès des Mirabeau," 1863, p. 61 *et seq.*). Thus **Orders of Arbitrary Arrest** had an entirely different effect from that which one is accustomed to look upon them as having; they become a means whereby parents could protect the honor of the family; they were granted for family reasons, and not for reasons of State alone. Cf. "Ord." of April 20, 1684; July 15, 1763 (deportation to Désirade, where they became colonists); *Viollet*, p. 506, n. 2.

the mother as one can upon the father.”¹ To sum up, the parents’ right of correction ended by not being exercised excepting with the co-operation of the courts.² This intervention of public authority in a domain where formerly it did not penetrate, unless by way of exception, has become frequent and normal: the family autonomy no longer exists; the father of the family must account to the State in the exercise of his power.

§ 162. **The Duties of Parents.** — The obligation of parents to bring up, to support, to protect their children, and even to start them in life, remained for a long time in rather an indefinite condition and without authority.³ Before the enactment of the laws bearing upon the reforms which decreed compulsory instruction, education was given without any rule, at the pleasure of the parents.⁴ To protect the children, that is to say, to be their legal representative, to assist them, to administer their possessions, was rather a right than a duty. The same thing applied to support: it is not without difficulty that the courts have acquired a power of regulation in these matters.⁵ As far as the start in life of the children is concerned, we shall see later on, when dealing with

¹ The guardian cannot have the ward detained excepting upon the order of a judge and notice to the relatives: *Pothier*, “Personnes,” I, 4, 3, 2, 1; *Meslé*, I, 260.

² Forfeiture of the paternal power: *Beaumanoir*, 21, 12 *et seq.*; *Masuer*, 5, 1; *Loysel*, I, 4, 22; *Declar.* March 8, 1704; *Stobbe*, § 252, n. 2; *cf.* Law of July 24, 1889. On the English law, *cf. Lehr*, p. 117.

³ The authority was with great difficulty established, and only in an imperfect manner.

⁴ Natural law: *Blackstone*, *loc. cit.* — The question of the education of the children is arbitrarily decided by the judge: *Cormis*, “Consult.,” II, 1130; *Soefve*, “Quest.,” 2, 3, 30. The Declaration of May 24, 1724, provides for the establishment of schools in every parish and compels parents to send their children to them until they attain the age of 14 years; this was designed especially with a religious object; the important thing was to instruct the children, especially the children of Protestants, in the mysteries of the Catholic religion: *cf.* Edict of 1695. But these laws were badly applied: *Champion*, “La France d’ap. les Cahiers de 1789,” p. 205. The Decree of the 29th Frim., year II, also made primary instruction compulsory: *cf.* Law of March 28, 1882. *Danton*: “After bread education is the first need of the people.” The projected Civil Code, I, 5, 2, compelled parents to have their children taught a trade (*cf. Rousseau* in “*Emile*”).

⁵ English legislation greatly limits the right of being supported. This right exists only so long as the child, because of his health or his age, is not in such a condition as to be able to provide for his own needs; in such a case as this he is only allowed to ask for an allowance of 325 francs per annum at the most. The compulsion exercised over the parents only is seen under the form of a distraint by the church wardens and inspectors of the parish; in other words, they do not admit of a family being able to free itself of the care of its poor at the expense of the parish: *Lehr*, p. 114. The jurisprudence of other countries is broader: *Brümek*, p. 50 (Sicily); “*Siete Part.*,” IV, 19; *Chaisemartin*, 63: “a father can better nourish ten children than ten children a father.”

emancipation, the rules of the very old law. During the monarchic period the majority of the Customs adhered to the principle: "no marriage portion for him who does not wish it,"¹ whereas, in countries of written law and in Normandy, the parents are held under a strict obligation to give their daughters a marriage portion.² The start in life by means of a marriage or entering into religious orders was at first imposed by the parents upon the children who were under their power; in time, under the influence of the Church, these acts became free; but the State, representing the old Customs, was opposed to reform³ (nullity, disinheritance, advantages to the profit of one of the children).⁴

§ 163. **Rights over Possessions.** — For a long time the persistence of family joint ownership was opposed to the son who lived with his father having possessions of his own; again, in the thirteenth century, what he acquires he acquires for the benefit of his father, even although he may be of age.⁵ The latter, however, has only the administration and the enjoyment of the personal belongings gathered by the child through inheritance from his mother or his maternal relatives (lease or custody, continuation of joint ownership).⁶ With the disorganization of the family

¹ Roman origin: *Masuer*, XIV, 12; "Auv.," 12, 30; "Bord.," 43; "Metz.," 1, 113. Prohibition of disinheriting a daughter who has only been guilty of misconduct after having attained the age of 25 years: "Normandie"; "Navarre," 24, 6; *Marnier*, p. 181; *post*, "Proper Marriage." — As to excessive marriage portions, *cf.* Edict of Roussillon, 1563, 17.

² *Montesquieu* does not admit that there is any obligation upon parents to set their children up in business; in their bringing up they have fulfilled all their duties: *Chaisemartin*, 61.

³ "Jostice," 19, 49, 2 (p. 323); infancy: *cf.* p. 104, Dig., 3, 2, 1; "Navarre," 24, 7. *Stobbe*, § 253; *Brinneck*, p. 49 (Sicily).

⁴ **Vows:** *Pothier*, "Personnes," 130. *Ayrault* writes a treatise on this occasion dealing with the paternal power addressed "To René Ayrault, His Son, So-called Jesuit," who had entered this order contrary to his father's wishes. — As to the conflict between the canon law and civil legislation, *cf.* "L'Eglise," I. Dig. X, 3, 31, 8; "Trente," 25, 18; *Thomassin*, I, 1760. "Ord.," 1560, 19; 1579, 28; March, 1768; Jan. 17, 1779; *Denisart*, see "Vœux." *Ferrière* refuses to see in this a consequence of the paternal power (see "Dict."). We must notice that in order to take vows or enter the army the child is freed from the paternal power at an earlier age.

⁵ *Beaumanoir*, 12, 45; 21, 20, makes no mention of it; "Bord., A. C.," 78; "Et. de Saint Louis," I, 140; "Parl. aux Bourg.," 1293 (*Simonne*, "R. h. Dr.," XIV, 529); "T. A. C., Bret.," 209; *Desm.*, 236, 248; "Gr. Cout.," 2, 40 (p. 370): legacy or gift not based on a consideration; *cf.* pp. 109, 263; *Boutillier*, I, 103; *Vitry*, 100; "Auv.," "Bourb.," "Berry," "Reims," "Hainaut," *cf.* *Dumées*, "Dr. Français en Flandre," 1753, 7. — *Cf.* "Jostice," VII, 6, 7; XII, 3, 1 (Roman formula of customary rules); "L. d. Droiz," 805, 756, 532, etc. Action for insults belonging to the son: "Toulouse," "De Minor.," 2; "Bourbon," 169; "Lille," XIII, 3. As to the other offenses, the father has for a long time had a right to damages: *Kraut*, I, 329, 362. The "Sachsenspiegel," I, 10, shows the father giving a sort of "peculium" to his son: *Heuster*, II, 442.

⁶ "Sal. Cap. Extravag.," 8: "res uxoris" or marriage portion: until the sons

joint ownership, the possessions acquired by the child, in whatever manner it might be (gifts, legacies, personal gains, etc.),¹ were recognized as belonging to him alone; even though under the paternal power, he had his own distinct inheritance.² The father and mother had the administration of it³ because of their right of custody, but the enjoyment only belonged to the noble and the citizen guardian, and even then not without restrictions.⁴ This enjoyment thus had something exceptional about it: the Customary law did not give the legal profits to the father.⁵ On the other hand, the paternal power in countries of written law was of some value to the father (but not to the mother); to say nothing of the ownership of possessions acquired by the son "ex re patris,"⁶ as well as the usufruct of the other possessions,⁷

who are "parvuli" shall have attained the "ætas perfecta," it is the father's place to "judicare" (not to sell or give). This leads us to suppose that coming of age emancipates the child. He acts in his own name and does not represent his father: "Bord.," 78. *Pollock and Mailland*, II, 437: the father is "tenant by the law of England"; but in actions relating to these lands his son must be made a party. There are even cases in which the custody belongs to the lord: *Bracton*, f. 138, 43, 253; *Heusler*, II, 443; and the usufruct to the father: "Sachsensp.," I, 11; *post*, "Guardianship."

¹ Excepting what he acquires "ex re patris," everything he earns through his labors while in the house of his father: "Metz," I, 4, 12; *G. Coquille*, "Quest.," 65; *Desmares*, 36, 248. Gifts to the son are regarded as being made to the father and mother, unless there is a special clause setting them aside for the son.

² "F. de Béarn," 277; "de Morlaas," 179; *Bout.*, I, 75; "L. d. Droiz," 142, 556, 756; "T. A. C., Bret.," 209; "Gr. Cout. de Fr.," II, 30; "Poitou," 321; "Bourb.," 174; "Hainaut," 32, 9. The Romanists draw a distinction between Italy and Germany: the "peculium" acquired regularly (of which the father has the administration and the enjoyment) and the one acquired irregularly (of which he only has the administration), the "peculium" acquired by the inheritance in the direct line, the "castrans peculium" and the "quasi castrans peculium" (including among the "milites," clericals; "milites Dei," advocates and doctors; "milites inermes"; "militæ litteratæ"): *Fitting*, *op. cit.*, p. 476; *Stobbe*, § 254; "Siete Part.," IV, 17, 5 *et seq.*

³ "T. A. C., Bret.," 77, 204. We can then say that the son is represented by his father: "Jostice," 59; "L. d. Droiz," 224, 589.

⁴ *Post*, "Guardianship," "Lease." However, *Imbert*, "Enchirid.," p. 162, considers this usufruct as being frequent: *Chassaneus*, 870; "Berry," I, 22 (ceases at the age of 18).

⁵ This fact is correlated to the setting up of a majority which emancipates and is to be accounted for in the same way: *cf. Glasson*, VII, 181. The usufruct exists in certain of the Customs as an exception: "L. d. Droiz," 142; "Bord.," 83, etc. *Cf.* "Bourges, A. C.," I, 5, etc. As to the usufruct of property jointly acquired by the community: *post*, "System of Possessions between Spouses." Final English law: the father only has a right to the product of the work of the children who live with him and whom he supports; he is an administrator who is held responsible for their other possessions: *post*, "Guardianship"; *Femière*, see "Administrateur"; *Pothier*, no. 82; *Duranton*, "R. h. Dr.," IV, 147; *Stobbe*, § 255, 2.

⁶ "Navarre," 24, 1. It is the same, moreover, in the customary law.

⁷ Details as to this usufruct in *Serres*, "Inst.," 2, 4, 9; *Henrys*, *op. and loc. cit.*, etc. It affects the possessions of children who are not emancipated.

excepting profits realized in the employment of warfare, the magistracy or the bar, and the Church ("peculium castrans" or "quasi castrans"); with regard to these, the son was looked upon as having the same rights as his father.¹

§ 164. **Capacity of the Child under Authority.** — The absolute incapacity of former times, the consequence of the unity of person and inheritance, had difficulty in disappearing; it is still to be found in certain sources of law in the thirteenth century.² As a general thing, however, it no longer exists. There has had to be a departure from the old principles, first of all in certain practical cases which are analogous to those concerns of the household in relation to which it was found necessary to recognize the capacity of the married woman. The German texts show the child validly paying for his share of the food, gambling, "quantum secum in parata pecunia habuerit," that which "sub suo cingulo continetur," pledging his clothing, even to his shirt, obligating himself to the extent of small sums. According to the Assizes of Jerusalem, the father and mother of the scholar are held liable to pay "that which he has borrowed for his enjoyment, or to pay his master."³ More than this, it is even admitted that in the household forum all the obligations of the son of good family are valid.⁴ This limited capacity must have increased by reason of the rights of ownership which the son of good family was recognized as having, and by the spreading of the doctrine of emancipation. At the end of the thirteenth century the idea that the child under authority enjoys full civil capacity from the time he comes of age has been pretty nearly attained.⁵ But his condition scarcely changes be-

does not belong to the mother, and does not cease as a consequence of a second marriage (cf. "Cod. Théod.," 8, 18, 3; and "Cod. Just.," 6, 60, 4; "Wis.," 4, 2, 13). The father may allow the children to enjoy their possessions, but this renunciation cannot be pleaded against creditors: *Stobbe*, § 255, 3; *Salvioli*, § 200. Has the legal enjoyment referred to in the Civil Code, 384, its origin in this institution of countries of written law or in the customary rules? Cf. *post*, "Custody."

¹ *Fitting*, "Peculium Castrense," 1871.

² "Bernier Handf.," 1218, 49. The father is not responsible for the debts of his son; the son himself is not held liable to pay them out of the possessions which he inherits after the death of his parents. The father has the right to reclaim anything which the son has disposed of for the benefit of third parties: *Stobbe*, § 256; "T. A. C., Bret.," 84, 175; "De Usib. Andeg.," 14: the son borrows without the permission of his parents; the latter are not held after his death if he has no property: *Beaumanoir*, 15, 31. Cf. "L. Pap. Roth.," 170; "Liut.," 58 (acts of the son which cannot be pleaded against the father).

³ "Ass. de Jérus.," "C. des B.," 218; "Siete Part.," IV, 17, 12.

⁴ *Beaumanoir*, 12, 35; cf. *post*, "Promissory Oath."

⁵ *Beaumanoir*, *ibid.*: the son who has attained majority can cause the cancelling of any act which is injurious to him, but only, it seems, by pre-

cause of this, so long as he has no personal possessions or those that he has are subject to the enjoyment of his father; the authorization of the latter alone gives practical value to his enjoyment; for, at the same time as he gives his authority, the father binds himself, contrary to the Roman rules.¹ When he is a minor he has a right to the privilege of restitution, even if he has been authorized; he is almost in the same situation as that of the minor under guardianship.² Although generally accepted,³ the capacity of the son who has come of age did not cease to be discussed as far as the right of making a will was concerned;⁴ upon this point the conflict between the old and the new law had not been settled, perhaps because of the disfavor with which the will was looked upon.⁵ In countries of written law the son of good family cannot make a will (excepting of his possessions which appertain to the camp), but he is free to dispose by gift, "mortis causa," with the consent of his father. We have already seen that he was capable of binding himself, of becoming surety, for example, but not of borrowing money, owing to the application of the Macedonian Decree of the Senate.⁶ The responsibility of

tending that it is because of reverential fear: "Jostice," pp. 80, 98 (the son brings an action against his father; there is no more community of persons). On Roman influence in Germany: *Stobbe, loc. cit.*

¹ "Bord.," 79, 80, 115: presence of the father; the written authorization is not sufficient. *Heusler*, II, 448. Cf. on responsibility of the father, "Bergereac," 130; "Limoges," 82; "Bourb.," 168; "Berry," I, 10, 11. In the Register of the ecclesiastical judge of Cerisy we find numerous examples of a fine computed "cum auctoritate patris," no. 7, *Basset*, 2, 4, 10, 4.

² *Post*, "Guardianship." Cf. English law: *Pollock and Mailland*, II, 443.

³ Thus the son who has attained majority may appear in court: cf. *Pollock and Mailland*, II, 438. On the "Demurrer of the Parol," cf. *post*, "Guardianship." — "T. A. C., Bret." 67. The son who has attained majority, but who is under the power of his father, can only be appointed a custodian with the authorization of his father: cf. "Jostice," 59; "L. d. Droiz," 224, 589.

⁴ Great confusion in the Customs. Frequently the will is only valid with the consent of the father: "T. A. C., Bret.," 220; "St.-Omer," 27; "Bourgogne," etc. In Flanders the son cannot make a will: "Gand," 21; "Courtray," 13, 13. He can make a will of property acquired by his own industry: "Hainaut," 32, 1; "Berry," 18; "Lorraine," IV, 5. Capacity without restriction: "Poitou," 276; "Angoumois," 119; "Labourt," 11. The age at which one can make a will varies with the Customs (20, 18, 16 years, etc.). In Normandy, 414, the amount which can be disposed of varies according to age: Civil Code, 904; *Guyot*, see "Testament."

⁵ A will authorized by the father is valid if there is added to it the clause that it shall be valid at least as a gift "mortis causa" (*Bordeaux contra*) if it is for a pious cause that it is made; and, finally, even without this consent, when he divides his possessions among his children: *Serres*, 11, 12.

⁶ The Macedonian Decree of the Senate is applied throughout the South (since when? "L. Rom. Wis.," *Paul*, 2, 10): *Bretonnier*, see "Fils de Famille"; *Argou*, 3, 31; *Beaumonts-Beauprê*, "C. d'Anjou," II, n. 576; "Limoges," 82; "Siete Part.," 5, 4. On the contrary, in countries of Customs the decree of the senate is not received: *Ferrière*, "Beaune," p. 541; *Papon*, 12, 4; *Merlin*,

the father caused by the offenses of the son is still found in the thirteenth century, because it is correlative to the right of correction, and because the son has no personal possessions;¹ but in consequence of this it is no longer justified. In spite of the controversy and the distinctions which are shown by the tenacity of the old rules, the principle prevails, in countries of written law as well as in countries of Customs, that "for another's offense one is not held liable" (save as to civil liability).²

§ 165. **Right of the Mother.**³ — If we are to believe Beaumanoir, 21, 20, the paternal power belonged in common to the father and to the mother: "father and mother have their children in their custody or under their guardianship."⁴ During the lifetime of the father did the mother then have some part in the exercise of this right? Surely very little, because she was herself found to be under the power of the husband. The education of the children was incumbent upon her,⁵ but under the supervision of the husband.⁶ The Edict of 1556 shows that her consent was

see "Macédonien"; *Bouhier*, 16, 2. German law: *Stobbe*, 256, II, 3. Italy: many statutes only allow him to bind himself with the consent of his father: *Pertile*, III, 379. As to the renunciation of the Macedonian Decree of the Senate, cf. *Meynial*, "N. R. H.," 1901, 262 (bibl.); the "Glose" (*Dig.*, 14, 6, 11; "L. Feud.," 2, 54, 3), annuls the renunciation, even made under oath (*Dumoulin*, on "Cod." 4, 28), for the Decree of the Senate was enacted out of hatred for creditors, and not in favor of the sons of families; certain of the canonists are of a contrary opinion (*Imola*, etc.). Cf. *Bartole*, 56 "Pr.," "de Fidej.," no. 10.

¹ *Beaumanoir*, 21, 20; "Amiens," 42 (1205); "Parl. aux Bourg.," p. 106; *Saint-Dizier*, 16; "Jostice," p. 98; *Grimm*, see "Weist.," 503, etc.; "Schwabenspiegel," II, 183; "Bret.," T. A. C., 175; "A. C.," 615 (*D'Argentré*, s. 611; *Beaumonts-Beaupré*, "Liger," 513; "Eu.," 169. Thus the father had to pay the fine to the treasurer, and civil damages to the party injured; he was only exempt from the corporal punishment: "Gr. Cout. de Fr.," p. 385; *Pertile*, III, 378; *Kraut*, I, 335. "Agen," 22; *Laroque-Timbaud*, 14, etc.

² *Boutillier*, II, 29; *Dig.* X, 5, 23, 2 (Alexander III, 1159-1181); the father is not responsible: "Berry," I, 12; "Bourbon," 169; "Gand," 21, 9, etc. Jurisprudence inclines towards this solution where the Customs are silent: "Beaune," p. 544. This is also the solution resorted to in countries of written law, — the practice of giving up the thing causing the injury to the person injured having disappeared. Swiss Customs: "Stat. de Rome," II, 80; *Pothier*, "Oblig.," 454; *Brillon*, see "Père"; *Boucheul*, *ibid.*

³ *Mertian de Müller*, *op. cit.* (p. 1080); *Du Plessis*, p. 168; *Viollet*, p. 508. As to the custody or guardianship of the mother see *Catellan*, 4, 8.

⁴ This is an expression which is more correct in fact than in law. It is to be accounted for by the participation of the mother in the education of children, by her rôle of assistant or of substitute for her husband: *Boularic*, I, 100; "Châlons," 2; "Vitry," 70, 100, etc.; *Mülhaus*, "Stat." (1692), IV, 31, 1; *Loysel*, 177; *Pothier*, "Pers.," I, 6, 2; *Fleury*, I, 225; cf. *Salis*, 152; *Du Plessis*, 550; *Schulte*, § 172 (authorization by the mother); *Heusler*, II, 433; "Stat. de Rome," 1580, II, 78.

⁵ Right of correcting the child of tender age: *Dig.*, 43, 30, 3, 5; "Wis.," 4, 5, 1; cf. English law, *Lehr*, p. 118: the paternal power is reserved to the father.

⁶ If he wishes to give them an immoral education, the mother has a right

required for the marriage of the children; but in case of disagreement between her and the father the wishes of the father prevailed. At the death of the father,¹ or if he is absent or ill,² the Customary law gives the mother the custody, which is very much like guardianship, with fewer rights than remain to the father when he survives; for the latter conserves, on principle, all the attributes of the paternal power. If there is a judicial separation, the courts decide to which of the two spouses the authority ought to belong.³ In countries of written law the mother legally occupies a little less important position, because of the principle that the "*patria potestas*" could not be attributed to her; thus it is that she does not have the legal profits of acquired possessions. But custom gives her a little of that which the law refuses her,⁴ and, according to the law itself, the minor child passes under the legal guardianship of its mother (or of its grandmother) at the death of its father. Thus, contrary to the old law, the mother becomes in all matters the assistant of the father in his rôle of head of the family.

§ 166. **Emancipation.**⁵ — *In countries of written law*, emancipation from the paternal power can only result, on principle, from an *expressed emancipation*: a declaration before the judge or a notarial deed (at least within the jurisdiction of the Parliament of Toulouse).⁶ Alongside of this Roman institution there took place

to go into court in order to prevent it. — In case of a judicial separation: "Ass. de Jérus.," "C. des B.," 177; *Boutaric*, II, 8; *Bernard*, p. 293, cites the celebrated action of Catherine Arnaud against Isaac Le Maistre, her husband, who had embraced Protestantism and demanded his children from her.

¹ *Beaumanoir*, 21, 9. This custody ceases by means of a judicial decree made at the request of the parents: Cases, Procedure, *ibid.*, 21, 17; "Et. de St. Louis," ed. *Viолlet*, I, 154; III, 137. Death of the mother: *Montargis*, 7, 3.

² *Pothier*, "Pers.," n. 134; *Stobbe*, § 252.

³ *Denisart*, see "Education."

⁴ *De Ribbe*, *op. cit.*, II, 135; cf. "Petrus," I, 3.

⁵ "Encicl. Giur. Ital.," see *Lattes*, p. 179; "Acad. Lég. Toulouse," I, 52; "R. h. Dr.," 14, 529; *Stobbe*, "Beitr.," 1865; *Néron*, see Table; *Isambert*, *id.*; *Guyot*, *id.*

⁶ *Guilbert*, "La Famille Limous.," p. 23. At Limoges, June 12, 1792, Pierre Chapoulaud, parish priest of Bazoches, in Gâtinais, is emancipated at the age of 47 years in the presence of a judge. He kneels down and, clasping his hands together, prays his father to emancipate him. The latter declares that he gives his consent and raises him up: *Viолlet*, *op. cit.*; *De Ribbe*, "Les Familles et la Soc.," I, 245; *Pertile*, III, 384: The father who abuses his power in order to administer the property badly can be forced to emancipate his son; emancipation is only allowed at a certain age, — 20 years at Milan, 18 at Novare, etc.; a custom of assigning the property to the emancipated son, Milan, 1216, 17; publicity given to emancipation, "Siete Part.," IV, 18. Incest causes the loss of the paternal power. A father who emancipates his son keeps one-half of the usufruct of the acquired property: *Du Cange*, see "Emancipatio"; *Ragueau*, *id.*

in many localities an *implied emancipation* which resulted from marriage,¹ from living apart for ten years, from being elevated to the highest dignities of the gown or the sword, or to a bishopric, and from the civil death of the father.² The expressed emancipation differed from the other in that it was voluntary on the part of the child, as well as on the part of the father; the son could not be emancipated in spite of himself,³ and, on the other hand, he had no means by which to compel his father to emancipate him (with some exceptions).⁴ From the Roman laws the Customary laws borrowed in the fourteenth century emancipation expressed before public authority, such as Boutillier⁵ has, for example, described, and emancipation by letters from the sovereign.

But in the old days the only kind of emancipation which was known was the depriving of their board, the "*foris familiatio*" of children who were of age;⁶ it took place without any participa-

¹ Provinces of written law within the jurisdiction of the Parliament of Paris: *Argou*, I, 25; *Henrys*, II, 715.

² "Montpellier," 53; "Navarre," 24, 8 ("Coseigneurie"); *Boutaric*, "Inst.," I, 12, 6; *Dunod*, "Prescr.," 185; *Henrys*, "Œuvres," II, 722; III, 452; *Bouhier*, I, 361; *Julien*, "Elém.," I, 8. In Provence, "habilitation," giving only the right of administration: "Toulouse," 3, 4 (marriage with gift or marriage portion). — Up to the age of 25 years the child who has been emancipated is aided by a curator in the alienation of his immovables. — Italy: emancipation results from entering into religious orders, from entering the priesthood or the military profession, going into business, or being invested with a fief or a public office: *Pertile*, III, 382; "Siete Part.," IV, 18. As to holding office *cf.* "Nov.," 81; "Cod. Just.," 12, 3, 5; 8, 46, 1.

³ *Henrys*, t. II, q. 127, n. 36; "Siete Part.," IV, 18, 17. *Cf.* Roman law, in which emancipation depends only upon the will of the father.

⁴ "Nov.," 89, c. 11; *Boer.*, "Dec." Power of the courts to make an estimate: *Julien*, "Stat. de Provence," I, p. 202. Forfeiture by the father who incurs penalties: "Siete Part.," IV, 18, 18 (cruelty of the father to his sons, prostitution of the daughters, etc.); 18, 19 (revocation of the emancipation because of ingratitude): *Hostiensis*, p. 320.

⁵ I, 100. *Cf.* *Beaumanoir*, 21, 21: intervention of the law or of the relatives, when the surviving spouse acquires influence over his children, so as to prevent him from stripping them. Custom of joining a gift to the emancipation: *Simonnet*, "R. h. Dr.," 533; *Salis.*, p. 181. The law makes sure that there is no fraud: *Beaumanoir*, 21, 20. It was all the more necessary because the consent of the child was not required beforehand; certain Customs allowed of his being emancipated in his absence: "Orl.," 185; "Reims," 6; "Sedan," 5, etc.; "T. A. C., Bret.," 79, 204. — A judicial emancipation was attained through the Customs, which was not affected by Roman influence. Made before the judge, notary, or municipal authorities (aldermen at Lille, "Roisin," concerning investiture; mayor at Provins, "B. Ch.," 1856, p. 193), it was sometimes looked upon as the act of the parties, sometimes as the act of the judge; sometimes the judge limited himself to registering it and giving it authenticity, sometimes he played a more active part, — he emancipated the child. *Salis.*, p. 187 (Statutes of the Châtelet, 1326-1396). In Burgundy, in the fourteenth century, the "Summa" of Rolandinus was reproduced: *Bouhier*, I, 491; "Beaune," 551.

⁶ *Ragueau*, see "Pain, Emancipez"; *Loysel*, 56; *Du Cange*, see "Foris Familiare"; *Viолет*, "Et. de Saint Louis," I, 130; *Heusler*, II, 438; *Salis*, *op.*

tion on the part of the judge,¹ and only by reason of a child's having a separate establishment, a distinct home, to the father's knowledge: "fire and place cause emancipation."² A simple change of residence was not enough to effect emancipation; the student who goes away from his home in order to follow the course of study of a university does not escape from the paternal power.³ The assignment to the "foris familiatus" of a portion of the family fortune is not indispensable, although it is frequent, and it constitutes a sort of compensation for the loss of the enjoyment of the possessions of the parents;⁴ in fact, the young man whose parents send him to work outside of the paternal house, and who owes his independence to his work, is emancipated in the same manner as the one who receives a portion of the possessions of his father.⁵ The "foris familiatio" could be imposed upon the child by way of a penalty, or because his parents were too poor, or because they wished to escape from responsibility for his offenses;⁶ but it could also happen that the child went away against the will of his father; he "deprived himself of board."⁷

cit. German law; "Absonderung," emancipation, "per separatam oconomiam, emancipatio saxonica" (sixteenth century, as opposed to Roman emancipation).

¹ Excepting in a few localities: *Ferrière*, see "Parl. aux Bourg.," p. 164. Giving of a piece of bread and disinheritance: *Simonnet*, *loc. cit.*

² Frequent disagreements between children who are living with the father and mother and children who are emancipated by the father and mother, or by one parent if the other is dead: "Amiens," 42, etc. They still say "enfant en celle" (meaning a child living with its father and mother, under their power, and having community of property with them): see *Ragueau*, *Loysel*, 101. A few Customs require that the separate establishment shall have been in existence a year and a day; sometimes jurisprudence requires ten years: "Cod. Just.," 8, 47, 1; *Du Plessis*, *op. cit.*

³ "Ass. de Jérus.," "C. d. B.," 215, 218; "Parl. aux B.," p. 164; *Varin*, "Arch. Lég. de Reims," I, 1, 39. The very early law could not have admitted of the emancipated child living with his father, as was done later on.

⁴ *Beaum.*, 21, 20 (partition without fraud). Certain texts give the child who goes away with the consent of his father a right to a settlement: *Estaires*, 75 ("Mém. Soc. sc. Lille," 1855). Without such a settlement living independently would not have been possible: *Viолет*, 221; "Et. de Saint Louis," I, 119; II, 26; *Beaum.*, 14, 13; 14, 29; 21, 4, 20; "Jost.," p. 236; "Picardie," I, 9, 3; *Saint-Dizier*, 236; "B. Ch.," 1874, p. 412. The son or the daughter who goes away against the wishes of the parents is disinherited, "ipso facto": "Wis.," 3, 2, 8; "Narbonne," 1232 (*D. Vaissette*, III, 208); "Amiens," IX, 2 (*Marnier*); 52 (*A. Thierry*). *Post*, "Partition," "Refunding."

⁵ *Beaum.*, 21, 20; *cf.*, however, *Glanville*, 7, 3; "Saint-Sever," 8, 1, 8; "Reims," 7; "Sedan," 6; *Loysel*, I, 1, 39; "Bergerac," 130; "Chartres," 103; if the mother dies the children are emancipated "ipso facto" because they are considered as having sufficient means to live on. *Heusler*, II, 438. According to this learned man, emancipation is due less to a separate establishment than to the receiving of a portion of the father's possessions: *cf. Grimm*, "Weist," III, 104, 14; the lord inherits from the emancipated child, and not his father.

⁶ *Beaum.*, *loc. cit.*

⁷ Controversy; *Labourt*, IX, 18; *Soule*, 24, 22; "Barèges," 16; "Bret.,"

The separate start in life results, in the case of daughters, from marriage; they are also emancipated by this means from the paternal power, which emancipation is all the more necessary when they change their family.¹ As for the sons, marriage does not always imply the establishing of a separate home; emancipation therefore is not a necessary consequence. In the end, however, the rule becomes established that: "every marriage emancipates," whether it be that of a son or a daughter.² The knighting of the son had the same effect as his marriage.³

§ 167. **Emancipating Majority.** — In the last stage of legislation, emancipation results, of absolute right, simply from majority; which is not difficult to understand, for the latter ordinarily coincides with the separate start in life and it causes the guardianship to cease.⁴ This is what the old "Coutumier de Champagne" already admits: "three things take from a man the pot of his father, age, marriage, fire and place." But in the sixteenth century the new rule had not yet become general, as is seen

T. A. C., 204; "Schwabenspiegel," I, 183, 159 (the son can demand to be emancipated after he is 20 years old); *contra*, Du Plessis, p. 483; *cf.* Bout., I, 100; Viollet, "Et. de Saint Louis," I, 130, 170; III, 300; Pasquier, "Inst.," p. 378; "Schwabenspiegel," I, 191; "Sachsensp.," I, 11, 13; Brünneck, p. 63 (Sicily), "Bret., T. A. C.," 204; the father cannot emancipate his son contrary to the wishes of the latter; the son who has attained majority can demand that he be emancipated: "Bourg.," 6, 3; "Angoum.," 120; "Saintonge," 2; "Reims," 7; "Limoges," 50; the son cannot leave his father without being authorized to do so (*cf.* Roman "patria pot."); *Salis, op. cit.*

¹ Loysel, 122; Chaisemartin, 69; Masuer, 14, 17. (*Contra*, Capit., 819); D'Argentré, on "Bret.," 472; "Nivern.," 23, 1; *cf.* however J. Faure, "Inst. de Sc. Tert.," 3; the power of the husband does not exclude the paternal power: "Montpellier," 54; "L. d. Droiz," 643, 526; "Anjou," 1411, Art. 350; 1463, Art. 400; *La Peyrère*, on "Bord.," necessity of an emancipation at law in order to be able to make a will; "Bord., A. C.," 62; in 1539, opinion that the married daughter can make a will unfavorable to her father.

² "Jostice," 10, 23, 3: "Does marriage extinguish a guardianship? Neither of a man nor a woman, in the North." Dumoulin does not admit it: on "Bourb.," 166 (*cf.* on "Blois," 1). Children who are married are emancipated "quando datur eis habitatio seorsim, secus si et quandiu retinentur in domo paterna": *La Salle de Lille*, 1567, 13, 1; *Chimay*, 6, 1; *Beautemps-Beaupré*, "F.," 1197 ("Anjou"); "Angoum.," 120; "Poitou," 317, 318; "T. A. C.," Bret., 81, 204; *Boutaric*, I, 100; *Chaisemartin*, 69; *cf.* "Jost.," I, 10, 8 (Dig., 7, 7, 36); "Gr. Cout. de Fr.," II, 29; *Desmares*, 236; *Varin, op. cit.*, 487, 3; *Marnier*, "Amiens," p. 138; *Brünneck*, p. 62; "Montp.," 58; "F. de Cuenca," 14, 10 ("Wis.," 4, 2, 13; "Form., Wis.," 34).

³ "Et. de Saint Louis," I, 21 (right to a third of the father's land). "Ord. de Jean," II, 5 (Brittany); "L. d. Droiz," 422.

⁴ England: from the thirteenth century age emancipates: *Bracton*, "F.," 6. It is just the opposite in France: *Beaumanoir*, 21, 20; *cf.* 12, 35; "Ord.," II, 63; III, 24. Acts of emancipation in 1396 (*Salis*, p. 170); "De. Us. Andegav.," 14; "Reims," 6, 7; *Bout.*, I, 100; *Simonne*, "R. h. Dr.," p. 189. Case in which the son has personal belongings of his own; when he comes of age he naturally has the administration of them.

from a passage from Loysel, 177.¹ The man emancipated by reason of age becomes invested with full capacity; he becomes head of the house;² in other cases his capacity is limited, at least in the sixteenth century, as to the alienation of immovables.

§ 168. **Revolutionary Law**,³ drawing its inspiration from the philosophical conceptions of the eighteenth century,⁴ made more progress in the direction which the old jurisprudence had taken; it restrained the paternal power, a sort of domestic royalty, an image as it seemed of monarchic despotism, and was not far from regarding the father simply as a delegate of the State.⁵ Unifying legislation, the Law of August 28, 1792, abolished the "*patria potestas*" over those who had come of age, which was still in force in the countries of written law.⁶ The consent of the parents to the marriage of their children was not required excepting until the age of twenty-one years.⁷ Disinheritance disappeared,⁸ and the portion which could be disposed of having been reduced to very little, the father of the family found himself deprived of all means of controlling his children by disposing of his possessions. Finally, the right of correction was made subordinate in its most serious attribute to the approval of a family tribunal⁹ composed of six

¹ Customs which always require a separate establishment or express emancipation or a request for it at law: "Bret.," 528; "Poitou," 312; "Bourg.," 6, 5, 7; "Hainaut," 110; "Lille," 4, 2, etc. In Flanders becoming a priest emancipates: *Deghewiet*, p. 65; *Kraut*, II, 590. Italy: emancipation at the age of 18 or 20, provided it is made public: *Salvioli*, p. 360; *Brünneck*, p. 62.

² "Bergerac," 82: he preserves the right of correction over his emancipated children. *Contra*, general Customary law according to which only the obligation to furnish nourishment remains: *Ferrière*, see "Em."; *Loysel*, 59. Custom often allowed the father to keep authority over the domestic hearth: cf. *Chateaubriand*, "Mém. d'Outre-Tombe."

³ *Sagnac*, "La Législ. Civile de la Révol. Fr.," p. 367; *Du Plessis*, p. 571. Cf. *Nougarede*, "Essai s. la Puiss. Pat."; *Chr. de Poly.*, "Puiss. Pat.," 1820; *Chardon*, "Traité des Trois Puissances."

⁴ As to the customs of the eighteenth century, cf. *Taine*, "Anc. Rég.," 174. It is a general opinion among the philosophers that children are bound to the father only so long as they need his support. When this is no longer the case it is not for their parents to give them orders: cf. "Encyclopédie," "Rousseau," "Locke," "Kant," etc.

⁵ In 1793 Robespierre suggested taking children away from their parents when they were 7 or 8 years old, in order to bring them all up together and thus prepare champions of the new ideas: "Déc.," 29 Frim., year II (first-class schools, free of charge, attendance at which was compulsory).

⁶ *Lamoignon* had already asked for this: "Arr.," I, 7.

⁷ A family council, consisting of two relatives who were heirs, two others who were not heirs, and the public officer, should be consulted by the child who has lost his parents: Dec., Sept. 7, 1793.

⁸ Declaration of 9 Fruct., year II (23 q.); *Duvergier*, VII, 318.

⁹ A singular anachronism: family solidarity no longer existed, so to speak. Many modern legislative enactments which are more practical have provided powers superior to those of the parents that are charged with aiding the latter

or eight relatives (and if these were lacking, of friends).¹ The Law of August 16-24, 1790, which established it, and which Mirabeau applied, limited to one year the duration of imprisonment pronounced by these tribunals against minors at the request of their fathers; again, the president of the district tribunal had the power to refuse to ratify this penalty after having heard the commissioner of the king. The exercise of the paternal power was confided, as it was already in Customary law, no longer to the father alone,² but *to the father and the mother*, that is to say, to the father first of all, and, in default, then to the mother, but not to both at the same time, which is impractical.³

Finally, the individualistic tendencies triumphed with the Revolutionary law. The paternal power, as well as the authority of the husband, meets with serious checks; the domestic magistracy of the father of the family is no longer exercised within the narrow domain to which it is confined, excepting under the supervision of public authority. The State, as we have said, endeavors to constitute itself the general father of the family. It would be more correct to say that it had already attained about half of this power, and that it succeeded in attaining all of it. Perhaps the last stage of an evolution which had been pending for long centuries was arrived at too suddenly. From the year VIII, "the restoration to the paternal authority of the lawful dominion which it should never have lost," is contemplated.⁴ The Civil Code realized this project so well that in the existing law, and especially in the Customs, which are the longest to retain the imprint of the past, the rights of the father, even over the children who have attained their majority, have not entirely disappeared (for example, matrimonial coming of age).⁵ It is otherwise with the Anglo-Saxons,

in carrying out the most important acts: thus the paternal power becomes still more like guardianship.

¹ Dec., Aug. 16-24, 1790, 10-15. *Duvergier*, I, 372. This tribunal or family council already existed in the old law, *cf.*, for example, Declaration of Feb., 1743, Art. 12. See also *Merlin*, "Rép.," "Arbitrage" (Statutes of Provence of 1469 and 1491); Ordinance of Aug., 1560; of Moulins, 83, Jan., 1629, 152; *Guichard*, "Tribunal de Famille."

² The Decree of Sept. 20, 1792, only mentions the father with regard to the giving of consent to marriage.

³ *Cf.*, however, Civil Code: "Adoption."

⁴ The Jacqueminot Project, *Fenet*, I, 331. *Cf.* Discussion of the Civil Code.

⁵ Le Play's School demands the restoration of the paternal power, and thinks that the best means of rebuilding the old family is for our laws to sanction freedom to make a will. But would freedom to make a will change our customs? In order to be sure that it would produce the same effect in France as it has in England we should have to begin by acquiring the Anglo-

where the independence of children with respect to the family is far more energetically maintained.¹

Saxon temperament. To the advantages claimed for it in Provence, according to *De Ribbe*, II, 359, has been opposed a passage from *La Bruyère*, "Caract.," XIV; *De Curzon*, "Le Gouvern. Familial" ("Ann. d'Econ. Soc.," 1877; *Nourrisson*, "Et. s. la Puiss. Pat." 1898; *Planteau du Maroussem*, *op. cit.*; *Taudière*, "Tr. de la Puiss. Pat.," 1898).

¹ *Starcke*, "La Famille," ch. IV; *Boistel*, "Le Dr. dans la Famille," 1864. However, let us observe that if the father has but few rights over the person, he has many over property (freedom to bequeath by will in England). The law compared in: "Bull. de la Soc. de Lég. Comp.," 1889. Summed up in *Taudière*, "in f." *Pascaud*, "R. Gén.," 1891, 1892.

TOPIC 11. CONCERNING ILLEGITIMATE CHILDREN

§ 169. Germanic Law.	§ 173. Proof of Natural Filiation.
§ 170. Christian Ideas.	§ 174. Revolutionary Law.
§ 171. The Law of the Monarchic Period.	§ 175. Legitimation.
§ 172. The Condition of Bastards.	§ 176. Legitimation by Rescript from the Prince.

§ 169. **Germanic Law.** — The disgrace which so long was attached to birth out of marriage does not seem to go back so far as the Germanic law;¹ this legislation was hardly concerned at all with the purity of morals; irregularity in the question of birth was not of very much importance,² unless there was joined to it another element, the baseness of the station of the mother.³ Whether born out of marriage or not, the children are connected with the father, provided that he accepts them.⁴ Ordinarily, the station of illegitimate children varied with that of the mother. Those who were born of a noble mother were treated better than those who were the issue of an intercourse with a woman of lower station. This sort of union was frequent, the laws ordinarily limiting themselves to the punishment of the misalliances of noble-

¹ *Kochne*, "Geschlechtsverb. d. Unfr.," 1888, p. 11 and 35; *Brunner*, *op. cit.*; *Du Plessis de Grenédan*, "Thèse," p. 188, 290.

² The contrary opinion still numbers a few partisans: *Amiable*, p. 372; *Pardessus*, 698; *Glasson*, III, 33. The disfavor which certain barbarian documents show with regard to illegitimate children does not have its origin in the Germanic customs, in which one notices little concern as to whether bastards are separated from the domestic hearth and the lawful family is elevated by lowering the natural one.

³ Polygamy: *Grimm*, p. 440; *Weinhold*, "D. Frauen," II, 13; *Glasson*, III, 6; Merovingians: *Greg. Tours*, 4, 3; 4, 26; 3, 22 *et seq.*; *Frédég.*, IV, 60; "Lib. Hist. Franc.," c. 28. Polygamy did not exclude concubinage. Harald Harfagr had ten wives and twenty concubines at the same time: *Koenigswarter*, p. 67. The old Icelandic law held that children born of exiles, mendicants, etc., were incapable of inheriting. In Denmark cohabitation for three years gave the concubine the position of a lawful spouse (*Dareste*, "Etudes," p. 309); in a case of this sort the children should be legitimate. Oriental usages: the children of the concubines belong to the lawful spouse (photographs of the Empress of China holding in her arms children that other women have borne to her husband. Jacob and the maid servants of Leah and Rachel, Abraham and Hagar). — The Irish custom of Gavelkind (same rights as legitimate children).

⁴ *Greg. Tours*, 7, 27. Gondevald calls himself the natural son of Clotaire. The latter protests: "Hunc ego non generavi." *Brunner*, "D. R. G.," I, 76. Cf. *Michélet*, "Orig.," p. 12. (Gallic custom of recognition by a kiss from the head of the family after the death of the father: *Dareste*, "Etudes," p. 310: the father acknowledges his natural child before the "Ting." — As to the practices of "Niyoga" and of the "Levirate," see "Levirate," § 18; *Dareste*, I, p. 109.

women.¹ (I) *Children born of a free woman.* Their situation is the equivalent of that of the child born of a legal wife, or, at least, it approached it.² They belong to the family of their father when he has accepted them, are under his "mundium," and have the rights of inheritance, the extent of which varies according to the laws.³ Thus, the natural sons of the Merovingians inherited from them⁴ in competition with their legitimate children.⁵ It was the rule in the old Frankish law, as it was in the old Scandinavian law.⁶ In Lombardy the hereditary right of "filii naturales" was

¹ See "Concubinage." Thus from a marriage which was regular from the point of view of the Church there might be born bastards.

² Lombard law "naturalis ignobiliter natus" as contrasted with "nobilis," "fullborn": "Roth.," 61, 154 (*Ficker*, "Erbenfolge," II, 237); right of inheritance of "filii naturales" inferior to that of lawful children (one-third at the most), 362, 158-160, 161; "Liut.," 13. These "filii" are born of the union of the master with his "aldia" or freed-woman, "wirdibora": "Roth.," 222; "Liut.," 106; cf. "Roth.," 156: lesser right of the child born of a free man and the slave of some one else purchased and set free. — Anglo-Saxon law argues contrary to this: "Ina," 27; "Alfred," 8. Old Norweigan law: children born of a marriage, of a free concubine (likened to the former), of a hidden union with a free woman (the same if they were kept by the father), or of a connection with a female slave (they are only free by virtue of an enfranchisement, and under these circumstances their station is inferior to that of the preceding). Cf. Sweden, *Dareste*, "Etudes," p. 292.

³ "Roth.," 154 *et seq.*; "App. Marculf.," 47 (calling to succession); *Papien*, 37 (one-eighth for the concubine and the children); "Cod. Théod.," 4, 6, 7; "App. Marc.," 52 (power to give all his possessions to bastards if he has no legitimate children); "Epit. Julian.," "Nov.," 82, 12; "Conc. Tribur.," 49; *P. de Font.*, p. 490.

⁴ *Brunner*, *op. cit.* Thierry, son of one of Clovis's concubines, etc., *Greg. Tours*, 5, 20, 4, 25; "Vita Balthild.," 2; "Vit. Columban.," "Ann. Bened.," II, 17. Under the Carolingians the illegitimate children of the kings seem to have lost the right to succeed to the throne: "Div. Imp.," 806, 817, 831. Cf., however, Charles Martel, Arnulf, Bernard (son of Pepin). William the Bastard: "Ann. Fuld.," 885, 889; *D. Bouquet*, VIII, 45, etc.; *Strycius*, "De Filiis Natur. Regum," 1700. In Norway illegitimate children born of a free mother succeed to the throne in the same way as legitimate sons until 1260, after which the latter are preferred; in 1273 bastards succeed after nephews. — Goths, Vandals, Normans (William the Conqueror, or the Bastard).

⁵ Calling to the succession daughters born of a slave: "App. Marc.," 47, sons born of a marriage with a free woman, but without "libellus dotis," from which it follows that the children are "naturales secundum lege," *ib.* 52; "Nov. Major.," VI, 9, in 458; "Berlin. Akad.," 1894, 553; from the "Nov. of Theodosius," II, 443 (22, c. 1 and 2 in the "L. Rom. Wisig."), a means of giving rights of inheritance to illegitimate children was devised through a will presented at the "curia," cf. offering to the "curia," *Viollet*, 396; *Thévenin*, 35; *Brunner*, p. 24.

⁶ The Germanic tradition is continued in the later French practice according to which the bastard is still connected with the family of his father, — transmission of name, arms, sometimes of a title of nobility: "Artois," 1509, 1544, 144, 201; "Cout. du Bourg. de Bruges," ed. *Gilliodts van Severen*, III, 271; "Comté de Berg.," c. 12; *Pertile*, 3, 341, 13; *Houard*, "Dict. de la Cout. de Norm.," I, 160; *Loyzel*, 62; the bastard who is acknowledged, that is to say, recognized by his father, is noble; an Ordinance of Henry IV, March, 1600, 26, would demand letters of nobility. Thus usage for a long time re-

at most to one-third of the inheritance.¹ Of this old law, for a long time, privileges for the bastards of princes and nobles remained.² (II) *Children born from a mother who was not noble.*³ They were looked upon as dependent servants, as was their mother.⁴ Enfranchisement left them in a lower station. Neither did they inherit from their father, because slaves cannot inherit, nor from their mother, because the latter could not have any heirs (whether she were a slave or a freed-woman, at least, according to the Frankish law). Their own inheritance did not go to their relatives (children or others), but to their "dominus" or to their patron; and when this patron was the king, as when it was a question of a "denarialis," it was the Treasurer who collected it. This was not very far from the rules of the later law: 1st, *bastards do not inherit*; 2d, the king or the lord inherits from bastards.

§ 170. **With the Christian ideas,**⁵ there appeared a new conception of illegitimacy. In the contemplation of the Church every child born out of marriage⁶ was illegitimate;⁷ every union other

sisted the rule which connects nobility with legitimacy: *Lagrèze*, "Hist. du Dr. d. dans les Pyrénées," 157; "Navarre," "fr." II, 195; "K. V. J.," IV, 3 s., 59.

¹ Cf. "Bai.," 14, 8, 2; "Sachsensp.," I, 51, 1; *Ficker*, II, 237.

² French practice: bastards of the king are princes, nobles or lords, or gentlemen. Illegitimate sons of Louis XIV, p. 142, II, *Stryckius*, "De Lib. Natur. Regum," 1700; *De Belleval*, "Les Bâtards de la Maison de France," 1901.

³ *Köhne*, *op. cit.*; *Meynial*, p. 38; *Du Plessis*, p. 293 (bibl.).

⁴ "Cod. Théod.," 14, 7, 1; "Wis.," "Cod. Théod.," 14, 1; *Papien*, 37, 5; "Cod. Théod.," 4, 6, 7; "L. Rib.," 58, 10; cf. rule: "servus trapiat ad se francum" ("Epistolæ conculeatorix"); "Cart. Senon.," 42; *Papien*, 37, 3. The child of a free man and the slave of some one else belongs to the master of the latter. This is the same in the Lombard law. — But the child born of a permanent union ("Form. Sen.," 42) between the master and his own slave was free as a general thing: "Cod. Dipl. Langob.," no. 6; "Roth.," 156; "Liut.," 66; "Alam.," 18, 3; "Fris.," 6; "Bai.," 15, 9; the child of the "ancilla" only has what his brothers give him "per misericordiam" out of the inheritance of his father (*Paul*, "Galat.," iv, 30); *Greg. Tours*, 5, 20.

⁵ Their influence is already very strongly marked in the laws of the Lower Empire, which limit the rights of inheritance of illegitimate children: "Cod. Théod.," IV, 6. During the classical period the illegitimate child, who had no connection with his father, had with respect to his mother the same rights as a legitimate child: *Girard*, p. 180. With Constantine forfeitures and incapacities suddenly made their appearance.

⁶ **Terminology:** In Rome: "liberi naturales," "spurii," "vulgo concepti." — The most widespread term in Western Europe is "bastard" or, "fils de bast" that is to say, a child begotten upon a pack-saddle, as they say in English, "bankart," begotten upon a bench; in Germany, "Winkelkind" or "Hornung," child of a corner; various terms calling up the idea of irregular birth, of conception outside of the nuptial bed. "Wildflügel," wild bird (without family), "Avoltres," children born of an adulteress. "Sacrilèges," sons of priests. "Manceres" ("Siete Part."), sons of a prostitute, "Bort," "campi" ("Bord.," A. C.); cf. *G. Sand*, "François le Champi"; *Grimm*, I, 655; "Hijo de Ganancia," "F. de Nav.," 4, 4; "Siete Part.," IV, 15, 1; *Du Cange*, see "Bastardus."

⁷ In the thirteenth century exclusive jurisdiction of the ecclesiastical

than marriage was a sin.¹ It punished this illicit intercourse upon the person of the parents, and even upon that of the children, for these latter came into the world with an original stain ("macula bastardiæ"). It was especially severe as regarded children born of an adulteress, born of an incestuous connection, or the sons of priests ("ex damnato coitu").² The dishonor, or even the infamy, and its serious consequences, such as the incapacity to inherit,³ affected them because of the single fact of the irregularity of their birth.⁴ Every natural child, on principle, was thenceforth out of the family, and, consequently, almost outside of the law. The prince was supposed to protect them during the Frankish period, and the Feudal lord who succeeded him, who had charge of providing for the needs of abandoned children, often treated the latter as his serfs, the more so as the mother herself was often of servile condition.⁵ Where they did not go so far as this, these children did not escape the law of mortmain,⁶ and they were not allowed to inherit from their mother, excepting under some Customs in which the rule "no one is a bastard on his mother's side" was followed.⁷ They were likened to aliens, who were also *with-*

courts: "Summa Norm.," c. 25; cf. *Beaum.*, 18, 3; 45, 16; *c.*, 35, q. 7, c. 1; *c.*, 32, q. 4, c. 15. The register of the ecclesiastical judge of Cerisy bears witness to the great number of bastards. It is the same in Navarre: (*Lagréze*); *Boutaric*, I, 95; "Jost.," p. 56, 245.

¹ *Saint Thomas*, "Summa Théol.," 3; "Supp.," q. 68. Traces of these ideas especially in "Siete Part.," IV, 13 and 15.

² "L. d. Droiz," no. 770; as contrasted with children born "ex soluto et soluta," that is to say, of persons between whom marriage was possible (simple natural children). "Nefarii," children of clericals. *Ante*, "Impediments to Marriage." — *Benecke*, "Strafrechtl.," Lehre v. Ehebruch, 1884; "Siete Part.," VII, 17 *et seq.*; *Lusignoli*, "Figli Adult. e Incest.," 1890; *D'Aguesseau*, IV, 398 (ed. 1772).

³ "Sal.," 14, 16; "App. Marculf.," 52, 54; "Capit.," 7, 473; cf. *Paul*, "Galat.," iv, 30; *Gratian*, "D.," 34; *Freisen*, § 74.

⁴ "Bord., A. C.," 177; out of hatred of the sin of fornication: "Jost.," p. 30, 34.

⁵ Their situation is similar to that of serfs and of aliens, without its being possible to compare them absolutely and in every place. — "Conc. Tolède," 655, c. 10. Bastards of priests are the serfs of the Church of their fathers: "Bourg., A. C.," 19; "Bourb.," 194; "Bout.," I, 95. Rights of collecting tribute, of reclaiming and of fees for the marriage of a vassal: *Bacquet*, "Dr. d'Aubaine," I, 4; "Laon," 7; "Reims," 338; *Louet*, 2, 1, 1; *Ragueau*, see "Bastard"; *Loysel*, 42; Mortmain: "Et. de Saint Louis," I, 101; "Olim," I, 668, 846, 913; "Bord., A. C.," 77; "Bourg., A. C.," 198, 199, 58 (*Giraud*, II, 302); *Vitry*, "Etudes," I, p. 297; *Brussel*, p. 955; *Stobbe*, "D. Privatr.," § 47, 3. (In certain localities, the same burdens as serfs.)

⁶ According to Beaumanoir, the bastard does not have the station of his father nor that of his mother: cf. 45, 76, 35; *Desmares*, 240. In the same way in England, the bastard is a free man: *Littleton*, 188 ("filius nullius"); *Pollock and Maitland*, II, 394 (William the Bastard?).

⁷ "Sachsensp.," I, 51; *Bout.*, I, 95; *Chaisemartin*, 66. In localities where this maxim is received the illegitimate child forms a part of the family of his

out lineage, who had no connection in the country.¹ Among other incapacities which affected them, and which sometimes persisted for a long time, figured those of receiving ecclesiastical benefices,² of exercising public functions,³ of being judges, sometimes even of being witnesses⁴ or of acquiring fiefs.⁵ In the time of Beaumanoir their admission into the hospitals is even doubtful,⁶ and an echo, as it were, of this repulsion is found in the singular rules of some German States, according to which, in the eighteenth century, their bodies had to serve for purposes of anatomical dissection.⁷ The Church only favored bastards in two ways: 1st, in formulating the rule that every natural child⁸ has a right to maintenance at the hands of his father and mother; 2d, in facilitating

mother; he is a stranger to his father (Franconia, Colmar, Cologne, etc.). Netherlands and Belgium, see *Koenigswarter*, p. 43 (and bibl.). There was some conflict, however, as to whether he inherited from his maternal relatives as well as from his mother. In southern Holland a child born of an adulteress or of an incestuous union inherits from his mother: cf. *De Mauroy*, "La Noblesse Maternelle," 1882; *Riston*, *id.*, 1878; *Ficker*, III, 437.

¹ There is often a question as to "explectatio albenorum et bastardorum": "Olim"; Table, see "Bastardi."

² Dig. X, "de fil. presbyt. c. ut. fil." ("Poitiers," 1078); "Trente," sess., 25, c. 15; "Mém. du Clergé," 12, 697. Sometimes they are not admitted to the doctor's degree: "Siete Part.", IV, 15, 3.

³ "Jost.," 34, 36 (annulment of election); *Pithou*, "Lib. d'Eglise Gall.," 21. D'Aguesseau maintains that the point is in dispute (the Ordinances are silent). In Rome the "spurii" themselves were capable of assuming public functions. In Germany the Diet of the Empire must have enacted that no inquiry should be made into the legality or illegality of a person's birth before he was admitted to a profession or trade: "Landr." (Prussian), II, 2, 662; "Cod. Autrich.," 1, 3, 161.

⁴ *Beaumanoir*, 39, 22, 40, 37, 63, 2 (not admitted to the duel at law against persons of a different station): "Jostice," pp. 30, 34, 74, 81, 177; *Stobbe*, § 47, 3; "Vetus Auctor de Benef.," 1, 4. In Germany, localities where the bastard is "rechtlos": *Heusler*, I, 193; *Koenigswarter*, p. 48; "F. de Nav.," 4, 4, 11; "Jost.," 177.

⁵ "L. Feud.," 2, 26, 10; "Milan," 1216, 29; 1541, II, 62; *Struve*, "Jurispr. Heroica," IV, 530; "Et. de Saint Louis," I, 89; *Loysel*, 60; "Bourg., A. C.," 20, etc.; "Sachsensp. Landr.," III, 54, 3; *Pertile*, 3, 388, 10 (Candia). — *Laurière* says (*Loysel*, 60) that they were forbidden to acquire lands, fiefs, copyholds or allodial holdings (one might argue the contrary from an enactment of 1329, which gives this authority to two bastards). The "Summa Norm.," 35, 6, recognizes them as having a right to acquire excepting through inheritance.

⁶ 46, 4; he compares them to aliens.

⁷ "Hesse," "Brunswick," *Stobbe*, § 47, 3. Formerly, in certain localities they went so far as to refuse them religious burial.

⁸ Even one born of an adulterous or of an incestuous union: Dig. X, 4, 17, 10; 4, 7, 5; cf., however, "Jostice," p. 212, § 11, "in. f.," "Montpellier," 1205, 13; up to three years. Cf. canon law with regard to lawful filiation: "Alais," 20; "L. d. Droiz.," 851; *Boutaric*, "Inst.," 1, 10, 12; *D'Aguesseau*, 34th "plaid"; *Loysel*, 1, 1, 41. Some Customs say that a bastard from the time he is born is understood to be out of the care of his parents; but it is adjudged that whoever has a child must support it: *Lehr*, p. 122; *D'Olive*, "Quest.," II, p. 160 (ed. 1638); *Pantani*, "De Alim.," 2, 9.

their legitimation. In an indirect manner it came to their assistance by obliging the seducer to marry the girl seduced or to give her a marriage portion (action "duc vel dota").¹

§ 171. **The Law of the Monarchic Period** raised the condition of bastards as it had improved that of serfs and aliens. The majority of the old disabilities disappeared. The seigniorial right of bastardy became transformed into a domanial right;² in this way its abolition was facilitated. It, however, maintained the principle that bastards had no family: "nec genus nec gentem habent";³ an untrammelled mind like Montesquieu then justified the inferiority of bastards by reason of the interest of society with respect to marriage. The recognized right of natural children to maintenance allowed them to seek out their father as well as their mother.

§ 172. **The Condition of Bastards** is summed up finally in a few remnants of their old incapacities, and in the idea that they have no family, not even a maternal family,⁴ and that as a consequence they are not submitted to the paternal power,⁵ but simply to a guardianship, and that they do not inherit the title of nobility of their father.⁶ 1st. The inheritance of the bastard belongs to

¹ "Exodus," xxii, 16; "Deuter.," xxii, 28; Dig. X, 16, 1; *Britz*, p. 557; German common law. *Idem.* Custom of the South, for example, *Lézat.*, Art. 32; "Monteuq," 11.

² At least from the fourteenth century. — The bastards declare themselves to be king's men: cf. "Et. de Saint Louis," 2, 31; "Olim," I, 495, 15; "Olim," II, 456; "Ordinacio" of 1301, as to persons in mortmain, aliens and bastards. The people of the king and the lord both claim them: *Ragueau*, see "Bord., A. C.," 77; "Gr. Cout.," 1, 3, p. 103; *Isambert*, I, 574; IV, 520; VII, 156. Excepting the lords justices have a right to claim them, according to general opinion, if the bastards are born within their territory, live there and are trespassers upon it: *Loysel*, 65; *Bout.*, 1, 95, 103. — England: Royal rights at every period.

³ A principle contrary to the rules which continue to exist among the high nobility of Germany: transmitting of the father's name, paternal power, Apanage: *Brunner*, p. 10.

⁴ He takes the name of whichever one of his parents with regard to whom his filiation has been established, — of his father if he has been recognized by both of them: *Denisart*, see "Quest. d'Etat."

⁵ He is out of the care of his parents; he has no need of the consent of his parents in order to marry: *Loysel*, 1, 1, 41; "Roisin," p. 83. At the age of fifteen he can alienate his possessions, whereas the legitimate children were not able to do this: (*Laur.*) "Bret., T. A. C.," 266, 267; "A. C.," 452; "N. C.," 478; "Jostice," p. 81: the bastard cannot call upon his mother to appear in court. The custody of illegitimate children was entrusted by the courts sometimes to their father, sometimes to their mother, and sometimes to third persons: *post*, "Guardianship."

⁶ See feudal period. In fact, bastards of mere gentlemen are commoners, those of the higher lords are nobles, but of an inferior degree: *Guy Coquille*, on "Niv.," 17, 26; "Ord.," 1629, 197. The bar placed upon their coat-of-arms was not at first a mark of bastardy, but simply a means of distinguishing the younger children from the head of the house.

the king,¹ and in exceptional cases to the lord² (right of bastardy, of the lord over the possessions of bastards, etc.), if he has no heirs of his body.³ 2d. The bastard cannot make a will (excepting of five "sols" "pro remedio animæ");⁴ a very logical rule under the Old Régime, difficult to justify in the monarchic period. From the thirteenth century it is limited; in the sixteenth, Dumoulin establishes the fact that it has been almost everywhere abandoned.⁵ 3d. Bastards do not inherit ("ab intestat").⁶ 4th. They cannot receive by gift or by will.⁷ At the same time, as they have a right to maintenance,⁸ their parents are allowed to give them

¹ "Et. de Saint Louis," I, 101; *Desm.*, 239-242; "Bourg., A. C.," 198; "Bord., A. C.," 77; *Bacquet*, I, 174; *Pothier*, IX, p. 46 (ed. *Bug.*). Obligation for the king or the lords to take care of foundlings, but an obligation which they endeavored to evade: "Arr. Parl." Paris, 1547, 1552; Edict of June, 1670; Regl. of July 21, 1670 (foundlings); Law of the 27th Frim., year V (asylums).

² By what right did the king or the lord take the inheritance of the bastard? Because of the "mundium" which they formerly exercised over him, and which took the place of protection for him by his family. *Beaumanoir*, 45, 35, sees in this property without an owner. *Glanville*, 7, 16; *Bout.*, I, 95 (p. 540): the lord does not pay the debts of the bastard. *Beaumanoir*, *loc. cit.*, only mentions the movables: "Bret., T. A. C.," 270; "Et. de Saint Louis," I, 102, 103 (IV, 78); II, 31; *Boutaric*, "Inst.," 1, 10, 12. In the Netherlands the right of bastardy ("havescot") was done away with at a very early time: *Koenigswarter*, p. 46 (in. 1289, 1296, etc.).

³ *Contra*, "Schwabenspiegel," c. 47. *Saint-Pol*, 2, 27.

⁴ *Loysel*, 60; *Bout.*, p. 543; "Laon, A. C.," 6; "Bret.," 480 (children born of an adulteress); "Bourb.," 184; "Clermont," 153; "Et. de Saint Louis," I, 97: "The bastard can give to charity out of his movables": *Desm.*, 24; *Glanville*, 7, 16 (*id.*).

⁵ Which was logical as soon as the bastard was no longer a serf: *Loysel*, 60; *Dumoulin* on "Lille," 29; "Orl.," 301, 311; "Bourges," 7; "Bret.," 451; cf. "Bord., A. C.," 77; *Beaumanoir*, 45, 35; *Desmares*, 24; "Arr.," 1279, 1327; *Bynkershoeck*, "Quaest. Jur. Prov.," 3, 11; *Koenigswarter*, p. 47 (Brabant, from 1247). — Various restrictions upon this power: movables only or a limited amount, "Anjou," 345; "Maine," 355; "Poitou," 399; "Hainaut," 85, etc.; born "ex soluto et soluta": "Bret.," 479, 480.

⁶ From their relatives, but they would inherit from their legitimate children: "Sal.," 14, 16 (incestuous children); "T. A. C., Norm.," 75; "Summa," 24; "Schwabenspiegel," 47; *Beaum.*, 18, 19; *Desmares*, 239; *Bout.*, I, 95; *Loysel*, I, 1, 45. — Customs which give the illegitimate child the right to inherit from his mother: "Nul n'est bastard de par sa mere." Flanders, Netherlands. Saint-Omer, Tournay, etc.: *Bout.*, I, 95; *Bouthors*, "Cout. du Baill. d'Amiens," p. 505; *Van der Marck*, "Inst. Jur. Civ. Reip. Omland.," 1761, c. II, § 149 ("Liège," "Louvain," etc., *contra*); *Michelet*, "Orig.," p. 67; *Huber*, IV, p. 532; *Naples: Carol. de Rosa*, "Ad Cons. Neap.," 1677. — "Ass. de Jérus.," "C. de B.," c. 60 (right to inherit from the father if the lawful relatives give their consent). — Countries of written law (excepting Grenoble): no inheriting from the mother: *Bretonnier*, on *Henrys*, 6, 3, 1; *Salvaing*, 56, 66. — The German common law had adopted the system of the "Novellæ" of Justinian. Cf., however, *Schulte*, p. 517; *Loysel*, 440. From the fact that bastards do not inherit it follows that they are not allowed to exercise the right of repurchasing by a person of the same lineage.

⁷ "Paris.," 310; "Orl.," 310; "Norm.," 275; "Bret.," 450, etc.

⁸ *Beaum.*, 18, 20: if there are no legitimate children the same disposable quantity is given to the bastard as to a stranger; if there are any legitimate

gratuities with some special object.¹ These diverse rules are common to the countries of written law and countries of Customs.²

§ 173. **Proof of Natural Filiation.**³—Natural filiation is established: (a) by the voluntary recognition or admission of the parents,⁴ sometimes expressed,⁵ sometimes implied (in the case of possession of status only);⁶ (b) by establishing in court the maternity or the paternity. **The investigation of the paternity,** which is difficult to conceive of in the case of the very old law,⁷ was permitted in the interest of the child, of the girl mothers who took care of it, and in Brittany⁸ in the interest of the parish held bound to provide for its needs,⁹ when the parents were not known:

children he only has a right to maintenance: "Alais," 20; "Bret.," 475; "Schwabenspiegel"; "Ass. de Jérus.," "C. de B.," 178: the father cannot give anything to the bastard without the consent of the legitimate children or of his own father and mother; if none of these are living he can give him everything: "Summa Norm.," 35, 2 and 3; they do not have any legal share: *Bacquet*, I, 159.

¹ *Sic*, *Dumoulin*, on 13 "Lille" (special legacies, which are not excessive); *Loysel*, 61: legacies of maintenance only, which still continued in the case of children, born of an adulteress and those of an incestuous union. Jurisprudence was still not very precise in the seventeenth century: *Merlin*, see "Bastard," 4, 6; "Anjou," "Maine"; gifts "inter vivos" only; Poitou, Brittany: in usufruct. As a general thing bastards are able to receive gifts from third parties (*contra*, "Melun"): *Bacquet*, I, 150; *Huber*, IV, 538; *Bugnyon*, "Lois Abrog.," I, 51.

² *Bacquet*, I, 149.

³ *Fournel*, *op. cit.*; *Allard*, "Pr. de la Fil. hors M.," 1858; *Héau*, "Paternité et Fil.," 1868; *Barel*, "Preuve de la Fil. Nat.," 1872; *Millet*, "La Séduction," 1876; *Berge*, "R. gén. de Dr.," 1878, 417; *Giraud*, "R. Crit. de L.," 1884, 590; *Amiable*, "Pr. de la Pat. hors M.," 1885; *Rivet*, "Rech. de la Pat.," 1890; "R. Cath. des Inst.," I, 568; II, 69; XXII, 296; "Arch. Giur.," 24, 162; 25, 385; "Réforme Soc.," 1897, vol. 33 (*Gigot*); *Giacobone*, "Dir. d. Donna Sedotta," 1891; *Viолlet*, p. 478 (bibl.); *Esmein*, "Mariage," II, 38.

⁴ To a recognizing of illegitimate children let us liken declarations of pregnancy and confinement imposed upon girl-mothers by the Edict of February, 1566; it is necessary that there be witnesses to the confinement; thus the proof of maternity resulted therefrom.

⁵ Either at law or by an extrajudicial act (under private or authenticated seal, certificate of baptism). A verbal admission would probably have sufficed. As to admission by the mother, *cf.* *Beaum.*, 18, 3; "Olim," III, 1494 ("C. d'Alais"); "T. A. C., Norm.," 75.

⁶ Child born "ex concubina doma relenta": *Bacquet*, I, 1, 2; *Guyot*, see "Aliments."

⁷ Ordeals, duel: "Roth.," 164; *Grimm*, p. 463. Ex. of *De Gondovald*, in *Koenigswarter*, p. 63; "F. de Navarre," 4, 4, 1. But *cf.* as to this, "Rights of the Father."—"Vaterschaftsklage" in Switzerland, at the end of the fifteenth century: *Huber*, IV, 535.

⁸ *Poullain du Parc*, VIII, 166.

⁹ English law: the parishes which have not many resources and upon which the care of the poor was imposed under Elizabeth found themselves compelled to have recourse to relatives: "R. h. Dr.," 12, 527; *Koenigswarter*, p. 49; *Lehr*, p. 123; *Glasson*, V, 476. In France the monasteries and almshouses receive children who are forsaken; thus the burden of the parishes is not so heavy.

"whoever has a child ought to support it."¹ How was this responsibility of the father enforced?² — (A) Simply on her own statement, a woman or girl who was enceinte obtained from the author of her pregnancy a provision for maintenance of the child and the expenses of confinement for herself: "creditur virgine parturienti, asserenti se prænantem esse ex aliquo."³ The custom of these declarations is perhaps derived from the proof by means of the oath.⁴ The Ordinance of Februrary, 1556, with the object of preventing concealment on the part of the father, provided for declarations of pregnancy and confinement by the mother, but without attaching to them any obligations for the father.⁵ — (B) This allowance of the **confinement expenses** had an entirely provisional character; no prejudice upon the question of the paternity resulted therefrom;⁶ the latter was the object of a distinct action, wherein the mother sought to establish relations⁷ (frequenting) between herself and the man whom she held responsible for her pregnancy (cohabitation,⁸ indications of familiarity, writings), and the latter, as his defense, showed her misconduct ("exceptio plurium constupratorum").⁹ If the suit were won by

¹ The erroneous ideas which were in vogue for a long time upon this point, and which one can find set forth, for example, in *Demolombe*, have been refuted by *Baret*, *op. cit.*

² *Loysel*, 59; Dig. X, "de Spons.," 1.

³ *Favre*, "Cod.," 4, 14, 18. Favre requires an oath and does not apply the rule to the woman who leads an evil life; nor does he admit of the declaration as against a married man. Fournel does not recognize these restrictions. (But does not Favre look upon this maxim as, in the last analysis, determining the question of paternity?) This mere declaration was adhered to because the expenses of the confinement were thus not affected by delay.

⁴ At Neufchâtel, "Geniessverhör," or declaration made by the woman during the pains of childbirth at a time when she is liable, as she believes, to appear before God, and during which she risks her salvation in not speaking the truth (*cf.* judgment of God). Example cited by *D. La Tour*, p. 59.

⁵ The Ordinance was not obeyed very well, it would seem, although a few judges made use of it as a pretext to have an examination made of girls who were suspected of being enceinte: Decl. Feb. 25, 1788; *Isamb.*, 13, 471; 20, 527; 27, 472. Recent Orders which make mention of them: "Cass.," Dec. 1, 1869; "D.," 70, 1, 97; *Planiol*, "Dr. Civil," I, 717. Strictly speaking, the father might not have been named ("Arr. de Rennes," March 28, 1837); but as a matter of fact, it seems that he always was: *Duval*, "Cahiers de la Marche," 116; *Bonnabelle*, "Mognéville," p. 15 (*cit.* by *Viollet*, p. 469); *Fournel*, see Table, "Forme de la Déclar."

⁶ *Fournel*, p. 104; *Papon*, "Rec. d'Arrêts," 18, 1; 22, 13; "Arrêt de 1572." Very old jurisprudence, says Fournel.

⁷ Criticism of the contrary opinion in *Baret*, p. 39. — Switzerland, England: proof of the paternity by means of the oath of the mother, *Huber*, IV, 536.

⁸ *Bacquet*, "Dr. de Bâtardise," I, 1, 2.

⁹ Particular systems on the subject of proof, *cf.* *Baret*, p. 21: (a) the declaration of the woman is a proof of paternity; (b) it is a semi-proof; (c) she gives proof, but only as to a choice between several men who are convicted of

the woman or the child, the latter had the right to demand the maintenance which the law gave him from the father;¹ the girl who was seduced was herself awarded damages on the theory that marriage was reputed to have been promised her.²

§ 174. **Revolutionary Law.**³ — The practice which we have just described is reputed to have given rise to the most scandalous litigations and the most arbitrary judgments. In the preparatory work for the Civil Code, Bigot-Préameneu sums up the criticisms to which it had been subjected: ⁴ in this sage man's phrase "the man whose hair had grown gray in the exercise of all the virtues was not safe from the attacks of a brazen woman."⁵ The Revolution put an end to this extortion by only admitting as proof of natural paternity voluntary recognition (or the possession of status); all judicial investigation was forbidden (Law of the 11th Brumaire, year II).⁶ But by way of a sort of set-off it

having been with her; (d) conviction of all the men who went with the woman at the time of the conception: *Poullain du Parc*, "Principes du Dr. Fr."; VIII, 110, 166; "Anc.," *Denisart*, see "Grossesse"; *Huber*, IV, 536. Add to this, opinion according to which a decision is arrived at based upon physical resemblance. For a long time the maid-servant who had become enceinte in the house of her master was reputed to be pregnant owing to him; but the jurisprudence of the eighteenth century abandons this presumption: *Fournel*, p. 131; *Guyot*, see "Fornication."

¹ *Coquille*, "Quest.," 29; *Denisart*, see "Bâtard," 30 *et seq.*: maintenance and education, a simple marriage portion, apprenticeship in some trade: *Chardon*, "Tr. des Trois Puissances," no. 12; "Arr.," June 18, 1607, compelling a rich burgher to have a higher-class trade taught to his illegitimate sons.

² *Fournel*, p. 5. — Otherwise, the common opinion, which sees in seduction a tort. — Historically, this last opinion is more correct, for the action based upon a declaration of paternity that can be brought by the father or the guardian of the girl seems like a transformation of the right of the parents against the abductor of their daughter (Frankish period). But *Fournel* gives expression to the modern point of view (*cf.* existing jurisprudence, which gives damages to girls who are seduced). As to existing theories (tort, parentage), *cf.* *Dupré La Tour*, p. 47.

³ *Robiquet*, "La Révol. Fr.," July 14, 1891; *Sagnac*, pp. 317, 357.

⁴ Celebrated speech of Servan in 1770 (at Grenoble). Let us notice, however, that neither *Fournel* nor the writers of the eighteenth century make any allusion to these abuses. There are more illegitimate children, but fewer abortions and cases of infanticide in countries where to-day an investigation of paternity is admitted.

⁵ *Fenet*, X, 154, 71; *cf.* L. Faucher's estimate as regards England: *Glasson*, VI, 291 (Laws of 1835, 1872, 1875).

⁶ Arts. 1, 8, 10, 11, 12, 13. See in *Baret*, *op. cit.*, p. 55 *et seq.*, an analysis of this confused legislation and of the jurisprudence upon this point. — (A) In order to obtain maintenance the illegitimate child can prove his filiation by all the means which were formerly made use of, *excepting an investigation of paternity*. The possession of status is admitted only if the parents are dead. — (B) Same rule for the claim of rights of inheritance if the inheritance opened after the 14th of July, 1789, and before the 12th Brumaire, year II; if it opened after this date, then recourse is had to the Civil Code. The retroactiveness of the Law of Brumaire, year II, was abolished by the Decree of the

ameliorated the condition of natural children by giving them the same rights of inheritance as legitimate children had.¹ This was to go in an exactly opposite direction to that of the Old Régime, under which natural children could easily find their fathers, but gained little thereby, because they had no rights of inheritance. The Revolution gave them these rights,² only it imposed upon their attainment conditions which are so difficult of fulfilment that very few of them succeeded in benefiting by the reform. The forfeitures which formerly affected natural children were no longer considered as a punishment inflicted on the children because of their parents' fault. In the eighteenth century they were justified by reasons of social interest; thus, the Advocate-General Segnier said in 1779: "It was recognized that the strongest brake on illicit unions was to punish the children who were the fruit of them." These were utilitarian considerations, which the legislator of the time of the Revolution did not take into account, because he clung by preference to the theories of natural right and to the humanitarian ideas so much in vogue at that time; legitimacy of birth seemed to confer privileges as little justified as those of the nobility; he wanted to abolish them, and to give the natural child of whom religious and aristocratic prejudices had made a sort of pariah of the family the same rights as his brothers; as he was not guilty of any wrong, it seemed iniquitous to punish him. On the other hand, motives of policy prevailed at the time of the drawing up of the Civil Code; natural children were sacrificed with a view to the fostering of marriage: the investigation of paternity was prohibited, as it had been under the Revolution (Art. 340);³ at the same time, the rights of natural children were almost as limited as they were in the old juris-

3d Vend., year IV, afterwards by the Law of the 15th Therm., year IV. Cf. Décret of the 26th Vend., year IV. There was no distinction made between ordinary illegitimate children and those born of an adulteress or of an incestuous union.

¹ D., June 4, 1793; Nov. 2d, 1793 (or 12 Brum., year II); *Sirey*, "Cod. Civ. Interm."; Table, see "Enfant." Not only with regard to the possessions of their father and mother, but also with regard to those of collaterals. As to children born of an adulteress or an incestuous union, they were also recognized as having a right of inheritance, but a lesser one; they had one-third of the share of a legitimate child: Civil Code, 757. — Analogous rules in the legislation of Joseph II: *Koenigswarter*, p. 62.

² *Cambacères*: "Individuals cannot be victims of the faults of their father. Disinheritance is the penalty for great crimes; has the child who is born committed any? And if marriage is a valuable institution, its sway cannot be extended to include the destruction of man and of the rights of citizens."

³ It was the same in the Projected Code of the Convention, I, 4, 12.

prudence. This rather inhuman combination, wherein only the harshness of the intervening law was given a place, is not the last word in legislation. For more than thirty years sharp criticisms have been directed against it,¹ and the system of the Civil Code is far from having pervaded the majority of foreign legislations; these latter have remained ordinarily at the former rule, which permitted the investigation of the paternity.²

§ 175. **Legitimation**, which was long unknown to the Roman law, owed its origin to Christian ideas; from the day when concubinage was looked upon as a wrong, means of amending it in the interests of the children³ were devised. Constantine and his successors created of it a privilege which was only applicable to "liberi naturales" (issue of concubinage). These provisions passed into the canon law, which extended the Roman institution to all legitimate children, with the exception of those whose parents could not have married at the time of the conception⁴ (born of an incestuous⁵ or adulterous⁶ union). Although it admitted two sorts of legitimation, these virtually were only one, that is, legitimation by means of subsequent marriage; this was still accomplished in the thirteenth century in conformity with a rite of adoption, or one analogous to those of adoption, by the placing of the children under the "pallium" with which the spouses are covered at the time of the celebration of marriage according to the Gallican liturgy.⁷ For a long time ignored in France, as in

¹ *Acollas*, "L'Enfant né hors Mar.," 1865; "Le Dr. de l'Enfant," 1885; *Jacquier*, "Thèse," 1873; *Lacointa*, "Acad. Lég. Toul.," 23, 316; *Thuillière*, "La Femme," 1885.

² *Dupré la Tour*, "Thèse," 1900; *De la Grasserie*, "Rech. de la Pater. Natur.," 1895. In the existing law it is possible to distinguish between two principal systems, — the system of paternity and the system of maternity, — not counting mixed systems and the variations of the two former: *Starcke*, "La Famille," p. 249.

³ *Girard*, "Manuel," p. 180. — As to legitimization by will, cf. *post*, "Brachylogus," "Appointment of an Heir," "Nov.," 74, 117. The "Siete Part.," IV, 15, admit of several other methods of legitimization: an offering at the court of the king, a will, a charter and marriage.

⁴ Cf. *Freisen*, § 74 and authors cited.

⁵ Unless the impediments due to relationship could be raised with the assistance of dispensations. See also *Freisen*, *ibid*.

⁶ *Beaumanoir*, 18, 5.

⁷ Cf. the Roman "Flammeum" (from which are derived "nubere," "nuptiæ"). Reply of Nicholas I to the Bulgarians: *Abbé Duchesne*, "Orig. du Culte," p. 413; *Beaumanoir*, 18, 22; *Du Cange*, see "Pallium"; "Aoste," I, 20, 31. *Loyse*, 58, again mentions it. From which the name "mantellati" given to these children: *Pollock and M.*, II, 395; *Schroeder*, 694. — "Amoilleré," "Aleauté," meaning legitimized ("Jostice," p. 36, 209, 212); *Schwarz*, "De Antiquo Ritu Liberos Legitim. per Pallium," 1747; *Michélet*, "Orig.," p. 10; *Grimm*, p. 463 (symbols of the shoe, the cloak, etc.). — Cf. as to Bar-

many other countries, perhaps because the Theodosian Code made no mention of it,¹ perhaps because it was opposed to the spirit of Barbarian law as to unions of a lower order, legitimation gradually came into general use, thanks to the jurisprudence of the ecclesiastical tribunals; the Renaissance of Roman law was not a stranger to it; a Decretal of Alexander III, 1172-80, "*tanta vis est matrimonii*,"² made it Christian common law. According to the canon legislation, which was not applied without resistance,³ legitimation ought to produce the very fullest effects;⁴ it

barian law: among the Lombards, declaration made to the "Thinx" with the consent of the legitimate children: "Roth.," 155; "Ass. de Jérus.," "C. de B.," 178; *Loysel*, 63.

¹ *Loysel*, 58, and *Laurière's* note; "L. Rom. Wis.," 4, 6. Cf. "Roth.," 155. — The "Const. de Constantin," "Cod. Just.," 5, 27, 5, is contemplated in *Julian*, "Epit.," 32, 3; "Petrus.," I, 41; "Brachyl.," 1, 9, 14 (legitimation by marriage, by rescript of the prince, by the fact that one has been appointed "ut legitimus heres": *Julian*, 82, 10; and, finally, by the fact that cohabitation with the mother lasted until her death: *Julian*, 82, 12). *Yves de Chartres*, "Déc.," 31, 32 (*Fournier*, "R. Q. H.," 1898, p. 46. The "*Schwabenspiegel*," 147, 378, admits of it contrary to the general practice in Germany, where it only prevailed after the sixteenth century; *Koenigswarter*, p. 42. — England: an adoption, deed of the king, and, finally, to the exclusion of every other means, act of Parliament: *Bracton*, I, 4: no legitimation by subsequent marriage: *Glanville*, 7, 45; "Fleta," 39, 4; Statute of Merton, 1253, c. 9; *Marnier*, "Etabl. de Norm.," p. 174; *Pollock and Maitland*, II, 395; *Blackstone*, I, 16. Subsequent marriage does not produce this effect with regard to children born previously, excepting in the case of the *eldest bastard* and the *younger child of a married woman* (the illegitimate child who is the eldest possesses all his life the paternal inheritance without his younger brother having any claim upon it, the "*filius mulieratus*" or one born of a married woman; after his death the latter has no authority to act).

² Dig X, 17, "Qui Filii sint Leg.," 6 ("episcopo Exoniensi"). Cf. *ibid.*, 1; "Jostice," p. 209; "L. d. Droiz," I, no. 22. Gratian does not seem to have foreseen the question.

³ Cf. *Loysel*, 63; *Du Plessis*, p. 530; "L. Feud.," II, 26, 10: exclusion from inheriting fiefs. "Lib. Consuet. Imp. Rom.," c. 105. At Ferrara they inherit only with the consent of the agnates. At Rome they take but one fourth of that which they would have taken had they been legitimate: "Stat.," I, 84. — In England the barons opposed the clericals who wished to introduce legitimation by subsequent marriage: "Nolumus leges Angliæ mutari," they say (Statute of Merton, 1253, 9; *Bracton*, "Note Book," I, 104); the true reason of their opposition was owing to the injury which they would sustain from the decrease of the number of bastards; in fact, "the more bastards, the more escheats." Grosseteste affirmed that the old English custom was in accord with the canon law; *Pollock and Maitland*, II, 395; *Glasson*, III, 185.

⁴ However, we must not go so far, as some have wished to do, as to give marriage a retroactive effect that goes back to the day of the conception (or even to the day of the birth); the fiction of a sort of secret marriage which is supposed to have taken place at that time is a contradiction of the solution set forth by *Beaumanoir*, 18, 24, with respect to the right of primogeniture; the children born of a marriage previous to the one which legitimizes the illegitimate child have the right of primogeniture: *Bout.*, I, 95; *Le Brun*, "Success.," I, 500; *Argou*, I, 80; *D'Aguesseau*, 7, 438; *Boutaric*, "Inst.," I, 10, 13.

ensued as of right by virtue of marriage, and even in spite of the parents and in spite of the children,¹ provided that the filiation was certain.²

§ 176. **Legitimation by Rescript from the Prince** (letters from the king)³ had less effect than the preceding (legitimation "ad honorem," but not "ad successionem")⁴ and was scarcely applied excepting in cases where marriage was not possible.⁵ Legiti-

¹ Dig. X, 4, 17, 6. But no previous recognition was admitted, as is the case in the Civil Code, 331. According to the Declaration of 1639, 6, and the Edict of 1697, 8, marriage "in extremis" did not legitimize.

² "Brautkinder" (children of betrothed persons) in Switzerland: they are ordinarily legitimized by subsequent marriage; if marriage is not possible, for example, as a consequence of the death of one of the betrothed, they are treated as being legitimate: *Huber*, IV, 538.

³ The pope, the emperor, the king and the lords competed with one another for the right to legitimize by letters. Philip Augustus had the pope (Innocent III, 1201) legitimize the illegitimate children which he had had by Agnes de Mérami (*D. Bouquet*, 19, 406). Louis XIV himself legitimized his own children: "Gr. Cout.," 1, 3 (p. 95); "Jostice," p. 36; "Ord.," XV, p. 28; *Isambert*, Table, see "Légitimation"; *Bacquet*, I, 190; *Viollet*, p. 475, cites *Chaillet*, "Priv. du Clergé," 1866, p. 32 (sons of priests). After the end of the thirteenth century letters of legitimization had to be registered with Parliament and at the Court of Counts, which allowed the king to cancel the effect of every legitimization which took place outside of the domains of the lords. The Ordinances of 1372, 1498 and 1687 sanctioned this exclusive right of the king (*Isambert*, see 372); *Loysel*, 62. As a very great exception, the right of legitimizing was granted to the Duc de Berry in his capacity of Lieutenant of the King, 1380. The canonists maintained that the pope legitimized "ad spiritualia" and, as a consequence, "ad temporalia": *Hos-tiensis*, p. 319; Decretal "Per Venerabilem" (Dig. X, 4, 17, 13); *D. Bouquet*, 19, 406; *Pithou*, "Lib. de l'Eglise Gall.," 21: the pope cannot legitimize so as to make one capable of inheriting, but he can do so in order to enable one to take a benefice. As to previous jurisprudence (Parliament verifying the bulls of the legates with reservations on the subject of the right of legitimizing, fifteenth and sixteenth centuries) cf. *Viollet*, p. 476; *Isambert*, X, 388; *Beaumanoir*, 18, 22; *Ficker*, II, § 256. — The emperors settled in their rescripts the rights of persons legitimized: *Schilter*, "Jus Feud. Aleman.," c. 40, § 4. After the time of Charles VI, legitimization by the Counts Palatine takes place. Also we find legitimization by rescript of the doctors by virtue of an imperial delegation of authority. — Flemish law: *Britz*, etc., "Siete Part.," IV, 15, 4.

⁴ *Loysel*, 63 (bibl.); "Schwabenspiegel," 377; *Pasquier*, "Inst.," p. 89; *Ragueau*, see "Lettres." Sons born of an incestuous or adulterous union legitimized by letters of the prince became capable of receiving permanent gifts from their fathers and mothers (and not merely gifts by way of maintenance). The right of inheritance belonged even to persons who had been legitimized in this way, in case there were an express clause and the consent of the near relatives were given (which was something that was not customary, say *Pothier* and *Boutaric*, "Inst.," 1, 10, 13). They might receive universal legacies. The name and the title of the father were transmitted to them: "Schwabenspiegel," 47. They had public rights and a right to hold office. — Adoption of illegitimate children admitted in theory, but not applied. — Legitimization before notary at Bologna and Naples: *Pertile*, § 116.

⁵ The Ordinances of Henry IV compelled the bastards of nobles to furnish themselves with letters of nobility in order to retain the names and titles of their fathers (March, 1600, Art. 26): *Isambert*, Table, see "Noblesse." These

mation by means of subsequent marriage was maintained by means of custom under the Revolution;¹ it was otherwise as regards legitimation by rescript of the prince, which the change in constitution impliedly abolished, and which the Civil Code has not re-enacted.²

letters had to be based upon some very great regard for their merits or those of their father.

¹ *Merlin*, "Rép.," 17, 15 (Act of the 11th Flor., year II).

² *Contra*, Italian Civil Code, 198.

TOPIC 12. ADOPTION

§§ 177-179. Adoption.

§ 180. Fraternization.

| § 181. Affiliation, or Foster-Brotherhood.

§ 177. **Adoption** is an archaic institution serving the purpose of gathering recruits for the family; he who has no children creates for himself an artificial posterity by adopting the children of another; ancestor worship makes it a religious duty for him; he may be driven to it by the interests of his own family, or by his own personal interests. The Germanic law recognizes this practice, as did the majority of the primitive legislations. It was carried out in various ways: The person adopting armed the person adopted,¹ cut his hair and his beard, or was satisfied with touching them,² as a father would have done to his son at the time of his coming of age; the person adopting made the person adopted sit down on his seat, took him upon his knees,³ sometimes clothed him with his own garments, with the object of giving a rough imitation of birth.⁴ Under the influence of the Roman practice, adoption also took place "per cartam";⁵ the formulæ assumed that the person adopting had no posterity ("peccatis meis facientibus orbatus sum a filiis"); he asks the adopted person to clothe him, to look after his affairs;⁶ in return he promises him all his inheritance.

¹ Ostrogoths, *Cassiod.*, "Var.," 4, 2 (Theodoric adopts the king of the Herules "per arma"); 8, 1 and 9; *P. Diac.*, I, 23, 24. Lombards: adoption by "Gairethinx": *Pappenheim*, "Launegild," p. 65; Franks: Gontran and Chilbert: *Greg. Tours*, 5, 17; 7, 33; *Aimoin*, 3, 68.

² Lombards: *P. Diac.*, 6, 53; 4, 30 (the patrician Gregory and the son of the Duc de Frioul): *Aimoin*, 1, 20.

³ Scandinavians: *Gulath.*, 58; *Grimm*, p. 155. The adopted and the adopter put on the same shoe.

⁴ *Grimm*, p. 463; *Michelet*, "Orig.," p. 10. Juno pretends to be pregnant from Hercules; same custom among the barbarians, says Diodorus of Sicily. At the time of the First Crusade the Prince of Edesse and his wife in order to adopt Baudoin passed him under their shirts. *Aragon, id. Pidal*, "Infantes de Lara," 1896, p. 30, no. 3. Adoption and legitimation under the cloak are frequent. As to the effects of these barbarian adoptions, cf. *Pertile*, III, 394.

⁵ *Rozière*, "Form.," 115 et seq.; *Marculf*, 2, 13; *Lindenbrog*, 58, 59; *Du Cange*, see "Adoptio."

⁶ Our old authors maintain that he who adopted amortized himself, that is to say, he gave his property on condition of being supported until his death: *Ragueau*, see "Admortir," "Reims," 237; *R. Schmidt*, "Affiatomie," p. 32, seems to us to have clearly established that the appointment of an heir did

§ 178. **The Same.** — Having at an early period fallen into disuse,¹ which came about owing to the evolution of the family,² adoption only appeared to our old juriconsults as a Roman institution which had been rejected by the Customary law.³ It was not even in use in countries of written law.⁴ Sometimes, however, but in a very exceptional manner, adoption took place by means of **letters of the prince**;⁵ in this case it did not confer the paternal power, did not even make a lawful heir of the person adopted, but only an heir by reason of a universal gift or universal legacy.⁶ This sort of adoption is similar to the appointment of a person charged with bearing the name and the arms of the donor or the testator.⁷

§ 179. **The Same.** — Under the Revolution adoption entered into the law without any necessity of its doing so, by being called up from classical antiquity. The Legislative Assembly decreed that its committee on legislation should include it in its general scheme of civil laws. The Convention set the example for the

not carry with it adoption. To the contrary, see Glasson and the majority of the authors.

¹ "Arbre des Batailles," c. CX., "Lille," 16, 4: Adoption does not take place. Cf. spiritual paternity (godfather and godmother): effects according to the canon law; *Du Cange*, see "Adoptari," "Filiolus," "Patrinus," — "Atalikat" in the Caucasus: *Kovalevsky*, "Cout. Contemp.," p. 190. Cf. feudal customs (the young gentleman becomes a page or an equerry in the household of his father's lord): *L. Gautier*, "Chevalerie."

² Or, rather, the disintegration of the family. And, as the families of the princes escaped this law, adoption was preserved in them or else reappeared in them all the more easily: e. g. in 939, 1277, and 1282. From the Frankish period on the formulæ show us the hostility felt by the family against adopted children; the latter, in fact, are enemies who deprive them of the family possessions.

³ *Bucherellus*, "Inst.," 1, 11 (and authors cited); *Dumoulin*, on "Paris," 2, 2, 10; *Chopin*, on "Anjou," 3, 3, 2; *Launay*, "Inst.," 2, 14; *Boutaric*, "Inst.," 1, 11; *Serres*, 1, 11; *Merlin*, see *Ferrière*. Adoption of orphans by the directors of the hospitals of Lyons: "L. Pat.," Nov., 1672; *Henrys*, 6, 5, 35. The "nutritor" of the barbarian period who takes a foundling can treat him like his own son; he then becomes a sort of adoptive father: cf. "Siete Part.," IV, 20.

⁴ Rare in Italy: *Pertile*, III, 396; *Salvioli*, § 205. Where it does take place ("apud judices curiæ," before notaries), it has only incomplete results; thus the adopted son does not succeed to fiefs and personal belongings. It is even a question as to whether he acquires the title of his adopted father. Spain: the "Siete Part.," IV, 16, include a title on the "Porfijamiento," "F. Real," IV, 22.

⁵ *J. Faber*, "Inst.," "De Adopt." (Rights of the pope and the emperor).

⁶ The adopted son therefore cannot exercise the right of repurchasing by a person of the same lineage.

⁷ "D., ad Sc. Treb.," 63, 18; "de don.," 19; "de condit.," 108; *Ferrière*, see "Institution." Necessity of letters patent from the king, if the person appointed gives up his name to take that of the donor. He owes in every case the transfer tax, which is not paid in the case of an inheritance in the direct line: *Lebrun*, "Succ.," 8, 3; *Bouvot*, I, 111.

details; the 27th of January, 1793, it adopted in the name of the Fatherland the daughter of Michel Lepelletier. If this was merely a manifestation of policy, without any civil effects, it surely showed at least the state of mind. Private adoption was thenceforth practised without having been legally regulated; the requirements were limited to the drawing up of an authenticated deed. By this means alone, without any exact conditions, the person adopted acquired the rights of a legitimate son. Adoption was irrevocable, excepting for the right of the minor to renounce it.¹

§ 180. **Fraternization.**² — During the barbarian period and in the early stages of Feudalism, the usage of sealing friendship by the aid of oaths and solemnities (like the mingling of blood), which transformed it into a fictitious brotherhood, carrying with it strict duties of mutual protection, and even a true joint ownership of possessions, is widespread. Thence arose the brotherhood of arms, of knighthood, which, differing from the preceding, did not create any tie of artificial relationship.³

§ 181. **Affiliation,**⁴ or **Foster-Brotherhood**⁵ ("unio" or "parificatio prolium").⁶ In the case of a second marriage the stipulation is made in the marriage contract that the children of the first marriage and those of the second marriage shall have the right to inherit from the two spouses, and to their share in the joint property. This practice had the advantage of keeping the family inheritance "in statu quo"; it dispensed with partition, which might cause a great injury to the "parens binubus" without profiting the children. In this there was seen a sort of adoption⁷ created

¹ Decree of the 16th Frim., year III; 25th Germ., year XI, *cf. Sagnac*, p. 315 (projected Civil Code). In the Civil Code, Art. 343 *et seq.*, we find adoption and official guardianship.

² *Du Cange*, "Frères d'Armes," 1668; *Kohler*, "Z. R. W.," 1884 ("Kunstl. Verwandtschaft"); *Inama-Sternegg*, "Deutsche Wirthschaftsg.," I. 261; *Tamassia*, "L'Affratellamento," 1886; *Gautier*, "Chevalerie," *passim*; *Flach.*, "Orig. de l'Anc. France," II, 471 (1893); *Post*, "Grundriss d. Ethnol. Jurisp.," I, 93; *Salvioli*, § 205; "Consortes et Colliberti," p. 9; *Mélusine*, III, 402; IV, 118, 259; V, 36, 194, 284; VII, 4, 134, 156.

³ Communities among brothers (Italy) do not seem to have any connection with the fraternization of barbarian times: *Lattes*, p. 267.

⁴ *Du Cange*, see *Ragueau*.

⁵ *Du Cange*, see "Afrayramentum" (associations of all property); *Saint-onge*, I; *Saint-Amand* in Flanders, 26.

⁶ "Einkindschaft" of the Germans; *Watstein*, "De Unione Prolium," 1709; *Gerber*, *id.*, 1844; *Ringelmann*, "Einkindschaft," 1825; *Mittelstein*, *id.*, 1886; *Mayer*, *id.*, 1900; *Schroeder*, p. 739; *Ficker*, "Erbenf.," III, 150; *Heusler*, § 164. — Examples in *Loersch and Schroeder*, 2d ed., nos. 178, 223, 225, 229. Thirteenth century: Act of 1275 (Austria), 1296, etc.

⁷ The one who becomes an associate has no rights over the person or the possession of the one who makes him an associate: *Lebrun*, "Succ.," 3, 3.

with the view to equality between the children; but foster-brotherhood does not change the civil condition of the children, and in establishing it so little account was taken of equality that the most ancient documents of this sort contain clauses dealing with the reference legacy.

TOPIC 13. CONDITION OF WOMEN

§ 182. In the Old Germanic Law.	§ 185. German and Italian Law.
§ 183. In Public Law.	§ 186. In France.
§ 184. Changes in the Station of Women.	§§ 187, 188. Velleianum Decree of the Senate.

§ 182. In the Old Germanic Law¹ the constitution of the family resulted in placing the woman under a perpetual guardianship: "Nulli mulieri liceat in suæ potestatis arbitrio, id est selb-mundia vivere, nisi semper sub potestate viri aut potestate curtis regiæ debeat permanere." This remarkable formula of the Edict of Rothar., 205, expresses the primitive condition of the Germanic woman.² As a daughter she found herself under the authority of her father, or, if she had no father, under that of his nearest male descendant;³ as a married woman, under the authority of her husband;⁴ as a widow, under the power of her own children or the relatives of her husband,⁵ when she did not leave the family

¹ An opinion contrary to the one which we set forth in the text gives the Germanic woman a true independence, at least during primitive times, either because it was necessary to see in this a survival of the matriarchate or because the roughness of customs made of her almost a man. Cf. *post*, "Power of the Husband," "Inheritance." This view is like the one, formerly very widespread, which made the Germanic woman the model of all the virtues, the prototype of the Christian woman. On this question cf. "Acad. Lég. Toulouse," 1900 ("Le Mariage par Achat"); *Meynial, Lefebvre, op. cit.; Tacitus, "Germ.,"* 8: "inesse feminis aliquid sanctum"; allusion to the magical power attributed to Velléda, etc.

² Cf. "L. Saxon.," 43 *et seq.*, which organizes the guardianship of widows and of daughters for the benefit of relatives ("proximus paterni generis"), without making any allusion to the guardianship of the State; the latter is, in fact, of later date: "Thuring.," 47; "Fris.," 9, 11; "Alam.," 54; "Bai.," 8, 8; "Burg.," 12, 36; "Wis.," 3, 3, and 3, 4, 2; *id.* in Scandinavian law; *Dareste, "Etudes,"* p. 287 *et seq.* *Heusler*, I, 118, and II, 484, interprets the Lombard Edict in this sense, that the woman has the power of claiming the royal "mundium"; she is not compelled to do so, she has no official guardian, but she cannot alienate or give her movables or her immovables without the assistance of a guardian. Even admitting this explanation, which does not agree very well with the texts, we can eventually recognize the fact that it is almost impossible for the woman to dispense with a guardian: "Roth.," 388.

³ For example, of her brothers: "Wis.," 1, 8, 9; "Roth.," 160, etc.

⁴ Unless the husband shall have conferred the "mundium" upon others, examples of which are found in the Italian deeds of the eleventh century. Certain statutes confer this power upon the husband. We even find a case of giving the "mundium" to the bearer (of the deed of grant) in 1036: *Pertile*, III, 235; "Roth.," 205, 182. Cf. "puella in verbo regis," "Rib.," 35, 3. Marriages "jussione regia," p. 1037; *D. Bouquet*, III, 306; *Viолlet*, 262; *Glasson*, III, 19.

⁵ Even minors: "Liut.," 101; "Antich. Ital.," IV, 785 (in 916); *Simonne*, p. 133.

of the latter, and under that of her own relatives if, in an exceptional case, she went back to her own family.¹ If she had no relatives she was under the "mundium" of the king, in the same way as an orphan.² The woman, in fact, because of her physical weakness,³ could not be the head of the family; she found herself to be dependent upon the one in whose house she lived; upon the relative who wore the sword, and who would draw it, if necessary, to defend her ("mulier faidam levare non potest"); upon the one who alone could appear in the judicial assembly,⁴ and whom the

¹ In the Lombard law the breaking of family ties is not complete (perhaps by an extension of the marriage without "mundium"). If a woman alienates her possessions (immovables) with her husband, says the "Liut.," 22 (in 721), two or three near relatives (agnates) are summoned and the woman should declare in their presence and in the presence of the judge that she freely consents to the sale, and if this is not done the latter will be void. *Rosin*, "Formvorschr. f. d. Veräusserung. d. Frauen," 1880 ("Unters." by *Gierke*) thinks that the "L." 29, "Liut.," is a variation and an extension of the "L." 22 (any woman) in the "Bénévent." Cf. "Lib. Pap. Pipp.," 34; *Wido*, 8 (right of a wife even to make a gift with her husband): *Laites*, p. 180. — Analogous rules elsewhere: *Viollet*, p. 290 (*Dunois*, XI, on "Belgique XIII^e siècle"); *Loersch and Schr.*, "Urk.," I, 125; "Cout. de Metz," II, 18.

² The royal "mundium" is here especially a general protection, with regard to the special effects that are connected with the domestic power. The Church recommends that kings shall defend the widow and the orphan ("Exodus," xxii, 22; "Deuter.," xxvii, 19); the State fulfills this duty. In the formula appointing a count it is said: "Ut viduis et pupillis maximus defensor appareas" (*Marculte*, I, 8). "Capit. Bavaois," 788, c. 2: "Ut ecclesia, viduæ, orphani vel minus potentes pacem rectam habeant;" a penalty of 60 "sol" in case the peace is broken. The Judge Ordinaries are recommended to examine actions brought by the widow and orphan before others. Finally, it is decided that the widow shall be judged if she so wishes by the king or the Church in preference to the Judge Ordinaries: *Beaumanoir*, 10, 12; cf. 11, 9. This is the practical side of the maxim: "To the king belongs the custody of widows and wards" (fifteenth century); "Summa Norm.," 77; "Olim," I, 169; "Justice," p. 218; "Et. de Saint Louis," I, 137; *P. de Fontaines*, 360; "L. d. Droiz," no. 921. The conception of a special protection due by the State to widows and orphans is found once more in our existing laws: Law of Aug. 16-24, 1790, 8, 3; "Code Proc. Civ.," 83; Civil Code, 2194; *Viollet*, p. 290; "Ord.," 1315, 24, prohibition to make war upon a minor or a widow who has children.

³ *Tacitus*, 13. *Heusler* is wrong in objecting, § 25, that to-day the woman is as weak, weaker even, than she was formerly, and that at the same time she is under more disability; the social surroundings are no longer the same; this is what has admitted of the emancipation of woman in spite of her weakness. I do not think, either, that one can say with *Meynial*, "Le Mar. Ap. les Inv.," p. 77, that "she is worth a man in war." One would not say this with regard to the squaws of the redskins, in spite of the roughness of their life; and it was not said with respect to the Germanic women. The Amazons have always been an exception. Cf. the mythological heroines of the Sagas or of the Germanic epic poems. "Bal.," 4, 29 (the woman fights "per audaciam cordis sui"); "Roth.," 278; "Liut.," 141.

⁴ In these military assemblies there is no place for women. Cf., however, the Synod of Nantes, c. 19 (participation of women in the sittings of the Frankish courts); *Laboulaye*, p. 443; *Greg. Tours*, 7, 8; "Etabl. de Rouen," I, 155. — *Post*, as to the Frankish period. — Cf. "Roth.," 203; "Sachsensp.," I, 43.

Germans later called "kriegerischer Vormund."¹ From this there resulted: 1st. *In private law*, the incapacity of the woman to have an inheritance of her own,² and, when she was permitted to have it, the capacity to enjoy it and to administer it, and especially to dispose of immovables.³ 2d. *In public law*, the absence of all political rights; the woman only being "pars domus," does not count in the eyes of the State.

§ 183. **In Public Law**⁴ the incapacity of the woman has remained through all the old law, and even until our own time. We do not even take the trouble to justify it. Thus, it is admitted that she is not eligible to public office;⁵ she cannot be barrister or solicitor, says Boutillier, for the same reason as Calpurnia,⁶ but this reason is only invoked because of pedantry; the

¹ To him alone belongs the power of claiming the "wergeld" from the murderer of the woman. As to the price of the "wergeld" of women cf. *Brunner*, II, 614; "Wis.," 8, 4, 16; the half of a man. *Id.*, Arabs, Alamans ("Pactus," II, 39 *et seq.*; "Lex," 46 *et seq.*, 88), Bavarians (IV, 29), it is double that of men "dum femina cum armis se defendere nequiverit"; "Roth.," 378, etc., among the Franks, and treble "wergeld" is admitted for the woman who is capable of bearing children: "Sal.," 24, 6; "Rib.," 12 *et seq.*; "Angl.," 48; "Sax.," 15; double if she is a virgin. From this there cannot be drawn any conclusions on the subject of the station of woman in general; the variations of the price of the "wergeld" are connected with the relative value of women, with the necessity for a higher degree of protection which they are under: *Grimm*, 403; *Du Plessis de Gr.*, "Thèse," 87; *Viollet*, p. 289; *Laboulaye*, p. 171; "Sachsensp.," 3, 45, 2 (half a man).

² As to the right of inheritance of women, cf. *Opet*, "Erbrechtl. Stell. d. Weiber," 1883 ("Unters.," by *Gierke*); *Ficker*, "Erbenfolge," etc. *Post*, "Inheritance."

³ As to the powers of the "mundoaldus," cf. "Power of the Father," "Power of the Husband"; *Pertile*, III, 236; *Simonnet*, p. 46. — Correction: "Roth.," 221; "Liut.," 5; "Wis.," 3, 4, 4. — Marriage: "Roth.," 196 (c. "Wis.," 3, 3, 1); "Thur.," 47; "Liut.," 119; "Wis.," 3, 2, 8 (disinheriting). Responsibility and right to the composition: "Roth.," 201 s., 186; "Liut.," 125; "Fris.," 9, 8 *et seq.*; "Sax.," 40 (both these laws give the young girl a portion of the composition); *Amira*, "Nordgerm., O. R.," I, 402. — Alienations: "Roth.," 204, to appear in court. Formulæ upon the Lombardian laws. ("Wis.," 2, 3, 6, allows him to appear); *Papien*, 11, 2.

⁴ *Laboulaye*, p. 442; *Ostrogorski*, "La Femme au Point de Vue du Droit Public," 1892; *Giraud*, "Les Cond. des F. au Point de Vue de l'Exercice des Dr. Publics," 1891.

⁵ *Dig. X*, I, 48, 4. Cf. the English axiom (already untrue in the time of Bracton): "The woman cannot be put outside of the law, because she is never within the law"; *Amira*, "Nordgerm., O. R.," I, 143 (no "Friedlosigkeit" for minors and women).

⁶ I, 10; II, 2; "Jost.," p. 103; *Beaumanoir*, 5, 17; *Gide*, p. 399, ridicules this reason in an agreeable manner; it is not so ridiculous as he makes out; our old juriconsults would lead one to suppose that women like the one spoken of in the Digest, 3, 1, 5, and who in reality was called Carfania, were not rare in their time. It may very well be that, while allowing the woman to plead for herself (*Beaumanoir*, 2, 17), our old law found some danger in allowing her to plead for another: "Wis.," 2, 3, 6; "Schwabenspiegel," 2, 24; cf. "Summa Norm.," 76. Women can neither prosecute nor defend a criminal action; if no one defended them, they cleared themselves by means of

true motive is in the tradition which separates women from the tribunals and from "officia virilia." The "Très Ancienne Coutume de Bretagne," Art. 68, declares that no woman shall be a guardian, a trustee (with the exception of the maternal guardian), or a judge, or shall undertake negotiations in court (excepting for a husband, her children, her father and mother). She cannot be a witness to notarial deeds, especially to wills,¹ which can be explained strictly by the idea that witnessing in a case of this sort has the appearance of a public function, but which is rather owing to the fact that the veracity of women is doubted; in fact, it is not without great difficulty that they have been admitted to testify in criminal matters. With time, the inferiority of the woman in relation to the man became less. In allowing her to have the capacity of inheriting fiefs, and even kingdoms, it was bound to follow that she should be granted the political capacity inherent in their possession.² It is thus that the lady who has a fief sits in the Feudal Court;³ in the Pyrenees the woman who is head of the house takes part in the assemblies of *neighbors*, and sometimes presides over them;⁴ elsewhere the daughters and widows who have a separate establishment take part in the village assemblies for the community of States in the same way as men.⁵ Again, in the sixteenth century, they can be chosen as arbi-

the ordeal: *J. d'Ibelin*, 82, 105; "T. A. C., Norm.," 50, 4. In the duel at law women had a champion to represent them: *Beaumanoir*, 63, 7; cf., however, "Schwabenspiegel," c. 229; "Roth.," 203; "Sachsensp.," I, 43; *Paris, de Puteo*, "Duell.," 1540; *Thomas*, "De Ordin. Duelli"; "Ass. de Jérus.," "C. de B.," II, 30; she can plead on behalf of her father if he be ill: "T. A. C., Bret.," 68.

¹ *Beaumanoir*, 39, 40, 49; "Summa Norm.," 85, 6; *Faber*, "Inst.," 44 b. ("vaga et instabilis").

² Thus the possession of a fief conferred rather extensive privileges upon women. Struck, no doubt, by the contradiction existing between the feudal system and the general rule of incapacity, *Bodin*, "Républ.," 6, 5, explains this last rule by saying that women are not lacking in prudence, but that their domestic rôle forbids their indulging in masculine deeds. — Certain Customs assured the women favorable treatment: *Glasson*, 7, 125. The "Coutume de Reims" was called the "Coutume des Femmes" because of the advantages which it conferred upon them: *Varin*, "Arch. Lég. de Reims," I, 606.

³ *P. de Fontaines*, 18, 74; *Beaumanoir*, 14, 27; "Artois," 54, 74; "Jostice," p. 273; *Duchesne*, "Script. r. Fr.," 4, 731, 471: "sedeas ad cognitionem causarum," says Louis VII to Ermengarde, Vicountess of Narbonne: *D. Vaissette*, n. 146, 275, 278, 518; *Brussel*, I, 262; "Cart. de Beaulieu," 195, 273; Dig. X, 1, 48, 4. Where women do not inherit fiefs they have no jurisdiction: *Loysel*, 608. In return for this the lady of the fief has to render military services (by means of a representative: "Schwabenspiegel," II, 61; "Et. de Saint Louis," I, 60), the service of marriage: *Laboulaye*, p. 257.

⁴ *Lagrèze*, "Dr. dans les Pyrénées," p. 66; "Actes" Mss.

⁵ Taxes (tallage), cf. "Summa Norm.," 14, 8; Law of June 10, 1793; *Viолет*, p. 293, n. 4.

trators;¹ it is true that a century later they can no more be arbitrators than they can be judges.

§ 184. **Changes in the Station of Women.** — The influence of the Roman Law and the Christian ideas, the disorganization of the family group, the interference of the State within the circle of private interest, brought about the gradual emancipation, here slow, there more rapid, of unmarried women. It is thus that among the Franks we have been justified in asking if as early as the barbarian period the guardianship of women had not disappeared.² The daughter who had come of age and lived with her parents had not the right to marry without their consent,³ until the triumph of the canonic doctrine of marriage "solo consensu."⁴ As to the widow, we have seen what difficulties her marriage gave rise to; the most that the primitive practice assumes is the decline of guardianship; and, consequently, the authority of the relatives over the widow seems to gain strength. The alienation of possessions and judicial acts call for the intervention of guardians;⁵ as far as the Frankish law is concerned, the documents are far from being clear; sometimes the woman acts alone, sometimes she is assisted by an "advocatus," or, if it is a matter concerning a widow, by her children.⁶ If one compares

¹ *Loysel*, 53; *Beaumanoir*, 51, 26; "Artois," 54; "Et. de Saint Louis," I, 62.

² *Ficker*, "Verwandschaft zw. Goth. u. Norweg. R.," 1887; *Erbenfolge, passim*; *Opet*, "Geschlechtsvorm. i. d. Fränk. Volksr.," 1890; "Frag. d. Fränk. Geschl.," 1898; ("Mitth. Oest. Geschichts. f."); *Hübner*, "K. V. J.," 1893, 38; *Brissaud*, "Acad. Sc. Toulouse," 1895; *Lefebvre*, p. 327.

³ *Cf.* "Thuring.," 10, 3.

⁴ "Reipus," marriage for a symbolical price. *Cf.* "Roth.," 222, and "Rib.," 58, 18. No allusion in the texts to the age after which the consent of the relatives was no longer required. — Vows: "Cap." 1819, c. 21 (I, 285); *Opet*, "Frag.," 20.

⁵ *Thévenin*, no. 113, *cf.* no. 119; "Roth.," 205. The Scandinavian law merely forbids women to appear in court: "Const. Sic.," 2, 38.

⁶ *Pardessus*, "Dipl.," 394; *Thévenin*, p. 192; "F. Andec.," 16, 12, 26; "Sen.," 51; "Sen. Rec.," 5; *Hübner*, "Gerichtsurk.," nos. 52, 56, 58, 165, etc. Numerous deeds in church and monastic records: *Cf.* *Opet*, *ibid.*, p. 30 *et seq.* The "advocatus" who is interposed in the deeds of women has nothing in common with a guardian (according to *Opet*), for he is to be found in deeds drawn by men; he is rather a "fidejussor," a "Saleburgio" ("Salmann"). *Cf.* especially the Cartulary of Savigny, where gifts take place ordinarily "per manum" of a third party. As to the presence of women in court: "Form. s. Roth.," 183, 204; discussion in *Opet*, p. 62; "Rib.," 81; "Capit.," 819, c. 3. In default of "testes" (Brunner translates this "fellow oath taker") or "si legem nescierint," the count shall come to their support by giving them a representative charged with defending their interests. These measures in the interest of widows and orphans do not perhaps show in the case of one more than in the other that *on principle* they are not under guardianship: "Capit.," I, 93, 209, etc.; "Ord.," 1319 (XII, 450); *cf.* "Exodus," xxii, 21; "Deuter.," xxvii, 19; "Conc. de Mâcon," 2, c. 12 (*Bruns*, II, 253); com-

these texts to the Lombard documents, where the "mundium" is concisely set forth, he will admit at least that the guardianship of women was in full decline among the Franks.¹ As we look at it, it would be going too far to say that it had completely disappeared, and much more so that it had never existed.²

§ 185. **German and Italian Law.**³ — In Germany and in Italy the enfranchisement of the woman was with difficulty realized; the *guardianship of the sex* was maintained; it seems to have been feared that, deprived of the protection of her family, and too inexperienced to administer her affairs at a time when these became complicated, she might compromise her interests if she were not provided with a guardian,⁴ and especially in litigation and judicial proceedings (alienation of movables).⁵ If she had no father, if the guardianship were first of all permanent and legal, and accorded to the nearest male descendant, it is already given by appointment in the "Sachsenspiegel," and the guardian named by the magistrate⁶ only assists the woman for some spe-

petency of the ecclesiastical judges. — Obligation for the woman to pay compositions and a right for her to demand them: "Rib.," 83, 1; "F. Andec.," 29; "Capit.," I, 281, c. 4. The power of disposing of their possessions seems to be beyond dispute in the case of nuns: *Pardessus*, "Dipl.," *passim*. The desire of facilitating gifts for the benefit of the Church must have been responsible for recognizing the capacity of women in general.

¹ Cf. "Wis.," 3, 4, 2.

² It is hard to see why this should never have existed among the Franks as it did amongst the other Alemanni. The family and marriage are organized in the same way; the condition of women is dependent upon it. The customs bear witness to the inferior position of women. Heroic songs: *Vétauld*, "Charlemagne" 509; *Gautier*, "Chevalerie," *passim*. At law unmarried girls who lived with their relatives did not escape from their domestic authority: "Bord.," 63. Guardianship of the girl who has attained her majority, and who has lost her father, until the time when she marries: "T. A. C., Bret.," 80. We doubt whether they could found a separate establishment. As to widows, the protection of the Church and the king bear witness to their independence in fact, at least, and their emancipation from their relatives; *post*, "Second Marriages." Their condition was thus like that of the Roman women: *Carolus de Tocco*, on "Lomb.," 2, 7, 2. As to the Lombardian law and the "L. 29 Liut.," *Rosin*, p. 57; *Beaumanoir*, 43, 27: "As soon as her baron is dead the wife comes back to her full capacity." "Wis.," 3, 4, 2, 7; "Burg.," 52, 3; "Æthelr.," 5, 21; *Cnut*, 2, 73; *Procop.*, "B. g.," 1, 2; *Meyrial*, "Mar.," p. 86. "Mother as Guardian," "Dower," "Right of Inheritance," *post*.

³ *Gide*, pp. 280, 302; *Stobbe*, IV, 427; *Huber*, IV, 291; *Pertile*, § 102; "Dr. Scandinave," *Gide*, pp. 224, 232; cf. *Daresté*, *Amira*.

⁴ "Dr. de Lübeck," Art. 21; "Soest.," 27; cf. *Kornmann*, "De Virginitate," p. 74.

⁵ "Beistand," who takes part: "Schwabenspiegel," II, 24: "No woman can be guardian of herself nor appear for herself in court," I, 50: "A woman pleads through her advocate." "T. A. C., Bret.," 68.

⁶ The Statute of Florence, 1415, 6, places among the attributes of the magistrates that of appointing guardians for women: "Const. Modène," 1771.

cific act, after which his functions no longer exist.¹ The designation of a guardian is in the end even made by the woman herself, subject to ratification by the judge.² As in the Roman law, the guardian only exists for the sake of formality. But, such is the force of tradition, that the obsolete institution of the guardianship of women was only done away with in 1870, at Hamburg, and in 1881 at Bâle-Campagne.³

§ 186. **In France**, during the feudal period, the guardianship of women no longer exists.⁴ The unmarried woman is capable of appearing in court, of contracting, of making a will, in the same manner as a man: "A girl is as good as a man."⁵ This does not mean to say that she can freely dispose of her possessions; the rights of the family are opposed to it, at least in that which concerns personal belongings; but these rights exist equally in relation to men. If there is an inequality to the detriment of the women, it is only as far as inheriting is concerned. The old custom, "in multis deterior est conditio feminarum quam masculorum" (Digest, 1, 5, 9), ceases in almost every respect to be true as concerns private law.

¹ I, 47, 2; II, 63, 1; cf. I, 41; Longé, "Cout. de Brabant," III, 205 (cited by Viollet); Chaisemartin, 71.

² Imagina de Linange chooses the guardian who assisted her in her contract of marriage in 1452: Albrecht, "Rappolst. Urkundeub.," IV, 464; Pertile, III, 236 (Act of 1190).

³ In Vienna (Austria), in 1340, unmarried women are freed from guardianship at the age of fifty: Viollet, p. 290; Gide, p. 234; among the Scandinavians they come of age at twenty-five, "venia sexus."

⁴ Beaumanoir, II, 27; "Jost.," p. 273; "T. A. C. Norm.," 80, 5; "Auv.," 14, 2; cf., however, Charter of Amiens, 1190, 23 ("Ord.," XI, 264). Opet, p. 94, denies that there is in this a remnant of the guardianship of women. See texts cited by Opet, p. 55, 87, 18. Laws and Statutes of Vaud, 1, 4, 1: "Married women and unmarried women are subject to a continual minority." Salis, "Z. S. S., G. A.," 1886, 141. England: equality of the two sexes: Pollock and Mailland, I, 465.

⁵ Like gentlemen and clericals, the woman has the privilege of being able to defend herself by means of an attorney: Beaumanoir, IV, 31. Cf. as to this intervention of the "advocatus": Beaumanoir, II, 31; X, 13; XII, 6. Cf., on the other hand, "Femme Mariée," ed. Salmon, see Table, "Jost.," p. 273 (she can give a guarantee); "Gr. C. de Fr.," pp. 323, 350, 379, 389; "Bourg.," 3, 18; "Auv.," 1510, 13, 1; "F. de Morlaas," 177, etc.; "Summa Norm.," 41 (delay for the widow). The "Gr. C. de Fr.," p. 216, establishes the fact that through custom in the lay court no woman, married or otherwise, shall be imprisoned in a civil case: "Nov.," 134, 9; Boutaric, 2, 6; Gui Pape, "Qu.," 256; Masuer, 20, 1; Imbert, "Enchir.," see "Femme" and the note. The privilege by virtue of which women, whether married or not, could not be compelled by physical means in a civil case, was sanctioned by the Ordinance of 1667, 34, 8; it ceased to apply when a tradeswoman who served the public had signed a bill of exchange (excepting in the jurisdiction of the Parliament of Toulouse). Ferrière, see "Femme, Contrainte par Corps"; Merlin, *ibid.* Cf. "Code Comm.," 113 (the bill of exchange is the equivalent of a simple promise).

§ 187. **Velleianum Decree of the Senate.**¹ — It became necessary, however, for an important exception to the principle of the equality of the sexes in civil matters to be introduced. An effort was made to limit the capacity of the woman by applying to her the provisions of the Velleianum Decree of the Senate; the woman, whether married or not, cannot obligate herself for another, it was said, following the Roman laws, because of her weakness and her inexperience in business.² Neglected for a long time, and almost forgotten in the South itself,³ the prohibition of interceding reappeared as a consequence of the renaissance of Roman law,⁴ and was propagated in the countries of Customary law,⁵ especially in the fourteenth century, when Boutillier considers the law of the Consul Velleius as being in full force.⁶ But, if it triumphed in the South at the same time as did the inalienability of the marriage portion elsewhere, it clashed, on the one hand, with the emancipation of the unmarried woman, which had already been realized, and on the other, with the peculiar situation which the woman has by reason of the system of joint ownership; in obligating herself on behalf of her husband, the head of the joint ownership, one does not know if she violates the Roman law, which held as being especially dangerous the intercession in the interest of the husband, or whether she respects that law from the moment when the interests of the two spouses, separated under the marriage portion system, are here, on the contrary,

¹ *Ferrière, Guyot*, "Dict. de dr. Norm.," see "Caution." *Froland*, "Mém. s. l'appl. du sénatusconsulte Vell.," 1772, *Gide*, p. 392. *Meynial*, "N. R. H.," Sept.-Oct., 1901.

² It was not discovered at a certain given time that woman was weak and inexperienced; neither did people yield to the superstition of the Roman law; but the organization of the family having changed, and women having acquired an independent position, it was naturally feared that they would be the first to suffer because of their well-known weakness.

³ "L. Rom. Wis.," *Paul*, 2, 11, 1; "Petrus," 4, 53. The "Brachylogus," 3, 10, considers the Justinian law. In "Preuves," by *D. Vaissette*, deeds in which women are participants do not allude to the Velleianum; but, as a general thing, these women bind themselves on their own account. Cf. *Gide*, 2d ed., 386, 2; *Glasson*, 7, 127, 1; "Montpellier" (1204), 38: the disability of the wife is done away with if she has the authority of her husband: "Toulouse," 74 (valid giving of surety). *Masuer*, 29, 91; the woman can renounce the benefit of the Velleianum, excepting if she binds herself for her husband. *Post*, "Auth.," "Si qua Mulier"; "Artois," 33, 7.

⁴ *D. Vaissette*, III, 344, etc.; *D. Plancher*, "Bourgogne," "Preuves," no. 162 (in 1302); *Masuer*, 29, 12; *Gui Pape*, 227; *Papon*, "Notaires," I, 654.

⁵ *Beaumanoir*, 43, 14, 22, 26, 28 (validity of the giving of surety by the widow); "Olim," II, 211 (in 1282); "Gr. Cout. de Fr.," p. 223; "Cout. Not.," 15; *Desmares*, 153.

⁶ II, 29. Cf. I, 97, p. 551. Already the "L. de Jostice," p. 273, forbids women to intercede: *Viollot*, "Et. de Saint Louis," III, 192; cf. *Planio*, "T. A. C., Bret."

mingled together.¹ Although the legal theory may, on principle, accept the Velleianum, it does not succeed in causing it to be practised; renunciations made because of this decree,² which are frequent in the South,³ become very numerous in the North, and become almost the general practice;⁴ but there is no agreement as to their efficaciousness, and especially as to the consequences of their omission. In order to put an end to these difficulties, the Edict of August, 1606, finally repealed the Decree,⁵ and a little later the "Lex Julia," which is naturally connected with the Velleianum, was repealed in its turn by an Edict of 1664.⁶ The

¹ *Boutaric*, I, 97, p. 551 (the woman does not benefit by the Decree of the Senate, unless she gives up the community): "Bretagne, T. A. C.," 68, 320 (she can bind herself on behalf of her father, her mother, her husband or her children): *Dumoulin*, "De Usur.," 162. The Velleianum is not applied if the funds have turned out to benefit the community, a thing which is presumed: *Meynial*, p. 273, n. 5.

² And of the Authentics, "Si qua Mulier" ("Cod. Just.," 4, 29, 22; "Nov.," 134, 8), which pronounced the nullity of intercession on behalf of the husband, whereas there are cases in which intercession on behalf of third parties is valid (confirmation at the end of two years, renunciation by the mother who is a guardian, of the advantages of the Decree of the Senate): *Girard*, p. 779; *Meynial*, "N. R. H.," 1900, 108, and 1901, 241, and especially Art. 3, Sept., 1900; *Gide*, 162, 405; "Et. de Saint Louis," III, p. 215.

³ They date back to the Roman practice: *Dig.*, 16, 1, 32, 4; "Cod. Just.," 5, 35, 2 ("Auth."); "Montpellier," 1204, Art. 38; *Mazure*, "F. de Béarn," p. 297; "Decis. Capellæ Tol.," q. 37, 29; *Lattes*, p. 183 (Italy); "Siete Part.," Table, see "Mulier Fidejubeus."

⁴ "Cartul. de Flines," 35, 40, etc. (thirteenth century); *Meynial*, 275; *Planio*, "T. A. C., Bret.," 501, 473, 301. The "Glose" admits the validity of renunciations. *Contra*: *J. de Ravanis*, *P. de Belleperche*, cited by *Cinus* on the "L. ult. C. ad. Sc. Vell.," *J. Faure*, "Inst.," 4, 7. But the practice after the thirteenth century rejects their opinion. The canon law pronounced itself in favor of this upon condition that the renunciation should be accompanied by an oath (*Dig. X*, 28, 8, twelfth century); *G. Durand* no longer even demands an oath (2, 2, 9, 10). As to the necessity of the "certioratio," cf. *Meynial*. Cf. Italian practice; the renunciation is allowed as a general thing, but not when the woman binds herself on behalf of her husband. The same in Spain: *Gide*, pp. 302, 326; *Meynial*, "In. F."

⁵ And the Authentic, "Si qua Mulier." Following the publication of the "Observ. de la Renonc. au Vel.," by *Lechassier* (reprinted in his "Œuvres," 1649): a snare for those who contract with women when through malice or ignorance the notaries leave out the clause of renunciation. The Edict of Henry IV, drawn up by *Sillery*, who was probably assisted by *Pasquier*, forbade notaries to insert any renunciation of the Velleianum and of the other privileges of women in any contracts drawn by them and ordered that these contracts should have the same effect as though these renunciations had been specified therein: "Néron," II, 722. The Parliaments of the South, those of Rouen and Rennes, refused to register this Edict (*Id. Perpignan, Colmar*). The Ordinances of 1683 and 1704 upheld it in Brittany and Burgundy: *Desjardins*, "Com. le Sénatusconsulte Vel. Disparut" ("R. crit.," 30, 148); *Gide*, 413; *Meynial*, "N. R. H.," 1901, Sept.-Oct. As to the evolution of the German law, cf. *Gide*, p. 274 (bibl.); *Dernburg*, "Pand.," II, 228; *Meynial*, loc. cit.

⁶ Formerly there was very often a confusing of the Velleianum with the "Lex Julia," and by the "Lex Julia" is to be understood the inalienability of the marriage portion, even when made with the consent of the woman, — that

provisions of these two laws were of no effect, however, in the countries of written law¹ and in Normandy;² the Velleianum was always in full force in them; it only disappeared with the publication of Art. 1125 of the Civil Code (Feb. 17, 1804).³

§ 188. **The Same.** — It would have been strange if the question of the capacity of women had not been raised under the **Revolution**.⁴ Condorcet brought it up as early as 1787, in a writing where he maintained that "there is between the two sexes no difference which is not the result of education." This paradox found a vehement adversary in Mirabeau.⁵ Taking their stand on a more practical ground, the Memorials of 1789 were concerned with the abolition of the privileges of men as far as inheritance was concerned; the exclusion of the daughters seemed contrary to natural law; the Revolutionary laws did away with it. The woman was also permitted to be a witness in the civil acts of life,⁶ but she was not given the right of being a guardian, nor that of

is to say, the "Lex Julia" as amended by Justinian. The Edict of April, 1664, repealed the "Lex Julia" in the Lyonnais, Mâconnais, Beaujolais and Forez, district of written law under the Parliament of Paris; it held in the interests of commerce that obligations entered into by women should be validly binding upon the land included in the marriage portion as well as upon the paraphernalia: *Gide*, p. 412.

¹ The "Coutume de Toulouse," "De Débitis," 2, rejected the Velleianum as well as the inalienability of the marriage portion; but in the sixteenth century it was no longer observed: *Catellan*, "Arr.," IV. 49; *Casaveteri*, fo. 27; *Serres*, "Inst.," p. 487 *et seq.*; *Julien*, "Elém. de Jur.," p. 370; *Brillon*, "Dict.," see "Femme," "Velléien"; *Henrys*, IV, 8. As to cases in which the Velleianum does not apply in the South, and as to renunciations of the advantages conferred by the Decree of the Senate (which were valid on condition of "certioratio"), cf. *Ferrière*, see "Velléien," "Renonciation," and authors cited: *Imbert*, "Enchirid.," see "Femme"; *Meynial*, "N. R. H.," 1901, Sept.-Oct.

² As to the application of the Velleianum in Normandy, cf. *Froland*, "Mémoire," 1722; *Colin*, "N. R. H.," 1892, p. 436. The Norman books of Customs, and even the "Coutume de Normandie," are silent upon the subject of the Velleianum, — an obvious proof that this Roman law was only introduced into Normandy through the combined action of doctrine and jurisprudence; the disability caused by the Velleianum was a logical outcome of the Norman law: *Gide*, 397. Also a renunciation of the Decree of the Senate is prohibited in Norman law. An obligation contracted by a woman in violation of the Velleianum is null and void of absolute right. In the South letters of rescission are required: *Froland*, p. 154; *Imbert*, "Enchirid.," see "Femme."

³ *Robert*, "Capacité des Femmes av. et Dep. la L., 17 Niv., an. II," 1813.

⁴ *Sagnac*, 251, 368.

⁵ A writing abolished after his death by Cabanis. *Sylvain Mareschal*, author of "Dict. des Athées," 1880, and of the "Code d'une Société d'Hommes sans Dieu," 1797, in 1801, wrote a "Projet de Loi Portant Défense d'Apprendre à Lire aux Femmes."

⁶ Law of Sept. 20, 1792, 3, 1; *Viолет*, "N. R. H.," 1890, 715. The Law of the 7th Dec., 1897, allowed women to be witnesses to certificates of birth, death and marriage, and to notarial deeds.

taking part in the council of the family.¹ Still more, political rights were refused her.² One is well aware how this last point has raised difficulties in modern legislations.³ On the other hand, the civil equality between the woman (unmarried) and the man is acquired in an absolute manner.⁴

¹ *Idem*, according to the Civil Code.

² Law of June 10, 1793: vote of women as to the partition of rights of commons.

³ "Gr. Encycl.," see "Femme"; *Bridel*, "Mélanges Féministes," 1897; *Ostrogorski*, "Dr. des Femmes," 1894; *Lamy*, "La Femme de Demain," 1901.

⁴ There is no longer any thought of appointing guardians for them; they are left to provide them for themselves. Cf. the "procuratores" of the Roman women: *Cicero*, "Pro Cæcina," V, 14.

TOPIC 14. GUARDIANSHIP AND CUSTODY

§ 189. Guardianship of Minors during the Barbarian Period.	§ 201. In France every Guardianship is Appointive.
§ 190. Suspension of Actions by or against the Minor.	§ 202. Powers of the Guardian.
§ 191. Intervention of the State.	§ 203. Guarantees in the Interest of the Minor.
§ 192. Feudal Law.	§ 204. The Revolutionary Law.
§ 193. Seigniorial Protection.	§ 205. The Question of the Capacity of the Minor.
§ 194. The Lease of Fiefs.	§ 206. The Barbarian Majority.
§ 195. Rights of the Guardian.	§§ 207, 208. Under the Feudal System.
§ 196. Obligations.	§§ 209, 210. Emancipation of Minors under Guardianship.
§ 197. Nobleman's Custody.	§§ 211-214. Persons who have attained Majority and are under a Disability.
§ 198. Plebeian Custody.	
§ 199. Citizen's Custody.	
§ 200. Modern Guardianship.	

§ 189. **Guardianship of Minors during the Barbarian Period.** — Germanic guardianship¹ is nothing more than the "mundium," or domestic power,² in its application to the minor whose father is dead.³ One must be careful not to see therein, as has been done only too often, an institution established in the interest of the minor with the object of saving him from the consequences of his weakness and inexperience.⁴ This is a power and a right which is entirely for the benefit of the family, and, as a consequence, entirely for the profit of the head of the

¹ See especially *Heusler*, §§ 23-27, and §§ 165-171.

² If a collective guardianship exercised by the "Sippe" existed, especially among the Anglo-Saxons (*cf. Schroeder* and authors cited) it was not long before this guardianship passed to the family, the "Sippe" keeping at the most a special right of supervision: *cf. Heusler*, § 130, II, p. 485 (authors cited: *Brunner*, "Z. S. S., G. A.," III, 49; *Amira*, "Erbenfolge," 84, 149, 208; *Gierke*, "Genossenschaftsr.," I, 22, 44; "Erbrecht u. Vicinenrecht," "Z. R. G.," XII, 487). Also: *Ficker*, "Erbenfolge," *passim*; *Amira*, "Recht," § 53 *et seq.*

³ The death of the mother does not alter the paternal power in the least. *Cf.*, however, "Wis.," 4, 2, 13 (second marriage of the father, possibility of a guardianship). — There are even found after this in Germany cases of guardians acting for minors who are under the paternal power (in 1279, 1488); partition; alienation of the child's possessions.

⁴ If the Roman stamp is observable in the laws of the Visigoths, 4, 3, and of the Burgundians, 85 (*cf. Papien*, 36), the Lombard law seems to be an accurate expression of the old Germanic law; from reading the laws of "Liut.," 58, 74, 75, 99, 117, 149, where the question of minors is dealt with, one would say that guardianship had no existence. They find a protection, not in guardianship, but in the principle that the minor shall not be allowed to cause injury to himself through his own acts; his rights lie dormant until his majority. When some act is absolutely necessary application has to be made to his relatives: "Liut.," 75.

latter.¹ Thenceforth, the only guardianship which is recognized is the **proprietary guardianship by agnates**,² that is to say, guardianship conferred by custom upon the nearest male relative, for example, the elder brother.³ It is for the latter the means of protecting his rights, especially with regard to the possessions of the minor; and this power consists in exercising these rights almost as if the minor had no existence.⁴ The agnate sees therein an advantage, and not a duty; he takes possession, if he wishes, without any other formality, of the person and possessions of the minor; but he is free to renounce the guardianship in the same way as an heir has the power to give up the inheritance which accrues to him; ⁵ if he does not exercise it, he does not incur any responsibility.⁶ Over the **person** of the minor he has, on principle, the same

¹ **Maternal Guardianship** was borrowed from the Roman law by the law of the Visigoths, 4, 3, 3; 3, 1, 7, and by the law of the Burgundes, 59, 85) so long as the mother does not marry again, "*nulla ei parentilla præponatur*"), cf. "*Bai.*," 8, 7. In the pure Germanic law the mother who is under guardianship could not have the "*mundium*" over her children. There is no trace of maternal guardianship in the "*Sachsenspiegel*": *Heusler*, II, 452. The "*Beisitz*" of the widow and of her children does not imply a guardianship exercised by her; the widow who lives with her children has their custody, brings them up, administers the common patrimony, and acts with the authorization of her own guardian; but the children have no guardian: "*Sachsensp.*," 3, 76, 1; cf. 1, 23, 3 and 1, 11; *Stobbe*, IV, 435. Among the Scandinavians and the Anglo-Saxons "*Hloth.*," 6, "*Ina.*," 38, the widow has only a right of custody, without any of the effects of the "*mundium*." — Afterwards this power in fact becomes changed into a guardianship at law, when guardianship becomes an institution for the protection of the minor. In Germany she is then given fellow guardians, she is compelled to promise not to remarry and not to invoke the Velleianum Decree of the Senate: *Stobbe*, IV, 434 *et seq.*

² These relatives are guardians by birth; the old Germanic law does not recognize any appointed guardian; the will is unknown in this law, and, as a consequence, there cannot be any testamentary guardian; as to the guardian who is appointed, he does not exist either, because it is not the place of the State to designate the head of the family; the transmission of the "*mundium*" takes place by virtue of the Custom: cf. *Brunner*, § 63.

³ "*Proximus paternæ generationis*," says the "*L. Sax.*," 44; "*Burg.*," 59, 85, 2; "*Wis.*," 4, 3, 3; "*Sachsensp.*," I, 23, 1 and 45, 1; "*Cap. Worm.*," 829, c. 4. The order in which the relatives are summoned is the same for guardianship as for inheritance. Disabilities are the same as with respect to inheritance: women, foreigners, monks, or clericals, people of feeble mind (?). — If there are no relatives on the father's side, then at a rather early period the relatives on the maternal side are called upon: "*Form. Salom.*," 14; "*Schwabensp.*," 59; "*Augsburg.*," 98, 1; *Kraut*, I, 170.

⁴ *Heusler*, II, 453.

⁵ In which case it devolves upon the next degree. But at an early period, if there were no closely related agnate, the guardianship by appointment was resorted to: "*L. Pap. Pipp.*," 5; "*Wis.*," 4, 3, 3; "*Sachsensp.*," I, 42, 2. Subsequently devolution was rejected out of hatred for usufructuary guardianship. — Has the agnate a right to grant the "*mundium*" to a third party? Outside of the quite special case in which he marries his ward (cf. example in *Violet*) this seems to us to be very doubtful. (cf., however, *Kraut*, I, 215; *Stobbe*, IV, 434.

⁶ As there was danger of his negligence compromising the rights of the

rights as the father; the same word, "mundium," is used to designate the paternal authority and the authority of the guardian, from which it follows that they have the same consequences¹ (correction,² consent to marriage, etc.). The possessions of the minor are mingled with those of the guardian. It is a sort of pre-inheritance by which the latter profits. If it is an exaggeration to say, especially with regard to more recent law, that the guardian becomes the owner of the possessions of the minor, because he must restore them, at the same time this formula gives a fairly accurate idea of what his rights are.³ He has the administration and the enjoyment of these possessions;⁴ all the income of the minor, and, as a consequence, every acquisition made with this income, belongs to him; it is sufficient if he restores the property which belongs to the ward at the time of the latter's majority ("Possessions of a minor neither increase nor decrease");⁵ he has a right to alienate movables;⁶ if he cannot dispose of the immovables in such a way that the deed can be opposed to the minor,⁷ it is less with the object of protecting the latter than as a consequence of the rights of the family; he is scarcely more

family, one can readily understand that the agnates were able to bring about his discharge, or, rather, to discharge him themselves. But there is no mention of this in the documents. The "Sachsenspiegel," I, 41, takes for granted the discharge of the faithless guardian ("Balmunt") only as far as the guardianship of women is concerned. Cf. Roman law, *Girard*, p. 215.—The intervention of the relatives according to the barbarian laws only takes place if the minor should marry (and in such a case as this he would ordinarily be released from guardianship) or when it becomes necessary for him to alienate his immovables: "Sax.," 43; "Roth.," 160, 182, 195-7, 207; *Grimm*, 6; "Liut.," 75, 120; *Schoepflin*, "Alsat. Diplom.," 676 (in 858).

¹ "Div. Imper.," 817, c. 16 ("Cap.," éd. Bor., I, 273). Education: *Stobbe*, IV, 448.

² This right was restricted at an early period in the case of the guardian who was punished by losing his guardianship if he inflicted any bad treatment upon his ward: "Burg.," 66; "Roth.," 195, 197; "Liut.," 12, 31, 120; "Wis.," 4, 5, 1; "Schwabenspiegel," I, 190.

³ Cf. Roman guardianship: *Girardin*, "N. R. H.," 1889, 2.

⁴ "Tutela Usufructuaria," "Sachsensp.," I, 11, 23. He does not have to furnish any surety, nor does he have to render any accounts during the guardianship: "Burg.," 85, 2, 3; "Wis.," 4, 3, 3; "Liut.," 149; *Stobbe*, IV, 449, 8; *Huber*, IV, 512; *post*, "Lease of Fiefs." The "L. Wis.," 4, 3, 3, allows the guardian only one-tenth of the income.

⁵ *Chaisemartin*, "Prov.," p. 326.

⁶ The minor could not claim them against third parties (*post*, "System of Movable Property"); it is even doubtful whether the personal responsibility of the guardian could be involved in this manner. Cf., however, to the contrary, "Burg.," 85.

⁷ Excepting in cases of necessary alienation: in order to support the ward in times of want, in order to pay the hereditary debts at a time when immovables could be seized for debts: "Liut.," 149 (authorization by the Judge); "T. A. C., Norm.," 7, 4, 78; *Brunner*, Table, see "Mündel."

free to dispose of his own movables. He has the power to collect claims included in the hereditary estates of the minor; on the other hand, he is held liable for the corresponding debts. The contracts of the minor do not bind him,¹ but he is responsible for the torts of the former, because of his "mundium," even out of his own personal possessions.² Finally, the **guardian does not represent the minor**; he can only act in his own name on behalf of the minor.³ The functions of the guardian do not change when, having attained his majority, the ward continues to live with him and does not claim his inheritance;⁴ it may happen that the ward becomes capable from this time, as in the case of a child under a disability; but the guardian does not cease to have the use of the ward's fortune, and he is not held liable for the obligations which the latter may contract, unless he has taken a part in their formation.

§ 190. **Suspension of Actions by or against the Minor.**⁵ — Under these conditions the capacity of the minor is nil; he has not the right to sue and cannot be sued. The rights which he can have do not come into existence until his majority, and, consequently, every proceeding in which he is an interested party must lie dormant until that time. His guardian does not have to represent him;⁶ he acts in his own name and on his own account. Moreover, representation in court is forbidden on principle; to have attempted it by way of an exception in this case would have been to run the risk of compromising the interests of the minor. These motives, together with the insufficiency of the organization of guardianship, assured the old rule a long duration. But as early as the second dynasty of kings it became necessary to improve it by

¹ "Burg," 87, 1, 2.

² On principle, compositions due by reason of torts of which the minor has been a victim belong to him: "Cap.," 819, 5; "Sachsensp.," II, 65, 1. Cf. *Stobbe*, IV, 453.

³ From which it follows that the minor, having come of age, is not responsible for debts contracted by the guardian. If the guardian has received a composition which was due the minor, the latter, having come of age, is not held bound to keep the peace made by the guardian; he is allowed to carry out vengeance, which places the guardian under the necessity of giving back the composition: *Brunner*, "Z. S. S., G. A.," III, 74, 1; *Honegger*, "Sachsensp.," III, 2, 481.

⁴ *Fribourg* ("Städtrodel"), § 34; "Sachsensp.," I, 42: after the age of twelve years the child can dispense with a guardian, but he may also keep his guardian until he attains the age of twenty-one.

⁵ *Schroeder*, p. 314; *Pollock and Mailland*, II, 440: "the parol demur" ("loquela remanebit"); *Bracton*, fo. 274, 421; *Meslé*, I, 179.

⁶ *Contra*: "Burg," 85; "Wis.," 4, 3, 3: Roman influence. Cf., however, Scandinavian law: *Amira*, "Rech," 157; *Wolf*, "Z. V. R.," 1886, 3, 63.

new touches, to so great an extent did it injure third parties.¹ The Capitulary of 819 allowed the compulsory appearance in court of a child less than twelve years old who had taken the property of another, and his condemnation to pay the composition ("excepto fredo"). The Capitulary of Worms, 829, assumed that those who took the property of another transferred it to minors so as to prevent the owner from making use of his claim, because no one could plead against a minor; it decided that the father or the guardian should be the legal representative of the minor in every litigation, excepting when the "hereditas parentum" was involved; in this there remained in existence the primitive system of suspension of process. Only in the thirteenth century does it begin to be given up; actions for possession are allowed in view of their provisional character.² At last, in 1330, an ordinance abolished the old law; thenceforth, minors could be made parties "in causa proprietaria vel reali"; they had appointed for them a guardian or custodian "in litem," with the assistance of whom they could be sued without postponing the settlement of the case; for it had been noticed that the privilege which they had enjoyed had reacted against them; they ran the risk of losing their rights, because the proofs had perished and in a general way the rendering of justice was found to be impeded by this delay.³ This special guardian finally came to be confused with the ordi-

¹ "L. Rib.," 81. On the texts, cf. *Kraut*, I, 133; II, 114; *Rive*, I, 200; *Waitz*, "V. G.," III², 281; *Amira*, "K. V. J.," 1875, 430; *Brunner*, "Z. V. R.," I, 333; "Liut.," 78; "Quæst. et Mon.," 27; "T. A. C., Norm.," 6: the minor cannot "probare seu defendere sua manu." Cf. 7, 3; 74; *Beaumanoir*, III, 18; XVII, 7; "Anjou," 95; *Marnier*, "Et. de Norm.," p. 8; *Chantereau-Lefèvre*, "Tr. des Fiefs," p. 48 et seq.; *Viолlet*, "Et. de Saint Louis," III, 206; "Ord. de Jean II," 36; cf. *Planiol*, "T. A. C., Bret.," p. 469.

² "T. A. C., Norm.," 74, 78; *P. de Fontaines*, 14, 2 et seq.; *Beaumanoir*, XVI, 1; "Et. de Saint Louis," I, 78; "Olim," II, 240; "Styl. Parl.," 17, 2; "Gr. C. de Fr.," II, "Des Mineurs"; *Boutaric*, I, 93; *Loysel*, 187; *Ragueau*, see "Loi Outrée"; "Summa Norm.," 42. Cf. Principle according to which ordinary prescriptions do not run against minors: "Fors de Béarn," p. 193 (40 years). Neither prescription nor usucaption run against a minor: *Boutaric*, I, 92, p. 521.

³ "Ord.," II, 63; *Isambert*, IV, 385; *Loysel*, 187; *Beaumanoir*, XVI, 3; "Const. du Châtelet," 2. — The Ordinance of 1330 mentions a particular fact which had drawn the attention of the "gentes parlamenti" to the disadvantages which resulted from the excessive prolongation of lawsuits (loss of titles, death of witnesses). Formerly this rule had fewer disadvantages because minority ended at the age of 12. As to the precedents for the Ordinance of 1330, cf. "Jost.," p. 131. As to the application of the Ordinance of 1330, cf. "Gr. C. de Fr.," II, 32, p. 378: there is found one action in the year 17, that is to say, 1317; but cf. pp. 370, 387, "T. A. C., Bret.," 76. The Addenda of *Aufreri* to the "Stil. Parl.," 17, established this change: *Boutaric*, I, 93, p. 527 (ed. 1603), however, still reports the old rule. — In England, the "Demurrer of the Parol" was only abolished in 1830.

nary guardian whose rôle consisted formerly in representing the minor.¹

§ 191. **Intervention of the State.** — Such a state of things assures guardians for rich minors; poor ones will often lack them. It would not be a rare thing to see minors forsaken by their relatives; it might also happen that there were no male descendants. One resource was left to these poor creatures; it was to place themselves under the “mundium” of the king.² With the second dynasty of kings one sees the king establish himself as the defender of the widow and the orphan; perhaps one might even be justified in saying that, on principle, the royal “mundium” extends over them as over strangers, without their having to ask for it, so much so that he gives them guardians chosen by himself or by his judges, and chosen, naturally enough, from among the maternal relatives.³ But this is an exceptional case; the organization of the protection of the minor is still rudimentary; the State limits itself to punishing those who abuse this weakness of his. It does not exercise any control over lawful guardians.⁴

§ 192. **Feudal Law.**⁵ — The proprietary guardianship of barba-

¹ *Heusler*, II, 502, shows how German practice remedied the disadvantages of the rule which held the rights of minors in suspension; in case of alienation of the lands of a minor or lands belonging to his relatives, for which his consent was required, security was given to the grantee in view of the supposition that the minor might plead his rights (ex. 1259, 1293, 1302, “amici recognoverunt esse proficua”). From the beginning of the fourteenth century the guardian acted in the name of the child; at Magdeburg he can dispose of his acquiesces; for personal belongings he has to have the consent of his relatives. In the same way the guardian is allowed to contract debts in the name of the minor; formerly there was no need for him to do this because he had to support the minor out of his own personal belongings; when he lost a right to the issues he had to have some resources. Such rights as these conferred upon a guardian led to the establishment of a system of controlling tutelary administration (reinvestment of immovables which were alienated, annual accounts).

² “Cap. Langob.,” 782, 5; 802, 5; 801-813; 810, 20; 801, 813, c. 2, etc. (I, 192; 93; 157; 171). These texts merely lay down a principle without elaborating it: “Sachsensp.,” I, 4; “Magdeb. R.,” 60; cf. “Rib.,” 81; “Roth.,” 204; “Liut.,” 19, 74, 75, 149; “T. A. C., Norm.,” 3. Already the laws of the Lower Empire contained protective provisions for widows and orphans.

³ *Heusler*, II, 483, denies the existence of the high guardianship (“Obervormundschaft”) of the king, which was rather generally admitted: cf. *Kraut*, I, 64, etc.

⁴ The action of the State was not felt for a long time. Thus in Switzerland the complaint of the minor against the guardian became possible only in the thirteenth century, and then, again, only in towns; a supervision of the guardian by the public authorities only dates from the sixteenth century: *Huber*, IV, 515. In Germany there are town statutes relating to guardianship and the control exercised by the Council of the Town, etc.: Breslau, 1339; “Ord.,” 1548, 1577; Colleges of Wards, Nuremberg, 1399, etc.

⁵ Cf. especially *D'Arbois de Jubainville*, *op. and loc. cit.* There is scarcely any subject with regard to which the interference of opposed lines of thought

rian times had not disappeared at the time of the feudal period; it was applied to fiefs under the name of *lease*; at the same time, *guardianship by appointment*, which was scarcely known, became organized, thanks to the king and the Lords-Justices, who continued the work of the Frankish princes and developed it more and more with the assistance of Roman precedents.¹ This double system became complicated by the addition of *seigniorial protection*, that is to say, by the taking back of the fief by the lord who had granted it, because the minor could not render him feudal services.² This was a conflict between the interest of the lord, that of the family, and that of the minor, which was often settled in a very simple manner by *plurality of guardianships*; ³ the minor had as many guardians as he had kinds of property, which was possible because the first concern was not the protection of the minor. As progress was made towards this idea, it became necessary to urge the opposite principle of unity of guardianship. The lord was the first to lose his rights, because the history of the fief can be summed up, as we have seen, in the continuous dispossession of the lord by the vassal; the prerogatives of the family stood their ground longer; but during the monarchic period an almost complete revolution had taken place in favor of the minor, realizing Beaumanoir's formula, 13, 12: "By common law, the lord (we would say the State) is bound to protect the rights of all those who are under age."⁴

§ 193. **Seigniorial Protection** ⁵ was less a guardianship than a and inaccuracy of terminology in documents have created more difficulties for the legal historian.

¹ *Beaumanoir*, XVI, 2: "In the common law everybody under age is in the custody of the lord within whose jurisdiction he may be." From whence it follows that the lord should appoint a guardian for anybody who has not a legal guardian, and, if he should not find any, he should himself serve as guardian: *P. de Fontaines*, 14, 6, 18. This finally became the only form of custody through assuming the form of Roman guardianship. Cf. *Pollock and Maitland*, II, 443.

² Normandy, Brittany. Elsewhere seigniorial custody is subsidiary to the lease and is not clearly distinguished from conferred custody or guardianship instituted by the lord justice.

³ *Stobbe*, IV, 441.

⁴ "Cap.," 802, 5; 805, 24; 806, 3; *P. de Fontaines*, 14, 18; "Jost.," p. 68; "L. d. Droiz," 921.

⁵ *Du Cange*, see "Custodia," "Custos"; *Ragueau*, see "Garde Noble Royale"; *Beaumanoir*, 16 (banns and custodies). Norman books of Customs ("Summa," 31, "Gr. C.," 33), and English authors; *Blackstone*, *Pollock and Maitland*, I, 299. *De Fort*, "Garde Noble Royale en Norm.," 1691; *D'Arbois de Jubainville*, p. 420; "Bret., T. A. C.," 230; "N. C.," 78 ("assise" of buying back, 1276); *D'Argentré* on this art.; *Planhol*, p. 470. — The "Libri Feudales" do not mention seigniorial custody. — As to "Anevelle" and the survivals of it in German law, cf. *Stobbe*, § 119, IV, texts and bibl.; "Auctor

taking back of the fief by the lord, a taking back which was at first absolute, and then temporary (*cf.* feudal confiscation and seizure), because the minor vassal was incapable of rendering the feudal services (for want of men). It was connected with the personal custody of the minor and the "custodia orphani" (Normandy): the wards had to be brought up "in bonis domibus"; they would be devoted to the lord with whom their youth had been passed, and the latter would treat them as his own sons.¹ In the sixteenth century these feudal ideas were forgotten; the lord had only the custody of his vassal as an exception ("Normandie," 217). This custody, outside of rights over the person of the minor,² assured him,³ perhaps for many years, the revenues of the fief;⁴ and in this way it was not without danger for the minor and the family; they had always to take care lest this use should be the forerunner of an absolute despoliation, at which unscrupulous lords would not hesitate if the occasion were presented them, although it might be illegal.⁵ For the lord himself the custody was

Vetus," I, 67; "Schwabenspiegel," II, 47, 101. — There has been a desire, which seems to us erroneous, to connect the seigniorial custody or lease with the avowery of the churches. Still less is it derived from the royal "mundium" which would have passed to the lords, for this "mundium" is exercised only if there are no relatives, whereas the seigniorial custody excludes the rights of relatives.

¹ "T. A. C., Norm.," 11: justification, under the form of a dialogue of the preference given to the lord over the mother and collaterals: "N. C.," 213; *Glanville*, 7, 9. Case in which the vassal has several lords; the custody of the person belongs to the liege lord, that of each fief to the lord granting it: in Normandy the duke, when he has the custody "ratione ducatus," takes all the fiefs and escheats of the minor: "Summa," 31, 6. Privileged Custody of the King: *Pollock and Maitland*, I, 302; *Bracton*, fo. 87; "Charter of 1215," c. 37, 43.

² Marriage of daughters (consent of relatives): "Summa," 31; "A. C., Picardie," ed. *Marnier*, p. 6, 58; "Ord.," 1246, 2; "Const. Sic.," 3, 23, 1; *Ph. de Navarre*, 86; *Laboulaye*, "Cond. d. Femmes," p. 256; *Pollock and Maitland*, I, 300 (marriage of sons); *Bracton*, fo. 89: "vendere maritagium."

³ *Loyse*, 4, 3, 24. The lucrative character comes out strongly in the power of transmitting the custody to testamentary executors (*Littleton*, § 123), of conferring it upon some one (*Glanville*, 7, 10), and of selling it at auction ("Ord." of 1309, I, 460).

⁴ He also acquires the movables. *Cf.* acquisition of movables in case of the custody of churches, prerogative (see "jus spoli"). He should neither decrease the value of nor sell the immovables: *Glanville*, 7, 9; *Britton*, 66; "Gr. C., Norm.," 33. — *Cf.* as to German law: *Stobbe*, II, 432 ("Anevelle" or "proventus honorum" conferred upon the lord who may either keep it himself or confer it upon a third party): IV, 450 ("Anerbe" and "Bauergut"). — The "T. A. C., Norm.," 11, 3, however, says: "exitus terre ponent in propectum parvulorum." *Cf.* "Anjou," "Maine": delay of minority (enjoyment of two-thirds by the lord).

⁵ Richard de Normandie maltreated by Louis d'Outre-Mer: "Hist. Franc.," IX, 52; *Martine*, "Ampl. Coll.," I, 621; *Brussel*, I, 313; "Glose" on "T. A. C., Norm.," 11; "Summa," 31, 16.

not always without its inconveniences, because it carried with it obligations;¹ the loss of the right of relief² and the seizure of several fiefs could be a source of embarrassment for the lord. It was for this reason, and because of the general reasons given above, that seigniorial protection disappeared, excepting in Normandy;³ the lord had to authorize the minor vassal.⁴ It was finally abolished the 6th of March, 1790 (Decree of March 15 to 28, 1790, I, 12).⁵

§ 194. **The Lease of Fiefs**⁶ almost everywhere did away with seigniorial protection.⁷ The proprietary guardianship of former

¹ (A) *To support and bring up the children.* At least, if they have no other possessions: "Norm.," 218, 219; *Beaumanoir*, 15, 19; cf. 21, 14; "Gr. Cout.," 2, 29. The lord justice who has the custody of minors who have no fortune is not held bound to support them. — (B) *To pay debts.* Upon taking the movables they should have paid all the debts. In Normandy and in England the lord only paid debts which came due during his custodianship and up to the amount of his emolument: *Glanville*, 7, 9; "Norm.," 215. In other countries where the custody was subsidiary and scarcely ever existed excepting in the case of a poor inheritance, the lord escaped the payment of debts by not taking the movables: *Beaumanoir*, 15, 13. For their part the creditors could neither have the issues sold nor take possession of the fief.

² "Summa," 31, 12. Thus the changing of the lease into a buying back in Brittany is to be accounted for: *Meslé*, II, 77.

³ In Normandy the king puts up for sale the lease or guardianship among the relatives of the minor. After the sixteenth century he makes a gift of the lease to the guardian or to the near relatives for a nominal price.

⁴ "A. C.," 28; *Boutaric*, II, 29.

⁵ England: abolished under Charles II.

⁶ See: "Fiefs," "Feudal Rights"; see *Ragueau*, *Du Cange*; see "Bajulus," "Ballum," "Usat.," "Barchin.," 103: "tutores vel bujuli respondeant, si voluerint, pro pupillis." Under the Lower Empire "bajulare" means to carry a child, in speaking of a nurse. From this is derived the meaning of "to keep" or "to govern": *Viолет*, p. 536, cites *Tardif*, "Mon. Hist.," p. 34: "boves quos, bajolat." As to the use of this word in Italy: *Pertile*, III, 466 (eighth century). "Bail" is applied rather to possessions, "garde" to the person; but the meaning of these two words is not very well fixed. One will notice that "bail" and "garde" mean the function and the person who exercises it at one and the same time; but the person is also called the "baillistre," the "gardien." *Loysel*, 176: "bail, garde, mainbour, gouverneur, légitime, administrateur et regentant sont quasi tout un"; 178, "Le mari est bail de sa femme." Numerous texts, cf. especially: *J. d'Idelin*, 170 et seq., 243; *Ph. de Navarre*, 22; *Beaumanoir*, c. 15 et seq., 21; "Justice," pp. 58, 221; "Et. de Saint Louis," ed. *Viолет*, II, 219 and 398 (see Table); *P. de Fontaines*, c. 14, "Artois," 29 et seq.; "Gr. C. de Fr.," II, 41, 42 (p. 373 et seq.); "L. d. Droiz," see Table; *Boutaric*, I, 93; "Vermand," no. 320; *Loysel*, I, 4. — This feudal institution exists in Germany and Italy. — *Beugnot* in his ed. of *Beaumanoir*, I, 244 (texts); *Britton*, 66; *J. d'Idelin*, 170 (*Beugnot's* note); *Chassaneus*, on "Burg.," p. 852; *Meslé*, II, 74; *Cauwès*, "Gr. Encycl.," see "Bail," "R. h. Dr.," XIV, 538.

⁷ At what date? At a very early period, no doubt. During the thirteenth century custodianship is already the exception: "Bret., A. C.," 78. Changing of the lease into buying back (1276); whatever age the heirs may be, the lord will demand a buying back and will not seize the fief: *Beaumanoir*, 15, 13, 19. If there is no guardian ("baillistre"), the lord holds the fief for lack of a man to represent it until the coming of age of the vassal: *Pothier*, "Introd. au

times, whose obsolete character had persisted for peculiar reasons, due to the nature of the fief,¹ was known by this new name; the feudal service demanding that the guardian should risk his life, he was allowed, as a compensation for the dangers which he ran, the old advantages, which it was far more difficult to justify in the case of lands held in villeinage.

To Whom did the Lease belong? — The lease was conferred by the Custom because "protection and custody are customary,"² whereas, guardianships were granted. It belonged to the nearest relative on the side from whence the fief came, that is to say, to the heir presumptive to the fief, provided that he was able to officiate.³ It was ordinarily a collateral, and not an ascendant, for "feuda non ascendunt";⁴ at the same time the lease was also granted in exceptional cases to the father or the mother.⁵

T. des Fiefs, C. d'Orléans," X, 315; *Laurière*, on *Loysel*: the lord began by entrusting the fief to the one of the relatives who seemed to him to be the most likely to render the feudal services: cf. "Assise Geffroi," Art. 3.

¹ Tendency for the lease to be changed into a guardianship in the interests of the minor: "Artois," 29, 8: the lease is granted at law, security and pledges are assured the minor, etc. (according to the written laws): "L. d. Droiz," 420, 768; "Const. Sic.," III, 30: the person having the lease is obliged to render an account.

² *Loysel*, 185. Cf. "L. d. Droiz," no. 420; *Boutaric*, I, 93, p. 526: he who has a right to the lease claims it at law; p. 528. He gives it up in the court of the lord; in both cases the procedure is by the "rain et baston," as in the case of a conveyance.

³ That is to say, he has attained his majority (cf. "Lorris," 48, 63; "L. d. Droiz," no. 876; "Paris," 270); *Beaumanoir*, 15, 2; *J. d'Idelin*, c. 177, 172, compels the woman who has a lease to marry. — "Gr. Cout.," 2, 41, 29; "Artois," 157. The second marriage carries with it the loss of the lease by the mother, but not by the father, according to several Customs: "Tour.," 339; "Blois," 2, 9, etc. Finally, *Loysel*, 197, says, speaking generally, that lease or custody is lost when the keeper remarries: "Ord.," 1246 ("Maine").

⁴ "Jost.," p. 221; *Beaumanoir*, 15, 2, 14 (sister); 16, 14 (brothers); *Desmares*, 256; "Gr. C. de Fr.," 2, 27, 28, 29 (grandparents), 41; "Cout. Not.," 25; "Et. de Saint Louis," I, 17; "Anjou," 89; "Maine," 202 *Boutaric*, I, 93; *Ragueau*, see "Bail." Same order as in matters of inheritance, primogeniture, preference of males: *D'Arbois*, III, 139; *Loysel*, 188; "A. C., Vermandois," no. 285; "A. C., Artois," 19, 5; *Beaumanoir*, 15, 7, 10. See the "Confér. de Coutumes" ("Berroyer," "Guénois").

⁵ *J. d'Idelin*, 170: The father and mother who have the lease of their child also have the custody of him, "because tenure of the fief cannot descend to him." *Beaumanoir*, 15, 9, gives the custody of the fief to the surviving spouse: cf. 21, 9; but this custody ceases when one of the children, having attained majority, asks for partition and takes upon himself the lease of the younger children: among commoners there is equality and no custody; this is the case where the law, at the request of the relatives, removes the custody from the survivor in the interest of minors. In case of second marriage, buying back by the stepfather, according to *Beaumanoir*, 21, 15; *Loysel*, 197, "Lease or custody is lost through misuse or when the keeper remarries": "Paris, N. C.," 268; "Artois," 157. Sometimes there is a distinction between the widower and the widow: "Tour.," 339; "Melun," 285; "Bourg. A. C.," 106: eldest son to the exclusion of the father or mother.

When the minor had paternal and maternal fiefs at the same time he had two guardians.¹ As the guardian in his quality of heir presumptive had an interest in getting rid of the minor, in order to take possession of his property himself, the custody of the person of the minor and his education were confided to a relative who had no claim upon his inheritance (ascendant, maternal relative): "he should not have the custody of the fleece who has that of the parchment."² For the relative who obtains it, the lease is like an anticipated inheritance;³ his interest being especially brought into play, he is free to give it up: "he who does not wish to does not accept lease or custody."⁴

§ 195. **Rights of the Guardian.** — During the time the lease lasted the guardian had the rights of an owner.⁵ He took the title belonging to the fief, received the homage of the vassals, could demand of them the feudal services, exercised the rights of use appertaining to the fief (for example, confiscation with the power of conferring a favor in its restitution);⁶ he was reputed to be the vassal with respect to the over-lord, and reputed to be the lord with respect to the vassals of the minor.⁷ He collected for his own benefit all the issues and income from the fief.⁸ All the movables were

¹ *Beaumanoir*, 15, 5.

² This modification in the Customs of the system of the "mundium" seems to be very old. It is expressed in the formula, "The custody goes to the ascendants, the lease to collaterals": *Ragueau*, see "Garde," "Gardien"; *Ph. de Navarre*, 20, 22; *J. d'Idelin*, c. 168, 169 (fear lest greed should tempt the guardian to defraud his ward): *Beaumanoir*, 6, 8; 15, 10; 21, 4; "Et. de Saint Louis," I, 117; "A. C., Artois," 29, 4; "L. d. Droiz," no. 466; *Loysel*, 176 (cites de Fortescue). The dividing up of guardianship is found in the old public law, less, perhaps, with a view of preventing usurpation on the part of a regent than because it is difficult for the latter to be occupied at one and the same time with the education of the king who is a minor and with the government of the kingdom; cf. the will of Louis XIV confiding the regency to the Duke of Orléans and the custody of the king to the Duke of Maine; *Viollet*, p. 540, 4; "Const.," Sept. 3-14, 1791, 2, 1; Law on Regency of Aug. 30-31, 1842.

³ With this difference, that the lease cannot be divided up: *Beaumanoir*, 15, 21; "Jostice," p. 221; "Ass. de Jérus.," "Clef. des Ass.," 259. Cf., however, "Blois," 4.

⁴ *Loysel*, 179; *Beaumanoir*, 15, 3, 4; "Olim" II, 240 (in 1284). But it is no more possible for the guardian to deprive his family by will or sale than it would be for him to take away from it a personal belonging: *Loysel*, 196, "Lease or custody cannot be transferred to another." *Beaulemps-Beaupré*, IV, 169. (cf., however, "Norm.," 215. The advantages, issues and revenues could obviously be granted.

⁵ Only over fiefs, and not over manors which might belong to a minor; he was not even allowed the use of the latter: *Beaumanoir*, 15, 6.

⁶ *Martène*, "Ampl. Coll.," I, 1239; *Ragueau*, see "Bail"; *Boutillier*, I, 93; II, 15; *Brussel*, I, 29; *Loysel*, 191 (buying back).

⁷ However, "the guardian neither of property nor of person can receive tenures or lease them": *Loysel*, 195, 647, 648; *Beaumanoir*, 45, 39; "Paris," 43.

⁸ "Jostice," pp. 58, 221; "Gr. Cout.," II, 28 (which here contrasts the

acquired by him as absolute owner.¹ On the other hand, he did not have the right to dispose of the immovables, and in a general way he was not permitted to do any act which might later on prevent the minor from taking back his fief and enjoying the benefits of it.² Bad administration on the part of the guardian³ laid him open from the thirteenth century to having surety demanded from him,⁴ or even to losing the lease:⁵ "lease or custody may be lost by abuse,"⁶ it was said in the sixteenth century, contrary to the old law.

§ 196. **Obligations.**—In return for the advantages which he obtained from the fief the guardian was held bound under heavy obligations: 1st. To render fealty and homage,⁷ to pay ransom⁸ and render all the feudal services at his own expense.⁹ 2d. To provide for all the expenses of the child.¹⁰ 3d. Finally, to pay the debts of the deceased,¹¹ whether or not they were greater than the per-

guardian of countries of written law with the Customary lease). "Et. de Saint Louis," I, 17; *Beaumanoir*, 15, 27 (letting without fraud); "Vermand., A. C.," 280; "Lorris," 37.—Acquiring by the minor: cf. *Beaumanoir*, 14, 30; "Sachsensp.," I, 23, 2.

¹ *Beaumanoir*, 15, 10; *P. de Fontaines*, 15, 40; "Gr. Cout.," II, 27; II, 41; I 29; "Cout. Not.," 25; *Boutillier*, I, 93; *Brussel*, I, 218. This right over movables was taken away from him little by little: *D'Arbois de Jubainville*, 1851, p. 162.

² *P. de Fontaines*, 14, 9; *Beaumanoir*, 15, 8, 28. The binding (mortgage) of the fief is valid only during the time of the lease: *Ib.*, 15, 15; 28, 6. Dis-tainment upon the fief because of a tort of the guardian was effective only during the lease: *Ib.*, 14, 17.—The forfeiture of the guardian did not carry with it confiscation to the detriment of the minor: *Ib.*, 15, 9.—The guardian has no right to make a new tenure or to unmake one already existing, because the vassal who wrongfully withdraws from his tenure forfeits his fief: *Ib.*, 45, 39; *Loysel*, I, 4, 20.

³ Obligation to keep the land "in bono statu": "Et. de Saint Louis," I, 17; "Justice," p. 58; "Gr. Cout.," II, 29; *Beaumanoir*, 15, 11 and 12.

⁴ *Beaumanoir*, 15, 12. Cf. "Amiens," 131, which gives the ward only a right to an indemnity.

⁵ "Et. de Saint Louis," I, 27; "Marche," 75; "Melun," 292.

⁶ *Loysel*, 197: or when the custodian remarries: and it is terminated by the coming of age or death of the minor.

⁷ "Ass. de Jér.," "Geoff. le Tort," 18; *Beaumanoir*, 14, 17; 15, 3; *Boutaric*, I, 93; "Gr. Cout.," II, 29; "Justice," p. 254; *La Thaumassière*, "Cout. de Berry," p. 344.

⁸ *Beaumanoir*, 15, 3, 8 (security for the payment); "Gr. Cout.," II, 32; II, 29. Cf. *D'Arbois*, 1851, 141; "Ord.," 1246. But the buying back cannot take place in the direct line: *Beaumanoir*, 15, 10; "Jost.," p. 243; "Gr. Cout.," II, 27, p. 291; *Desmares*, 194, 206; *Loysel*, 191 et seq., 195, 199. If the mother enters into a second marriage the stepfather may buy back. The guardian does not enter into the transaction and does not pay for the buying back.

⁹ *Marnier*, "A. C. de Picardie," p. 7.

¹⁰ *Ph. de Navarre*, 20; *J. d'Idelin*, 170; "Et. de Saint Louis," I, 121; *Beaumanoir*, 15, 6; 21, 12; "Anjou," 89 (fixed amount). Generally estimation by the judge. Cf. "Wis.," 4, 3, 3.

¹¹ The liabilities go with the movable assets. Cf. "Inheritance," "Olim,"

sonal assets received; legacies, which were originally exclusively in personal property, were charged, as were debts of personal property, to the heir of the personalty, and, as a consequence, to the guardian: ¹ "he who takes a lease, gives it up free from debt." ²

The lease ceases on principle at the majority of the vassal: ³ but it depends upon him whether he will prolong it indefinitely by not asking for the restitution of his possessions, and provided that the guardian does not compel him to take them back. ⁴

§ 197. **Nobleman's Custody.** — In time, the feudal obligations having disappeared in the same way as military service, the lease held by collaterals had no longer any reason for existing. It was done away with in many Customs, for example, in the Custom of Paris, ⁵ and the only corresponding institution which one finds during the monarchic period is the *nobleman's custody*, ordinarily conferred on the ascendants alone, or even only on the father and mother. The *nobleman's custody* was only the old lease preserved for the benefit of this class of relatives, ⁶ who had always enjoyed the custody of the person, deprived of many of its effects, ⁷ and which had become a privilege of nobility. ⁸ Acceptance, which was

II, 95, 240; *Beaumanoir*, 15, 3, 4, 10, 16; "Jostice," p. 221; "Artois," 29; "Jost," pp. 58, 221; "A. C., Verm.," 280; "Ord.," 1246; "Gr. Cout.," II, 41; *Desmares*, 185; "Cout. Not.," 25, 28, 100; *Boutaric*, I, 93. — The creditor could proceed against the minor who had come of age only if the guardian were insolvent or absent, or if he himself were absent, or, again, if the debt came due after the expiration of the lease: *Beaumanoir*, 15, 16 to 26.

¹ *Beaumanoir*, 15, 10; "A. C. de Picardie," p. 7. Cf. *Boutaric*, I, 93.

² *Loysel*, 186; *Beaumanoir*, 36, 14, 16; 15 (I, 244, ed. B); "Gr. Cout.," II, 41.

³ Other methods: *Loysel*, 197.

⁴ *Beaumanoir*, 15, 14: implied prolongation (without fraud to the rights of the lord).

⁵ *Ferrière* on "Paris," vol. 12; *Guyot*, see "Garde"; *Renusson*, "Tr. de la Garde," 1743; *Mestlé*, II, 74. Cf. *Stobbe*, § 119, IV.

⁶ Abandonment of the rule, "Fiefs do not ascend": *post*, "Disabilities"; *Loysel*, 184, "Forfeiture"; "Paris," 286. Elimination by contract of marriage: *Pothier*, no. 45, etc.

⁷ Thus, at least in Paris, he does not render fealty and homage, for the minor is given some toleration; he does not pay for the buying back: "A. C.," 32; "N. C.," 46. Exemption from registration fees, laws of Sept. 20 and Oct. 9, 1791. Whereas the guardian of the property is a true vassal, the nobleman guardian is merely a usufructuary who is obliged to use the property as a good father of the family, no longer gaining the movables and losing his rights because of misuse.

⁸ *Contra*, *Beaumanoir*, 15, 23: lease of commoners who had a fief. Conversely, custody of the copyhold which belongs to a minor who is a noble: *Ib.*, 21, 10. It is the kind of property which must be taken into consideration, and not the rank of the person. — Cf. "Gr. Cout.," II, 41; *Pothier*, no. 31: the Customs confer nobleman's custody only upon nobles and over nobles. Thus at this time the lease no longer depends upon the kind of property, but upon the rank of persons. It is no longer regulated according to the special capacity required for the service of the fief. Thenceforward nobleman's custody

still *optional*, for those who had the right to it, was made in court.¹ The characteristic which chiefly made *nobleman's custody* similar to the lease was that it involved a right of enjoyment, but it was less extensive; it only affected the inheritance of the predeceased father or mother;² the possessions given or bequeathed to the minor, those which had accrued to him by way of inheritance from ascendants or collaterals, were not subject to this usufruct; they were administered by a guardian who did not have the profits, and who was, perhaps, moreover, the nobleman custodian himself. As to the increase in movables, the Court of Paris did not grant it to the custodian, and, as a consequence, it compelled him to make an inventory,³ without going so far as to demand surety.⁴ His obligations consisted in providing for the support of the minor, in administering the property, and in discharging the debts;⁵ this last, which it is rather hard to justify in the case where the custodian had no more personal property, was looked upon as the compensation for the advantage of having the increase of the income. A tendency to restrict the obligation of the guardian, as far as this matter is concerned, is noticeable in the jurisprudence, and several of the Customs did not look upon it as being held "ultra vires"; in Paris and Orléans the nobleman's guardianship was looked upon as a sort of contract, under which the custodian ran the risk of losing or winning: he was compelled to liquidate all the charges, even over and above the amount of his emolument. Differing in this way from the guardian, the custodian did not represent the minor; he acted "*proprio nomine*," because of

affects all the property of the minor: "Paris," 267. Cf. *Boutaric*, I, 93, pp. 526, 528. See "Indivisibility of the Lease." — The expression, "Nobleman's custody" had at first nothing technical about it.

¹ "Paris," 269, and Commentaries. *Contra*, "Orléans," 23; acquiring of absolute right excepting for renunciation. — Renunciation is looked upon by our old juriconsults as being disadvantageous.

² "Tours," "Loudun," *Pothier, Renusson*, etc. General usage, cf. "Nov.," 118, 2. *Contra*, "Anjou," "Maine," *Péronne, Dumoulin, Bacquet, De Laurière*, "Paris, A. C.," 99 and 100, "N. C.," 267, 270, 46.

³ "Movables do not come under guardianship": for example, the "Cout. de Berry," which, however, gives the movables to the custodian. Sanction: *Dumoulin*, on "Bourb.," 147; "Paris," 240. Proof by means of general reputation.

⁴ *Contra*: *Beaumanoir*, 15, 31; 21, 18; "A. C., Picardie," p. 6; *Boutaric*, I, 93; Order of 1309 ("Olim"). Acceptance at law implies a general mortgage.

⁵ *Pothier*, no. 86; Civil Code, 385, 3 and 4. Thus, differing from what took place in the case of a lease, the minor was not released as far as his creditors were concerned; the latter could pursue him, but the custodian had to indemnify him: "Paris," 267; *Renusson*, c. 7; *Fr. Duranton*, "R. h. Dr.," 1858, 47.

his own right; furthermore, he could not plead ownership of the property, because he only had the enjoyment.¹

§ 198. **Plebeian Custody**, which we call *plebeian*,² in order to distinguish it from nobleman's custody and citizen's custody, was applied to property which did not belong to noblemen:³ "in vil-
leinage, common or plebeian land is not leased."⁴ And the prin-
cipal difference between the lease and the custody was that the
latter did not carry with it the use of the property; as the copy-
holder had only to pay a quit-rent in money, and not to risk his
life, as did the vassal, there was no reason to grant him so great
an advantage. At an early period, no doubt, plebeian custody
had lost the usufructuary character of the old guardianship.⁵
When the lease became changed into nobleman's custody, plebeian
custody was conferred less by reason of the nature of the property
than of the grade of the persons; it had to do with plebeians over
plebeians. The nearest relative of the minor⁶ took the custody
of his person⁷ and administered his goods;⁸ he did not have the
use of them,⁹ had no right to movables nor credits, must set aside
the issues and income, did not pay the debts, and was held to ac-
count for the property and had to give surety.¹⁰ Plebeian custody

¹ *Pothier*, no. 73; "Paris, N. C.," 270. A guardian or a custodian is named for the lawsuits of the minor. Costs: the guardian advances them accord-
ing to the custom of the Châtelet. Civil Code, 613.

² Cf. *Beaumanoir*, c. 15, 16, 21; "A. C., Verm.," 289; *Glasson*, VII, 198; "Garde Simple"; *Pollock and Maitland*, I, 302: "Guardianship in Socage"; *Glanville*, 7, 9; *Bracton*, fo. 86.

³ Belonging to noblemen or persons who were not noblemen: *Beaumanoir*, 15, 4; Naples adage: "baillius in feudis, tutor in burgensaticis."

⁴ *Loysel*, 189; *Beaumanoir*, 15, 7, 23; "Et. de Saint Louis," II, 18; "Gr. Cout.," II, "De Garde." — If the survivor of the spouses and the minor lived together: *Beaumanoir*, 15, 10 (continuation of the community), which is only possible among commoners, there can be no question of custody: *Ibid.*, 21, 9, 10, 23; 15, 7. — *Mestlé*, II, 115. — In German law cf. "Interimswirthschaft" of the "Bauerngüter," *Stobbe*, § 135.

⁵ Cf. the "sponderagium" of the Custom of Toulouse (from "spondere"). The "spondarius" or testamentary guardian does not make any inventory, does not furnish any surety, is believed upon his own oath on the subject of the administration of the guardianship, can sell the property of the minor after having advertised the fact three times. Reforms of the "Arrestum Sane," written at the end of the manuscript of the "Coutume de Toulouse," ed. *Tardif*, *Pollock and Maitland*, 303: the Provisions of Merton compel the guardian to render an account.

⁶ Whether paternal or maternal, whether the property comes from the father or the mother: *Beaumanoir*, 15, 32 (case of exclusion); 16, 16, 17. Cf. 21, 18.

⁷ Torts of the minor: *Beaumanoir*, 21, 20, 21.

⁸ *Beaumanoir*, 15, 12, 7, 10.

⁹ *Id.*, 14, 30; 21, 14; 15, 6.

¹⁰ *Id.*, 15, 5, 7, 12: to the relatives, or to the lord justice if the relatives do not demand it; cf. 21, 18; *Boularic*, I, 93.

was similar, however, to the lease in that, like the latter, it was not compulsory;¹ Pothier maintains, however, that the Customs vary, and that there was a tendency to compel the acceptance of the custody. In every other respect this institution was scarcely more than a proprietary guardianship under a Customary name. It terminated, as did nobleman's custody, by reason of majority or marriage,² abuse of its enjoyment,³ or the second marriage of the surviving spouse.⁴

§ 199. **Citizen's Custody**,⁵ a remarkable survival of usufructuary guardianship, the origin of which our old authors mistakenly attributed to writings of Charles V in 1371,⁶ was a sort of nobleman's custody without feudal obligations, for the benefit of the citizens of the town and suburbs of Paris alone.⁷ It only belonged, at least in the sixteenth century, to the surviving father or mother,⁸ and never to the grandparents.⁹ It conferred the enjoyment of the possessions of the minor, but not the ownership of movables, and it ceased at the majority of the minor, which majority was not the same as in the case of noblemen.

§ 200. **Modern Guardianship**.¹⁰ — Excepting for a few traces of the old family laws and feudal legislation, we have arrived at the

¹ *Id.*, 15, 7, 9 (comparison), 29.

² *Desmares*, 249; "Gr. Cout.," II, 12; *Beaumanoir*, 15, 29. Cf. "Coming of Age," "Emancipation."

³ According to *Beaumanoir*, 15, 12, the lord demands only guarantees.

⁴ See "Modification of the old law": "Paris, A. C.," 99, 100; "A. C., Verm.," 289. "A fortiori" misconduct of the widow.

⁵ *Ferrière* on vol. XII of the "Cout. de Paris," and authors cited; *Guyot*, see "Garde Noble"; *Meslé*, II, 94, 107; *Cauwès*, "Gr. Encycl.," see "Bail."

⁶ *Ferrière*, see "Garde"; Aug. 9th. Others, July 3d: "Ord.," V, 418. Cf. *Isambert*, VI, 688 (letters of Charles VI, of the 5th Aug., 1390); *Glasson*, VII, 201, mentions two Ordinances of Charles VI, of 1399 and 1409. Cf. *Chopin*, on "Paris," I, 2; "Paris," 265.

⁷ "Cout. Not.," 157: plebeian custody within the jurisdiction of the Provost and the jurisdiction of the Viscount of Paris: "Paris, A. C.," 101; "N. C.," 266. *Viollet*, p. 536, 3, cites a "Style du Châtelet" (French Ms.), 1076, fo. 22: "ascendants have in Paris, but only in the suburbs, the custody of plebeians; they take the profits themselves, do not pay the debts and do not keep up the inheritance." Cf. "Gr. Cout.," II, 41, also a few Customs, for example, "Calais."

⁸ "Gr. Cout.," II, 41 (p. 373 *et seq.*); "Paris, N. C.," 269; surety in every case.

⁹ Cf. Roman usufruct of acquired property and Civil Code, 386.

¹⁰ See the authors of Institutes, *Pothier*, *Bourjon*, etc., and special treatises such as those of *Ferrière* and *Meslé*: *Masuer*, see "L. d. Droiz," 61. Order of Lamoignon, title of Guardianship, Edict of December, 1732. Regulations as to guardianship in Brittany (*Meslé*, II, 259). As to Normandy, cf. Order of Regulation of the Parliament of Rouen, 1673: *Cauwet*, "Obs. s. le Régl. des Tutelles," 1777; *Cauwet*, "R. de Lég.," 32, 100. Flanders: *Deghe-wiel*, p. 67. Lombardy: *Lattes*, "Dir. Consuet.," 275. Sicily: *Brünneck*, "Sicil. Stadtr.," 69.

Roman conception of guardianship;¹ it is a public duty regulated in the interest of the minor.² This is a remarkable evolution; and for its realization nothing less sufficed than the disintegration of the old family, the weakening of the rights of the parents, the expansion of the prerogatives of the State, and the introduction into procedure and the civil law of the new principle of representation.³ The changes which it results in bear: 1st, on the appointment of the guardian; 2d, on the control of his administration; 3d, on the capacity of the minor. All these matters converge towards a more complete and enlightened protection of the minor.

§ 201. **In France every Guardianship is Appointive.**⁴ — Where there is no lease or custody, or, even, concurrently with lease or custody, it is necessary to name a guardian for the minor.

¹ Which does not mean to say that the Roman laws have purely and simply been put back in force. Astruc brings out very clearly the differences which exist between these laws and the old practice. But a great deal has been borrowed from the Roman law. On the other hand, in Germany, in spite of its being copied after the Roman institution, guardianship is especially a Customary institution: *Heusler*, II, 508. *Stobbe*, IV, 451, 12, establishes the fact that usufructuary guardianship had disappeared before the Roman law was received: "Schwabenspiegel," II, 52. As to how it came about that a distinction was no longer made between guardianship and custody, cf. *Stobbe*, § 264. *Post*, "Custody": "guardian and custodian are one."

² One can say that in the fourteenth century the idea of protecting the minor was the all-important thing; from that time on it entered more and more into legislation and practice. — A salary paid to the guardian: *Stobbe*, IV, 452 (Act of 1443). — The "Const. Sic.," III, 30, compels the guardian to render an account. In Sardinia usufructuary guardianship did not disappear until 1827: *Pertile*, III, 405.

³ It was especially in the towns that it came into existence first of all; the communities such as those referred to in "M. G. H., S. S.," XX, 792, which were composed of fifty persons, are no longer found excepting in the country.

⁴ *Loysel*, 181, 183; *Astruc*, p. 26: even in countries of written law. Guardianship which is by appointment, that is to say, conferred by public authority, has been granted sometimes by the judge, sometimes by the town councils; in France the conferring of guardianship is reserved, during the monarchic period, to judges alone. The three kinds of Roman guardianship, proprietary, testamentary, and conferred, coexisted as an exception among certain of the Customs: "Bourb.," "Auv.," "Niv.," etc.; "Orl.," 28, 178. Cf. "Flandre," "Hainaut," "Boulé," *Britz*. So that Lamoignon is compelled to write in his "Arr. Tut.," 2: "Let us do away with testamentary, proprietary, customary and natural guardianships." Similarly in foreign countries the Roman distinction is often met with: *Stobbe*, IV, 436. In Germany, however, the Ordinances of 1548 and 1572 forbade the investiture of a guardian by means of a decree. — England: guardianship of the father and the mother and the ascendants; these are the natural guardians; the father does not have the legal enjoyment of the property of his children; he is the proprietary administrator of it and is held to account. The "Siete Part." distinguish, as do the Roman laws, between three sorts of guardianship. It is the same in Italy: *Pertile*, III, 410: guardianship by contract, — for example, by contract of marriage: *Kraut*, I, 263. — "Schwabenspiegel," I, 58; II, 116; "R. h. Dr.," 165; *Chassan.*, on "Bourg," ed. 1552, p. 853.

Guardians by birth are no longer found; the appointment is made in an assembly of relatives summoned before the judge at the request of the most nearly related of them; the guardian is chosen, on principle, among the relatives summoned; but, as it is necessary that he be a *fit person* (intellectually and morally), *capable* and *satisfactory* (possessions), the assembly has large discretionary powers and can bring its choice to bear on a distant relative;¹ if there are no relatives, a neighbor or a friend is designated. The judge gives the guardian named by the relatives his authority by means of a decree.² **Testamentary guardianship** has disappeared, as well as proprietary guardianship, in the countries of written law, as well as in the countries of Customs; this is not because no attention is paid to the appointment made by the father, and even the mother, in their wills; but confirmation by the judge is always necessary in the preceding forms, and it is from this that the guardian derives his powers.³ On principle, guardianship could not be given to women; there is no exception, unless in the case of the mother and grandmother, who, in countries of

¹ *Masuer*, 5, 17, still shows us the preference which was formerly given to the paternal relatives. As to maternal relatives, *cf.* "Schwabensp.," 59; *Kraut*, I, 170. — Near relatives who do not ask for the appointment of a guardian are deprived of the inheritance.

² As to this procedure, *cf.* for more details *Astruc*, p. 45, and authors cited: *Pothier*, etc.; *Masuer*, *loc. cit.*; *Imbert*, "Enchir.," see "Tutela"; *Rebuffe*, "De Sent. Prov.," 2, 2, 6. — Responsibility of the relatives who make the appointment in the South, in Normandy: "Dissens Domin.," p. 65. — Italy: as to the choice of relatives for guardians *cf.* *Pertile*, III, 408.

³ *Pothier*, on "Orl.," 183; "Pers.," no. 145; *Prévôt de la Janès*, I, 16. There are some Customs, however, in which it has been introduced. "Bourges" in the twelfth century: "Ord.," I, 22; "Bourb.," 177; "Auv.," 11, 1; "Niv.," 30, 1; *D'Arbois de Jubainville*, "R. de Lég.," I, 295 (unpublished document). Assise of Count Geffroi, 3 (feudal origin?); "L. d. Droiz," 420, 896; *Masuer*, 5, 3, 4; *Beautemps-Beaupré*, "Liger," 785. Opposition by proprietary guardians (Act of 1349, Burg.). In Italy and in Germany we find testamentary guardians at a very early period. At Milan, in 1152: *cf.* "Consuetud.," 8 (in 1216): "tut. testamentarii, legitimi, dativi." "Fribourg," 34; "Schwabensp.," 65, 22. Act of 1273 (cited by *Heusler*, II, 499) according to which agnates renounced their right of guardianship at the same time as the father named a guardian: *Stobbe*, IV, 436; *Kraut*, I, 202. Testamentary executors are often at the same time guardians: "Montpellier," 1205, 7 ("gladiatores"); *cf.* "Toulouse," 5, 8, 49, 160 ("spondarius," surety, testamentary guardian). — Testamentary guardianship is also met with in England (where the father may give up his natural rights to the guardianship), and in Spain. In countries of written law the authors seem to disagree (*Argou*, *Boularic*, *Serres*, etc.); we must abide by *Astruc's* formula, which explains their divergences of opinion, p. 26: "Unlimited confidence is shown in the appointment of guardians which fathers have made in their wills; but, as it is necessary that testamentary guardians should have their appointments confirmed by the judge and should take an oath before him, it is sufficient if we look upon them as having their guardianship conferred upon them." *Id.*, "Reims," 329; "Auxerre," 258, etc.; Edict of 1732 (Brittany). *Cf.* "Alais," 19; "R. h. Dr.," 15, 161.

written law, and in several Customs, are looked upon as lawful guardians.¹ Excepting in cases where there is a proprietary excuse, guardianship cannot be refused.²

§ 202. **Powers of the Guardian.** — (A) **Over the person of the minor.** As the guardian takes the place of a father to the minor, his powers are, upon principle, the same as those of the father, but with restrictions (correction, consent to marriage).³ — (B) **Over possessions.** The guardian represents the minor under all conditions ("factum tutoris, factum pupilli")⁴ in everything which

¹ The Guardianship of the Mother and of the grandmother date back to the Lower Empire: "Cod. Just.," 5, 35, 2; 30, 4. Cf. "Auth.," "Matri et Avia," "Nov.," 118, 5, and "Sacramentum," "Nov.," 94, 2; "L. Rom. Wis.," "Cod. Théod.," 17; "Nov. Théod.," II, 5; *Papien*, 36, 4; "Petrus," I, 3. They are to be found already in the laws of the Burgundians and the Visigoths: "Salis," "Z. S. S.," 1884, p. 150; "Siete Part.," 6, 16, 4. Italy: *Pertile*, III, 409. This form of guardianship is perfectly consistent under a legislation wherein guardianship is entirely in favor of the minor, — all the more so because the mother and the grandmother have his interests at heart. In countries of written law they are legal guardians, but guardianship is not imposed upon them; if they wish to undertake it they are not held bound, as in Rome, to give up any idea of a second marriage ("Auth.," "Sacramentum.") and the advantage given by the Velleianum Decree of the Senate: *Bugnyon*, I, 94. If they do remarry, it depends upon the relatives and the judge as to whether the guardianship shall be conferred upon them; but when they do so without providing the minor with a guardian, they lose the guardianship of him and his inheritance at one and the same time. Misconduct on the part of the widow also causes her to lose the guardianship. In countries of Customs, the same rules are generally applied, but the guardianship of the mother and that of the grandmother are by appointment: cf. "Arr. de Lam.," "Tut.," 20; *Beaumanoir*, 21, 8, 21, 24, shows us the mother who survives, at the head of the community which continues to exist after the death of the father; in a case of this sort there is no occasion for guardianship: cf. 16, 7; *Heusler*, § 50; *Viollat*, pp. 641-673. It may also happen that she already has the lease or the custody of the child under age. In the final stages of the law the Custom of Paris still confers nobleman's custody and citizen's custody upon the mother. "R. h. Dr.," 15, 163: Statutes of the fifteenth century in which the relatives give the guardianship to the brother, to a stranger in the presence of the mother who has not remarried. — English law: the mother becomes guardian of absolute right if there is no testamentary guardian: *Schroeder*, p. 733. — Bastards: *Meslé*, I, 192; II, 288, 295; *Ferrière*, "Tut.," p. 24.

² *Beaumanoir*, 16, 3; *Boutaric*, "Inst.," I, 25; *Astruc*, p. 119, etc.; "Siete Part.," 6, 17; "Mantoue," thirteenth century, II, 57: "nullus compellatur tutelam et curam alicujus accipere"; "Aoste," II, 2, 30, excludes from the inheritance of the ward a person who refuses the guardianship without any reason. — Disabilities: "L. d. Droiz," 916; "T. A. C., Bret.," 67; "Const. Leg. Pis.," 21; "Schwabenspiegel," I, 58; *Schroeder*, p. 733; *Stobbe*, IV, 442.

³ As to the education of wards, cf. *Astruc*, p. 86. — *Stobbe*, § 268; "Bail à Nourriture" (Burgundy, Champagne, Lorraine): a third party takes it upon himself to support the ward in return for a certain sum of money; the guardian must obtain the opinion of the relatives before making such a contract as this; the abuses to which it gave rise compelled the Parliaments to intervene: *Ferrière*, see "Encycl. Méthod."

⁴ As to representation at law cf. *Stobbe*, § 268, II. England: the minor can begin an action in the name of his guardian or in the name of his "prochein amy" (any one).

concerns administration, "domini loco habetur."¹ But his power does not extend to voluntary alienations of immovables.² He would be responsible for his maladministration, responsible if he took an important step without notifying the relatives (actions),³ if he disposed of the immovables without the required conditions (necessity established by law after giving notice to the relatives, and sale by judicial proceedings).⁴

§ 203. **Guarantees in the Interest of the Minor.**⁵ — Some are moral, like the taking of an oath;⁶ others, material, such as the making out of an inventory,⁷ the rendering⁸ of accounts, the im-

¹ Dig., 26, 7, 27; *Pothier*, "Pers.," 162 *et seq.* He does not give his "auctoritas" to the ward, as he does in Rome, but if the ward acts with the assistance of a guardian it is just as though the guardian had acted alone. He pleads in the name of the ward: *Beaumanoir*, III, 18; XII, 45; XVII, 6, and on this subject "Const. du Chât.," 2; *Loysel*, 187; *Isambert*, IV, 385; I, 186; cf. "Siete Part.," 6, 16, 17.

² "T. A. C., Norm.," 7, 4; "Artois," 27, 15.

³ Custom of having a judge tax the ward's expenses. Employment of the ward's funds upon consulting the relatives and an order from the judge (*leases at interest* in Orléans until 1726) under penalty of involving the responsibility of the guardian (*Pothier*, "Pers.," no. 176), for example, 100 "pistoles" or more. *Stobbe*, IV, 461, cites the "Brünn. Schoeffenb.," 144: "Non est necessitas curatoribus minorum pecunias fœnerare" (fear of losing the capital), "sed caute reponere et servare." "Munich," 421: deposit in the hands of the town council, who pay interest at the rate of ten per cent. Leases of six and ten years, according as the property is in the city or in the country: *Meslé*, I, 151; "T. A. C., Bret.," 75. Loans: *Ferrière*, "Tut.," p. 237; "R. h. Dr.," 15, 184.

⁴ *Desmares*, 12; *P. de Fontaines*, 165 (transaction); cf. p. 83; "Gr. C. de Fr.," p. 370; "T. A. C., Bret.," 71; "Toulouse" 5, 100; *Lamoignon*, I, 85; *Meslé*, 191; *Ferrière*, "Tut.," 228, 355; *Guyot*, *Ferrière*, "Dict.," see "Aliénation"; "Ord.," 1667, 33, 13; *Britz*, p. 567, "Siete Part.," 6, 16, 18. On the German law, cf. *Stobbe*, IV, 462 (case of necessary alienation, "echte Noth"): the Ordinances of 1548 and 1577 required a decree for an alienation to be legal: *Pertile*, III, 402.

⁵ Abuses in the South, where guardians allowed the property of minors to become dilapidated. The Ordinances of the Reforms in Languedoc, known under the name of "Arrestum Sanc," and inscribed at the end of the "Coutumes de Toulouse," must have remedied this by providing for oaths, sureties and inventories: *Casavet*, fo. 70; *Tardif*, "Droit Privé au XIII^e s.," p. 42 "Jostice," p. 69, 79 (supervision of the bailiffs over guardians and custodians). Cf. *Beaumanoir*, XV, 12 (lease and custody).

⁶ Surety by oath: *Masuer*, 5, 17, 31; "Siete Part.," 6, 19, 9.

⁷ *Meslé*, I, 107. A practice which went out of existence before this time. Appraisal in Scandinavian law: *Stobbe*, IV, 456. — "Ass. de Jérus.," "C. des B.," 53; "L. d. Droiz," 921 (dispensations).

⁸ In this we find a revival of Roman practices. Sale of perishable movables: "Ord. d'Orléans," 102; "Arr. de Lam.," 69; "Ord.," 1667, title, "Accounts"; "Toulouse," 49, 40, 42; *Stobbe*, IV, 460. Nullity of grants for the benefit of the guardian, and of agreements with him: *Meslé*, I, 290; *Ferrière* on "Paris," 170; *Henrys*, I, 1; "Paris," Art. 276. Ten years' prescription with respect to agreements as to the rendering of accounts. *Stobbe*, IV, 457: in Germany annual accounts are rendered to the family or to the public authorities. *Britz*, p. 567: every year, every two years. In France under the Roman influence the rendering of accounts takes place only when the guardianship comes to an end: *Ferrière*, see "Compte"; "Acte de Notor. du

plied mortgage on the possessions of the guardian;¹ towards the sixteenth century this mortgage took the place of the pledge and surety.² In countries of Custom the ward is always given a **subrogated guardian**; this is the custodian of countries of written law become permanent;³ he is named once for all, instead of appointing a new one each time it becomes necessary; he intervenes in case there is a conflict of interests between the minor and the guardian;⁴ he is charged with watching over the drawing up of the inventory; he calls together the reunion of the **assemblies of relatives** in order to discharge the guardian who embezzles.⁵ The action of the relatives⁶ in this case, as in that of the naming of a guardian, is collective; it is also collective when the guardian takes their opinion on an important step, for example, with re-

21 Mars, 1699." Cf. as to Normandy, "R. de Lég.," 32, 102: the family council may compel the guardian to render an account every three years and to join with him two relatives and three juriconsults whose opinion he must take; responsibility of the relatives making the appointment just as in the South: *Ferrière*, "Tut.," p. 322.

¹ Same in Flanders: *Britz*, p. 569; *Ferrière*, "Tut.," p. 404.

² As to the giving of surety, cf. *Stobbe*, IV, 457. *Boutaric*, I, 24, establishes the fact that the custom of giving surety was lost: "Jostice," p. 88; "L. d. Droiz," 1008; "T. A. C., Bret.," 69 (will pledge himself and what is his); *Masuer*, 5, 2, 1; "Toulouse," 5; "R. h. Dr.," 15, 170 (surety given by the mother). *Rebuffe*, "De Sent. Exec.," I, 16, 37; on the law "De Creat.," "Cod. Just.," "de epaud.": in the case of relatives surety sworn to is deemed sufficient. — "Const. Lég." of Pisa, 21: delay of two years before the guardian is relieved of all responsibility towards the ward.

³ *Lamoignon* calls him custodian or subrogated guardian. *Serres*, "Inst.," I, 13, 5, almost confuses them. This guardian is subrogated to the ordinary guardian, — that is to say, he takes his place: "Stil. Parl.," 7, 147 ("tutor ad actiones subrogatus"); *Bouhier*, I, 475: "Toulouse," 6. As his responsibility is limited and he takes absolutely no part in the administration of the property, he does not have to render any account, he is not held secondarily liable for the administration of the guardian: *Louet*, "T.," 13; "Arr. de Lam.," "Tut.," 12; *Britz*, p. 566. — Roman rule: "habenti tutorem non datur alius," is *contra*: "Siete Part.," 6, 16, 13. Acting guardian for property situated in the colonies, Declaration of Dec. 15, 1721, and Feb. 1, 1743. Splitting up of guardianship for persons of quality: honorary guardian and acting guardian. It is the same in Germany, where the guardian who has charge of the person of the ward is often a proprietary guardian, whereas the one who administers the property is an appointed guardian.

⁴ If there is no subrogated guardian a guardian "ad hoc" is named: "T. A. C., Bret.," 79.

⁵ "T. A. C., Bret.," 178; *Pertile*, III, 411; "Siete Part.," 6, 18.

⁶ On the action of the family in Germany, cf. *Stobbe*, IV, 444; in Italy: *Pertile*, III, 403. — During the whole of the Middle Ages the intervention of the relatives is frequent and takes place in a great number of cases: "Cod. Théod.," 9, 13, 1; "Tac.," 19; "Roth.," 189, etc.; "Arrestum Sane," *Viollet*, p. 465; *Langlois*, "Thèse," 1884; *Meslé*, Table, see "Avis des Parents." — On principle, the women do not take part in these assemblies: *Meslé*, I, 86. — *Pothier*, "Pers.," 151, 172 (the alienation of an inheritance in order to avoid a distraint). *Argou*, I, 48; *Poullain du Parc*, I, 233. *Beaumanoir*, *loc. cit.*, explicitly declares that the guardian should give security to the judge or to the friends of the minor: "L. d. Droiz.," 807.

gard to the investment of the funds of the ward.¹ But the term *family council* is not made use of,² and the manner of organization of these assemblies of relatives is not very well settled.³

§ 204. **The Revolutionary Law**, in its attempt to render the family democratic, organized assemblies of relatives which were really like domestic tribunals.⁴ Disputes between members of the family (spouses, children, near relatives) were submitted in the first instance to four relatives or friends chosen by the parties; thus they thought to assure domestic tranquillity without expense. An assembly of relatives, or friends and neighbors, at least six in number, pronounced, at the request of the relatives or the guardian, upon the subject of the placing of minor children in a house of correction. Finally, another assembly (whose composition varied) was called to deliberate upon the marriage of minors.⁵ These rather unfortunate innovations, because of the lack of cohesion between relatives, did not all last, but they led to the system of the Civil Code, wherein the family council occupies an important place corresponding to that which is given in Germanic countries to the judicial or administrative authority (tribunal of guardianship, college of wards), and which appears to be more in conformity with the actual condition of Customs.⁶ Guardianship

¹ Edict of Guardianships, 1732, Art. 17 (Brittany): *Meslé*, II, p. 259.

² These assemblies of relatives should be distinguished from the **Council of Guardianship**; by the latter is meant a lawyer named by the Sentence of Prohibition or the deed which appoints a guardian, who has been chosen by the parents, with the object of advising the guardian; they can even appoint several of these men. In countries of written law the father, who can by will appoint a guardian for his minor son, also has the right to name one or more counselors: *Denisart, loc. cit.* For illustrious persons, see *Ferrière*.

³ "Arr. de Lamoignon," "Tut.," 3 *et seq.*; *Viолет*, "Et. de Saint Louis," I, p. 145 and III, 33. During the thirteenth century in Touraine and Anjou the paternal relatives alone take part in them; during the sixteenth century the king introduces the maternal relatives into them. — Customs, *cf. Marivaux*, "Vie de Marianne."

⁴ Decree of Aug. 16-24, 1790, vol. X; *cf.* vol. III, 11.

⁵ Also: *Giraud*, "Essai s. l'Hist. du Dr. Fr.," II, 259 (Salon). — *Cf.* Decree of Sept. 20, 1791, 4, 1; five relatives: Decree of Sept. 7, 1793: two relatives who are heirs, or two who are not heirs, and the public officer: Law of June 15, 1794.

⁶ Nor does the family council exist in England, where the Lord Chancellor has general supervision over guardianships: *Blackstone*, I, 9, 1, a rule which is connected with the old seigniorial custody: *Glasson*, VI, 232. The Chancellor can dismiss any guardian (even the father) in case of embezzlement, and he names guardians (or, if he does not do this, then salaried administrators) for all minors who are not provided with them; but formerly this was only done when the minor began an action; by this very means he became the *ward of the court*. In order to avoid involving his responsibility, the guardian acts under the direction of the Court of Chancery and renders an annual account. *Lehr*, "La Tut. des Mineurs et les Conseils de Famille," 1896.

ceases absolutely to be a family institution, in order to rise to the rank of a function of the State.¹

§ 205. **The Question of the Capacity of the Minor**² did not come up under the obsolete systems of usufructuary guardianship by virtue of which the minor, stripped of his possessions, descended almost to the rank of the "alieni juris." The old axiom, "He who is under age has neither voice nor reply in court," corresponds to this state of law; by this is meant that the minor cannot appear in court;³ the guardian alone shall there play a part, if there is occasion to do so, in his own name, and not as representing the minor. This rule must be generalized and extended to extrajudicial acts, such as contracts and alienations. But the torts of the minor involve the responsibility of the guardian. As far as torts were concerned, however, it was admitted at an early period that the minor could be sued himself, perhaps because the guardian was authorized to give up the guardianship and to free himself thereby from all responsibility.⁴

¹ *Stobbe*, § 266 (details). "Obervormundschaft" or high guardianship of the sovereign, commissions of superintendence and salaried guardians: *Calame*, "Cout. de Neuchâtel," p. 362. All tutelary power emanates from the Council of State by order or in the name of which the courts of justice confer it upon the person who is required to exercise it. — *Viолlet*, p. 544: at Lille and Dunkirk, "gard'orphenes" or municipal commissions, watching over the interests of minors and subject to inspection by the board of aldermen: "Roisin," 135; *Britz*, p. 566. In Germany and Switzerland the protection of minors also belongs to the corporations ("Zünfte"); perhaps even the town at first played a subsidiary part with respect to the corporations, in the same way as the State generally does with respect to the family: *Stobbe*, IV, 445.

² *Ferrière*, on 239, "Paris"; "Dict.," see "Mineurs"; *Guyot*, *ib.*; *Argou*, I, 7; *Meslé*, II, 27, and bibl., II, 42, etc.; *Pou. du Parc*, "Principes," I, 13, etc.; *Flach*, *op. cit.* Cf. "Obligations," "Rescission," etc. — "Salis," "Z. S. S.," 1884; "G. A.," 166.

³ *Loysel*, 51. Cf. 53, "Women have a voice and reply in court," and notes. Still less can the minor be a judge and carry out public functions. But his is not the meaning of the maxim. *Voice* signifies demand; *reply*, defense. He cannot be an attorney; *Papien*, II, 2; *Chassaneus*, p. 850. On testamentary execution see *post*, "Dec. Cap. Tolos.," 154. In criminal matters the minor, even though emancipated, cannot act; but he can be prosecuted: cf. *Laurière* on *Loysel* and the authors cited. — He cannot be a witness in court: *Beaumanoir*, 39, 34, 139; "Arch. Lég. de Reims," I, 36: the guardian can annul the testimony of the one who is under his guardianship; if he does not do so, this testimony becomes valid after the age of eighteen years.

⁴ "Justice," p. 118. Cf. 131. *Beaumanoir*, 16, 10: the judge takes into consideration the seriousness of the offense and the mental capacity of the minor: "Sachsensp.," II, 65, 1; *Boutaric*, I, 92; "Olim," II, 767; "Ass. de Jérus.," "C. de B.," II, p. 205; *Ferrière*, see "Mineur" (and authors cited): the minor is held as having come of age "in delictis," provided that he is of sufficient age to know what he is doing: it is the judge's prerogative to modify the punishment. *Domat*, I, 4, 6, 2, 10: same obligation to pay damages as in the case of one who has come of age; *Pothier*, "Oblig.," 120 (prodigals); *Chassaneus*, p. 810: the minor who is twenty-five cannot be imprisoned for a pecuniary debt.

While guardianship was being organized with a view to the protection of the minor, the incapacity of the latter changed its character; it was no longer based merely on his interest, and, consequently, it ceased to be as absolute; it had to be resolved into a collection of provisions intended to protect this interest. A distinction was made as to the acts which he could validly do and, without bringing into this the subtlety of the Roman juriconsults, in the beginning these same ideas of theirs were relied upon: the guardian or the minor (they are no longer distinguished in Customary law) may ameliorate his condition;¹ he cannot make it worse; the "in integrum restitutio" was borrowed from them. Thus, Beaumanoir leaves to the judges the duty of seeing whether the "dealings were carried out without fraud and without malice for the profit of the one under age," or, on the contrary, to his *injury*;² elsewhere he completes this rule in the following terms: "(those under age) cannot do any other binding act without the authority of him who has the lease or custody; if they did it with this authority and they were dishonored or injured, they could repudiate it when they came of age." Whereas, formerly, the guardian's failure to join made the act "per se" void,³ everything thenceforth was resolved into a question of injury; whether assisted or not, had the minor suffered any injury? This was the only question on which the examination by the judge had any bearing: "minor restituitur non tanquam minor sed tanquam læsus."⁴ The same rule applied

¹ Ordinance of 1731, Art. 7: acceptance of gifts made by ascendants or guardians.

² *Beaumanoir*, 16, 4 *et seq.*; "Jostice," pp. 111, 117 (an injury produced by some chance happening did not authorize re-establishing), p. 118; *Boutaric*, I, 92. As a consequence, juriconsults showed a great deal of severity against those who had dealings with minors. *Argou*, I, 7: the cause of the injury is scarcely ever gone into, which results in placing minors under a sort of prohibition; no one wants to make a contract with them; *Serres*, II, 8, 2: case in which the injury is presumed. As to the minor who says that he has come of age: *P. de Fontaines*, 14, 26; *Beaumanoir*, 16, 13; *Boutaric*, I, 92, pp. 518, 523; *Louet*, "M.," 7, 4; "Arr. de Régl.," 1624; *Argou*, I, 7; *Serres*, I, 23, 2.

³ "Bern. Handfest.," c. 50.

⁴ As a consequence of the adoption of the Roman rules, the jurisprudence in countries of written law pretty nearly agrees with that of the countries of Customs. Already there was a question of restitution in the "L. Wis.," 4, 3, 3; "Burg.," 87: *Mauricius*, "De Restit. in Integr. Jost.," pp. 110, 118. Cf. *Beaumanoir*, 63, 4; "Artois," 27; "T. A. C., Bret.," 73; *Loysel*, 813. — The advantage of restitution is not lost by a mere declaration of majority (*P. de Fontaines*, 14, 19), unless it be accompanied by an oath: *Boutaric*, I, 92. According to Charondas, the oath is of little importance; there must be some fraudulent action on the part of the minor. Frauds checked by the Regulating Orders of March 6, 1629, and March 26, 1624. *Louet*, "M.," 7. A loan made to a minor is annulled in every case, even if the minor has acted

to acts carried out by the guardian alone.¹ It was left to the minor on coming of age to rescind or affirm either class of act; the fate of these lame acts ("negotia claudicantia") was in his hands. The action of rescission which he had should be made use of, according to Beaumanoir, within a year and a day of the coming of age.² The Ordinance of August, 1539, lengthened this delay; the annulling of the act can be asked for until the age of thirty-five years is completed.³ The *action of rescission* was not the only one given to the minor to cancel acts prejudicial to his interests; the defense of nullity was open to him as far as certain of them were concerned, — those for which formalities were prescribed by the law, for example, the alienation of immovables, which was subject to the necessity of judicial authorization (decree); for these acts there was no need to establish the damage; the absence of the required formalities alone allowed the tribunals to pronounce their nullity.⁴ The civil petition permitted him to reopen judgments as a last resort, if he had not been helped or defended in a valid way.⁵ The benefit of restitution, as well as that of the civil petition, was refused the minor who was in business and reputed to be of age, as far as his business was concerned.⁶ Finally, the minor enjoyed another privilege; prescription did not run against him, at least,⁷ if it was a matter of a long prescription; on the other hand, "every customary prescription for a year or less runs against those who are absent and minors, without hope of restitution."⁸

fraudulently: *Bourjon*, I, 6, 5; *Denisart*, see "Mineurs"; *Maynard*, "Quest.," 3, 52, 10.

¹ *Boutaric*, I, 92, p. 520.

² *Beaumanoir*, 16, 4; *Boutaric*, I, 92, pp. 518 and 522; "Jostice," p. 1118. Confirmation, "Jostice," p. 117. During the minority the guardian has a right to demand a second payment from the debtors of the minor who have made the mistake of paying their debts to the latter: *Beaumanoir*, 15, 33. — Also: "T. A. C., Norm.," 78, 5; "T. A. C., Bret.," 71: four years. "Siete Part.," 6, 19, 8.

³ The Ordinance of June, 1510, 46, contemplates in a general manner rescissions because of fraud, fear, violence, injury amounting to more than half of a fair value. The Ordinance of August, 1539, 134: after the age of thirty-five years completed, no more annulment of the contracts of minors, either by a plaintiff or a defendant, by letters of rescission or by cancelling (alienations of immovables without a decree), *Loysel*, 715.

⁴ *Serres*, "Inst.," II, 8, 2. — Even though regular, the sale could still be rescinded by reason of injury. Cf. *Boutaric*, I, 92, p. 519; *Meslé*, II, 46.

⁵ *Boutaric*, I, 92: restitution of a thing conferred by judgment.

⁶ Ordinance of 1673, I, 6; *Ferrère*, see "Mineur." Similar presumption in the case of minors who have a benefice or hold some office.

⁷ *Loysel*, 718, 721; "L. d. Droiz," 720.

⁸ Year for the repurchase by a person of the same lineage, prescription of five years in the case of arrears of constituted rents. To be quite logical

These measures of protection had in them nothing excessive when it was a matter of children of tender age; but, as majority was postponed to twenty-five years, they were not so well justified in the case of those who were approaching this age. Practice attempted to accommodate the law to the necessities of life by validating **renunciations of the benefit of minority**, and especially to the "restitutio in integrum" (twelfth and thirteenth centuries).¹ Unknown to Rome, condemned by the Commentary ("in hoc ipso [minor] esset deceptus"),² they were introduced under cover of an oath; now a Constitution of Alexander Severus seems in this case to be in derogation of the general rule, according to which an act which is null would be validated by an oath.³ Bulgarus and Martinus discussed the effect of this law. Martinus gave renunciation under oath an absolute effect; according to Bulgarus, the oath did indeed deprive the minor of the "restitutio," but it did not prevent him from reclaiming the immovables of which the alienation, made "sine decreto," was null and void because of a defect in form.⁴ Frederick Barbarossa confirmed the opinion of the former by having inserted in the Code, following the Constitution of Severus, the Authentic, "Sacramenta puberum" (Diet of Roncaglia), which validates renunciations under oath when made by those who have attained the age of puberty.⁵ In the Commentary the tendency to extend the Authentic is already shown, a tendency which is exaggerated by Bartolus, and, following him, by the Italians and the Canonists: thus they apply it to the person who has not attained puberty, "pubertati proximus." Cinus and the French School hold the Authentic to be "odiosa," because it injures those who are under a disability; they do not apply it to those who have not attained the age of puberty, nor to minors provided with a guardian; they limit it to sale, the

it would seem that the decision should have been to the contrary, because short prescriptions will almost invariably expire during the minority, whereas this will not be so in the case of long prescriptions; against the former the minor has no protection; he runs a chance of not being affected by the latter. This difference is to be accounted for by the Roman origin of the former and the customary origin of the latter. Also, no doubt, the disfavor for such rights as that of the repurchase by a person of the same lineage was combined with this other motive. As to the countries of written law, *cf. Argou*, I, 7; *Meslé*, I, 276.

¹ *Meynial*, "N. R. H.," 1901, 246.

² On the Law, "*Si Juxta*": Dig., 4, 4, 41.

³ "Cod. Just.," 2, 28, 1; *cf.* 1, 14, 14; *Esmein*, "N. R. H.," 1888, 32.

⁴ "Dissens," "*Dominorum*," pp. 52, 98, etc. (ed. *Haenel*).

⁵ "Cod. Just.," 2, 28, 1; "L. Feud.," 53; *Meynial*, "N. R. H.," 1901; *P. de Fontaines*, 14, 19; *Beaumanoir*, 16, 8; *Boutaric*, I, 92, p. 526.

only act which it had in view, not admitting that the oath validates sales "sine decreto," rejecting general renunciations, and, finally, wanting the minor to have been "certioratus" (notified at the time of the renunciation of the existence of the privileges in his favor).¹ This restrictive interpretation paved the way for the practice of the sixteenth century, which completely sets aside the Authentic and refuses all efficaciousness to the promissory oath, starting with the usage which had been introduced of asking the king for a dispensation from the oath.²

§ 206. **The Barbarian Majority**³ did not carry with it emancipation from the paternal power. Purely political as it seems, among the Germans it was arbitrarily fixed by the relatives; when they were of opinion that their children were capable of bearing arms, they either bestowed them upon their children or else had them given to their children by other members of the assembly of free men.⁴ For these arbitrary decisions, the only ones known, undoubtedly, in the time of Tacitus, the Barbarian law substitutes a fixed age whose precocity astonishes us:⁵ twelve years among the Salians, fourteen among the Ripuarians.⁶ What was a child of twelve capable of doing, or even one of ten, as among the Anglo-Saxons? Here we have, as we think, rather a religious than a civil majority. At this age reason awakens and with it the

¹ *Meynial*, p. 256; *Doneau*, 21, 13; "Ant. Fab.," "De Err. Pragm.," 69; "Decis. Cap. Tolos.," 49.

² *Esmein*, *loc. cit.*; *Boutaric*, p. 526, ed. 1603, note by *Charondas*; *Bugnyon*, "Lois Abrog.," I, 120 (he cites *P. Jacobi*, *Imbert*, etc.): he who can rescind a contract can perfectly well dispense with the oath which is joined to this contract. The king dispenses with this oath subject to absolution by the ecclesiastical authorities, and even sometimes without this reservation. In Belgium and Italy the Authentic fell into disuse. In Germany it remained in force, and in Spain as well: *Meynial*, p. 259.

³ *B. de Merville*, "Tr. des Majorités," 1729; *Meslé*, "Minorités," 1785; *Amiable*, "R. h. Dr.," 1861, 217; *Stobbe*, § 264; *Glasson*, VII, 112; *Lattes*, "Dir. Consuet.," p. 175.

⁴ Physical indications of puberty have here furnished a connecting link. Or else physical strength: *Cassiodore*. *Tacitus*, "Germ.," 20: "sera juvenum Venus." *Post*, "Ethnol. Jur.," II, 30. Details as to the divisions of age in *Grimm*, 410; *Chaisemartin*, 67: at the age of 7 years one is a child, "Schwabenspiegel," 2, 47; at the age of 18 years one can be a witness, "T. A. C., Bret.," 79; at the age of 14 years one's oath is valid.

⁵ "Sal.," 24: twelve years completed (*Geffcken*, p. 134, bibl.); *Id. Alam.*, Frisians, Saxons, Lombards ("Roth.," 155), Norwegians, Icelanders. — Different Ages: "Rib.," 81 (14 yrs. completed); "Burg.," 87; "Wis.," 2, 4, 10; 5, 9; 4, 3, 1; 13, 4; 10, 1, 17 (10, 12, 15, 20 yrs.); *Hloth.*, 6; *Ina*, 7, 2 (10 yrs., then 12); *Grimm*, 413; *Kraut*, I, 112; *Stobbe*, I, 40; *Daresté*, "Etudes," pp. 273, 310, 326, 349. Cf. as to the coming of age of the king: *Pardessus*, I, p. 452; "Diplom.," I, 200; *Viollet*, "Dr. Publ.," I, 227.

⁶ Terminology: "ætas legitima" (legal age), "pueri infra ætatem," etc. During the feudal period minors are called "sous agés" (under age). Germany: "zu zeinen Jahren" or "Tagen kommen": "Fribourg en B.," 22.

aptitude to perform the acts of religious life.¹ If a few civil effects can have been connected with it, this is because the life which was then led was very simple and transactions seldom occurred; the cohesion of the family and the protection in fact which resulted for the adults also contributed to make this premature emancipation tolerable.² Already, moreover, at this period it is felt that such premature emancipation has its inconveniences: Liutprand postpones majority until eighteen years, and the law of the Visigoths until twenty.³

§ 207. **Under the Feudal System** majority varies according to the status of people; the nobleman comes of age when he is twenty (completed) or twenty-one (begun);⁴ the plebeian, at fifteen (begun),⁵ for before twenty years the former is not fit for military service, whereas the latter can "measure stuffs, reckon amounts of money, and busy himself in the affairs of his father." Noblewomen attained their majority at the age of fifteen,⁶ plebeian women at the age of twelve. Such are, at least, the general rules, for variations of these were not lacking,⁷ and there were even several majorities for certain acts, taking the veil, marriage, and making a will.⁸ Thus the Feudal law had retarded majority in

¹ Oath of fealty at the age of twelve: "Cap.," 792, 4; 808, 2; *Blackstone*, I, 9.

² After the age of 12 or 14 years the child was still under the paternal power, but became responsible for his own torts ("Sal.," 24, 5, and note in *Hessels*, *Geffcken*; "Cap.," 819, 5, I, 293); if his father were a widower and remarried, he administered the dower of his mother and had the use of it: "Sal. Cap. Extrav.," 8; *Schroeder*, 315.

³ *Id.*, "Bulle d'Or," VII, 4, and many German statutes. In the case of commoners in Germany we often find that they came of age at 14 or 16: *Heusler*, II, 490.

⁴ *P. de Fontaines*, 15, 35; "Jostice," pp. 58, 116, 221; "T. A. C., Norm.," 6; "Summa," 31, 1, 8, 14; "Fleta," 1, 9, 4; *Beaumanoir*, 15, 30 ("Beauvaisis": 15 yrs.; *id.*, in Palestine; *J. d'Ibelin*, 272, etc.; France, 20 yrs.); 63, 4; "Et. de Saint Louis," I, 73; "Ord." of May, 1246; *Desmares*, 249: nobles 21 years of age with regard to nobleman's property, and 14 years of age with regard to villein property. *Loysel*, 52 (a commoner came of age at 21 years with regard to nobleman's property). Cf. 813; *Britton*, 66; *Meslé*, I, 210.

⁵ *Beaumanoir*, 15, 22, combats an opinion according to which children in authority were always of age. Here we see that the Roman age of puberty has been adopted. For the very frequent cases in which the age was not known the "Sachsensp.," I, 42 and the "Schwabensp.," I, 28, maintain that one should depend upon indications of puberty. *Glanville*, 7, 9. *Beaumanoir* and our old books of Customs fall back upon the testimony of godfather and godmother and parish priests. Cf. *Papien*, 26, 8.

⁶ Completed: "Ord." 1246. The lease (guardianship) of the daughters of nobles at first lasted until the time of their marriage.

⁷ As to the minor who was possessed of property in various places he would attain his majority at the age fixed by the Custom of his principal "herbergement."

⁸ *Blackstone*, I, 9: the seven ages of woman.

the case of noblemen; but in the plebeian class the independence of the adult was premature. It is true that he was often protected against himself by the possibility of remaining under the care of a guardian, and always by the rules for conservation of his immovable inheritance. But there came a time when, these rules having been overthrown and the number of transactions having increased, it was realized that the age of legal capacity should await a state of complete maturity of mind.¹

§ 208. **The Same.** — By the end of the thirteenth century it was necessary in practice to add to the customary majority the **full majority**, or Roman majority, of twenty-five years (completed);² in the sixteenth century and until 1789, twenty-five years is the legal age at which minority ceases in the whole of France³ (excepting in Normandy, where it is twenty-one years begun).⁴ One exaggeration had now been avoided merely to fall into another; majority had become too tardy. The Law of September 20, 1792, IV, 2, arrived at a just conclusion by deciding upon the age of twenty-one years completed.⁵

§ 209. **Emancipation of Minors under Guardianship.**⁶ — Hard to reconcile with the usufructuary guardianship and the premature majority of the old law,⁷ this institution made its appearance

¹ Similar movement in Germany: *Stobbe*, § 46.

² *P. de Fontaines*, 15, 35, contrasts the coming of age at 15 with that of the Roman law. Cf. 14, 11; *Beaumanoir*, 15, 22, 33; 16, 8, 11; "Jostice," 3, 5, 7; 3, 9, 1; *Boutaric*, I, 92. — Custodians for minors 25 years old, according to the "Const. du Chât.," 74, 84 (note ed. *Mortet*); *Buche*, "N. R. H.," 1884, 664; *Flach*, p. 66; "T. A. C., Bret.," 79: up to the age of 25 no minor can enter into a contract without consulting with his pastor: Cf. 84; "Bourges," 158; "Toulouse," 7: the father can by will cause his son to be under a disability until the age of 25, or else the consuls appoint a custodian for him: cf. Art. 69. — "T. A. C., Bret.," 80: from the time she is 12 years old until she is married a woman should be under the protection of a custodian: ed. *Planiol*, p. 511, 366; *Masuer*, 5, 34.

³ "Paris, A. C.," 97; "N. C.," 272; *Dumoulin*, on "Paris," 32, 1, q. 2; on "Montreuil," 14; on "Amiens," 46; on "Boullenois," 119, 126; *Ferrière*, on "Paris," 32, 268; "Dict.," see "Majorité"; "Arr. du Gr. Cons.," 1717; *Flach*, p. 76. — Sometimes minority at the age of 25 merely in the case of alienating immovables: *Loysel*. — *B. de Merville* distinguishes between: Customary majority (in the case of custody, alienation of immovables, gift and will) and majorities determined by the Ordinances (marriage, benefices and office).

⁴ "Placit.," 1066, 38; *Id.*: "Bretagne," "Auvergne," "Pol.," "Berry," "Amiens," 46. — *Blackstone*, I, 9; *Pollock and Maitland*, II, 436.

⁵ *Id.*, Civil Code, 388; England.

⁶ *Graeter*, "De Conces. Veniæ, Aet.," 1695; *Graefe*, "De Emanc. Saxon.," 1715; *Brandeler*, "De Emanc. et Ven. Aet.," 1635; *Ferrière*, *Guyot*, etc. See "Emancipation," "Curateur," etc. — *Pothier*, "Pers.," no. 186. Cf. "Emancipation from the Paternal Power," ante; *Beaumanoir*, 16, 12; *P. de Fontaines*, 14, 27.

⁷ Cf., however, *Beaumanoir*, 21 (to take a child from the lease), 21: the

when majority came to be settled at twenty-five years; by borrowing this late age from the Roman law, it was found necessary to borrow also the corrective measure which the "*Venia ætatis*"¹ had placed there. Often, in fact, the interest of the minor demanded that he be given the management of his possessions; with this object in view, emancipation was as good as an anticipated majority.² It could be implied or expressed; in the former case it resulted from marriage;³ in the latter, from being granted by writings of the king, called "writings relating to the advantage of age";⁴ they were only granted, on principle, to minors who had attained full puberty, that is to say, the age of eighteen years.⁵ Able to draw their income and administer their possessions, minors who were emancipated were still very far from being in every respect like a person who had attained his majority; they had to be aided by a guardian in order to go into court or to alienate their immovables; moreover, in this last case they had to get the opinion of their relatives.⁶ If there were occasion to do so by reason of their misconduct, they could be put back under guardianship.

§ 210. **The Same.** — The countries of written law knew neither

surviving spouse puts the children out of his custody by allowing them to have the property of the deceased spouse and causing the law or the relatives of the children to intervene; 15, 31: the father and mother free the children from their lease through the law, so as to escape responsibility for their torts, and also in order that there shall be no community ownership among them when the latter have any personal belongings: *Viollot*, p. 545.

¹ "Cod. Just.," 2, 44, 2, 3 (18 and 20 yrs.); "Nov.," 28 of Leo (no longer any condition dependent upon age).

² *Glasson*, "Inst. Anglet.," VI, 233: the English law does not recognize any expressed emancipation; but it admits the fact that marriage frees a child from guardianship; at the age of 12 or 14, according to sex, a child may choose his own guardian and dispose of his movables by will. — German law: anticipated declaration of majority.

³ It caused the paternal power to cease and, "a fortiori," the guardianship. This was not so in countries of written law and in some of the Customs. *Beaumanoir*, 15, 29: "marriage emancipates from custody, but not from lease." As to the minor carrying on a trade: "Ord.," 1673, 6. — *Ferrière*, on "Paris, 239."

⁴ *Meslé*, I, 203; II, 168 (letters of 1506, 1507); *Boutaric*, p. 126. Germany: *Schroeder*, p. 733. — "T. A. C., Bret.," 79, emancipation by the judge; the friends and the law maintain that the minor at the age of 17 is provided with understanding.

⁵ But, as there was no legal age, they might be granted earlier, a thing which did not offer many disadvantages, because they were only ratified upon knowledge of the cause and on the advice of the relatives: "Gr. Cout. de Fr.," p. 374.

⁶ *Argou*, I, 9; *Pothier*, "Procéd. Civ.," 5, 6, 11 (no restitution in case of these acts): *Argou*, *loc. cit.*: the wife who is a minor needs a guardian for transactions affecting immovables and the help of her husband is not sufficient in a case of this sort. As to alienations of immovables, see *Ferrière*.

emancipation by writing nor emancipation by marriage; the minor was set free from the guardianship by the mere fact of attaining the age of puberty, fourteen years for boys, twelve years for girls; after this age they could have been subjected to a permanent custody, but this was not done; it was thought sufficient to demand that they should have the assistance of a guardian in order to appear in court,¹ and the judge ended by giving them as guardian the attorney who was engaged for them in the lawsuit; for other acts the assistance of the guardian was only a protection, the lack of which did not carry with it the nullity of the act; also, it was for the minor himself to choose this guardian at his own pleasure.²

§ 211. **Persons who have attained Majority and are under a Disability.** — Formerly, merely because a man was affected with a serious physical infirmity (blind, deaf, dumb, dwarf) or with mental illnesses (weakness of mind, dementia), he found himself deprived of the rights which ordinarily belonged to those who had attained their majority;³ the deformed, the infirm, and those lacking in intelligence, were in the same situation as children or women, submitted to the "mundium" of the nearest male relative.⁴ Age itself was a cause of forfeiture; the head of the family who had become old should abdicate in order to make room for the young man and place himself under his guardianship.⁵ It was the same thing with regard to the man who lost his reason. Against prodigals the family was protected by the old system of property, which was very unfavorable to alienations.

¹ *Papien*, 36, 3, 5; "Capitular. Add.," 3a, 50 (*Walter*, II, 805); "Petrus" I, 2, 5, 46, 64; "Arles," 116-118; *Viollet*, p. 584; Limoges, thirteenth century; Marseilles, fourteenth century. In Burgundy, cf. "R. h. Dr.," 13, 549.

² *Serres*, "Inst.," I, 23; *Boutaric*, *Julian*, *ib.*, "Ord." 1667, "t. des Req. Civ.," 35.

³ Cf. *post*, "Disability of Inheriting." — As to lepers, see *post* (sanitary provisions of a public nature). — *Stobbe*, § 41, II.

⁴ Cf. as to these rules of the old form of guardianship: *Stobbe*, IV, 513, 12. This legal guardianship became changed into a conferred guardianship, and the new rules relating to the guardianship of minors were applied thereto.

⁵ The "Sachsenspiegel" contrasts the child under age who is less than 21 years old with the person who is over age, — that is to say, who is more than 60: both of them are under guardianship (I, 42). Elsewhere, I, 52, it declares that in order to be capable of alienating one's "eigen Gut," one must be able to mount a horse, carrying sword and shield, from a rock or a slight elevation, providing only that his horse and his stirrup be held: "Schwabenspiegel," 168; "Leg. Burchardi," 11; *Walter*, "Corp. J. Germ.," III, 777; "L. Rom. Cur."; *Paul*, II, 18, 7; *Grimm*, "R. A.," p. 486; *Stobbe*, § 41; *Huber*, IV, 528 (in 1137: persons who themselves ask that they be prohibited). *Jobbé-Duval*, "Thèse," p. 86 ("Dr. Comparé"). — The practice of giving up possessions often made it unnecessary to prohibit old men. — *Post*, "Add. R. h. Dr.," 15, 190, 203; the mayor of Dijon names a curator for an old man who is infirm. Cf. *Boutaric*, I, 90, "Concerning Those over Age and the Enfeebled."

§ 212. **The Same.** — From this system, where the interest of the family precedes everything, and is characterized, one might say, by the *proprietary guardianship of agnates*, the law passed, as had been done in the case of minors, to a system of protection organized especially in the interest of the incapacitated; the family always preserved a certain part therein, but that of the State was still more important. — All those who were not found to be absolutely unfit to administer their affairs had a full capacity (for example, deaf and dumb people).¹ — As to the demented² and feeble-minded, the acts which they accomplished were looked upon as void; but, as dementia and feebleness of intellect are susceptible of a varying degree, and as great difficulties might arise between the relatives and those whom they pretended to be mad or imbecile, the tribunals placed them under guardianship or custody,³ so as not to have to pronounce themselves upon the result of each one of their acts after it had been accomplished.⁴ This system of prevention seems to have been substituted for the system of repression from the end of the thirteenth century.⁵ It was extended without difficulty to prodigals, who are, after all, only a class of the feeble-minded.⁶ Justice should have proceeded officially,⁷ but this would have been to break abruptly with the former

¹ "Aripbrand and Alb.," p. 166; "Jostice," p. 105; "Schwabenspiegel," 2, 57; *Ferrière*, "Tut.," pp. 59, 95; *Ferrière*, see "Dict."

² During the thirteenth century natural madness (imbecility) was contrasted with frenzied madness (insanity with lucid intervals): "Jostice," I, 8; *Beaumanoir*, 34. Cf. in English law, idiots and lunatics: *Pollock and Maitland*, I, 464; *Glasson*, VI, 148.

³ Our old law places the insane under a disability just as it does prodigals: "T. A. C., Bret.," 83. Cf. Roman law, *Girard*, p. 220 *et seq.*

⁴ Madness makes the act void, and not the judge's decree; but the prohibition is a presumption of madness; the conditions under which proof of lucid intervals may be given are regulated in order to shorten lawsuits. Cf. *post.*

⁵ "Jostice," p. 131; cf. p. 59; *Beaumanoir*, 56, 9; 12, 45; 34, 56; "Ass. de Jérus.," "C. des B.," 81; "L. d. Droiz," 779.

⁶ "Olim," III, 849 (in 1313): disability placed upon a clerical who is a prodigal by the ecclesiastical judge; thirteenth century at Limoges the councils name custodians for prodigals: *Guibert*, "La Famille Limous.," p. 34. *Viолет*, p. 550, cites an Act of 1303 in which the king commands the bailiff of Amiens to appoint a custodian after having conferred with the relatives for an "ydiota prodigus": "Olim," II, 661, in 1317 ("curator ydiotae"); III, 168, in 1306 ("curator patris"). Burgundy: "R. h. Dr.," 15, 190. — During the latter part of the Old Régime orders of arbitrary arrest are also issued against prodigals: "R. D. M.," 1892, 113, 832. — Germany, fourteenth and fifteenth centuries: imprisonment, a banishment of prodigals or placing them under guardianship: *Stobbe*, § 275. — England (*Lehr*, p. 40): the feeble-minded and prodigals are not protected by the law; they are only allowed to place their property in the hands of trustees.

⁷ **System of Caring for the Insane.** For a long while the violently insane were treated like demoniacs by means of exorcism or like criminals by shutting

family system; it was not put in motion excepting upon the demand of a relative (fourteenth century),¹ after the examination, notice to the family, and in the case of one who was demented, after interrogatories on the part of the judge. The same forms were requisite for the withdrawal of the prohibition. There was already a question as to the publishing of judgments of prohibition in the well-known Customs of Châtelet;² which was finally organized by the Regulating Orders of the Parliament of Paris, of the 18th of March, 1614, and the 23d of December, 1621.³

§ 213. **The Same.** — As a result of the proceedings, the person prohibited was deprived of the administration of his possessions,⁴ which passed to his guardian or custodian;⁵ he was not able to dispose of them "inter vivos" or "causa mortis," nor to bind himself.⁶ But, if this was the normal result of the prohibition,

them up in dungeons. Before the time of Pinel, who in 1792 regarded them as patients, they received more humane treatment in certain places: special asylums at Geneva, 1468; at Marseilles and Avignon in the sixteenth century, in Paris and Charenton and Bicêtre (Order of the Parliament of Paris, Sept. 7, 1660; "Instr.," 1785). Intermediate law: Law of March 16-24, 1790, Art. 9; August 4-29, 1790; August 16-24, 1790; 11, 3; July 19, 1791: I, 15; Sept. 23, 1792; the 24th Vendém., year II, 3, 7; *Dalloz*, "Rép.," see "Aliénés." It was not until the law of June 30, 1838, that the burial of the insane was provided for, and then only in a very inadequate manner. England: verdict of a jury after an inquest "de lunatico inquirendo."

¹ "Ad Requisitionem Amicorum," "Olim," III, 421; *Louet*, § 16; *Serres*, I, 23, 3 and 4; *Stobbe*, § 275: but public authority also intervened, for the simple reason that it had jurisdiction of acts of prodigality (public interest in avoiding their becoming a public charge upon the city): *Dumoulin*, on "Bret.," 495; "Norm.," 151: creditors; "L. Pat.," Dec. 25, 1769: conclusions of the Ministry of Public Affairs. — "Ord. de Blois," 1579, 182: widows who remarry with persons beneath their station are placed under a disability of absolute right.

² "Olim," III, 421 (in 1309): notice is given by the town crier in neighboring localities that no one must contract with the person under the disability. The "Ord." of 1629 provides for the posting up of the decree at the clerk's office: *Stobbe*, IV, 526: public notice in church.

³ *Argou*, I, 9: notification first of all of the notary's clerks; later on each notary is notified individually and it is written up on a notice board in each office. Responsibility of notaries if they do not notify those who have transactions with the person under the disability.

⁴ In England the king has the custody of the insane and the use of their property. From the time of Edward II he declares himself to be the protector of the insane: *Pollock and Mailland*, I, 464. Cf. as to this "Seigniorial Protection."

⁵ "Olim," III, 849, 421 (in 1309): "administracio bonorum totaliter interdicta." He becomes a minor again. His guardian or custodian would ordinarily be his nearest relative: "Paris," 183. Disadvantages: *Pasquier*, "Lett.," 18; *Meslé*, II, 291: Order of Apr. 17, 1734. Retroactive effect of the Decree: *Bourjon*, I, 6, 4, 2.

⁶ Nullity of the acts which he does by himself, at least if he is injured, and the injury shall be readily presumed. Acceptance of gifts made by prodigals themselves, by the ascendants or the custodians of the demented: *Pothier*, I, 361; VIII, 371 (ed. *Bug.*); *Pothier*, "Oblig.," no. 51: the contract made by a

the tribunals were free to impose other restrictions.¹ Thus, prodigals were not necessarily deprived of the administration of their possessions;² it might be sufficient to provide for them, as in the case of the feeble-minded,³ a **judicial council**,⁴ without which they could not validly accomplish the acts enumerated in the judgment which named it, especially as regards alienating or mortgaging their immovables. Outside of the administration of the inheritance, which escaped the prohibition, there were certain acts, like marriage, which concerned the person of the one under the disability, and as to the outcome of which the judgment said nothing; they were left under the application of the old rule, which annulled acts done under a state of dementia or absolute imbecility; it was for the judges to say, in fact, if these were the acts of a conscious or clear will (lucid intervals).⁵

§ 214. **The Same.**⁶ — Those who had attained majority and were under a disability⁷ were provided with a *custodian*, whose duties varied according to the nature of their disability. Sometimes he administered the possessions of the one under the disability and

madman, before his being placed under a disability, is void if his madness is established as having existed at the very time of the deed (*contra* in the case of the prodigal); "Pers.," no. 201: placing a minor under a disability is useless, if he has not been emancipated. — Dementia is proved by means of witnesses in the case of acts "inter vivos," and even according to many in the case of wills; but, as the notary mentions the fact that the testator is of sound mind, this point is in dispute. *Bourjon*, I, 6, 4, 1: the jurisprudence of the Châtelet adds to the difficulties of the proof of acts previous to the disability, or if the demented person is dead, or if it is wished to prove that the act was carried out during a lucid interval after the disability was decreed. Letters of rescission are not necessary in the case of acts done by a person under this disability.

¹ Thus the capacity of the feeble-minded and prodigals varies according to the inclination of the judges, and this without third parties always being informed of it; under these conditions the appointment of a judicial council might very easily be a snare for the public: *Bourjon*, *loc. cit.*

² Disability of prodigals only disappeared from our law at the time of the drawing up of the Civil Code, Art. 513. "Const.," 5, Fruct., year III, Art. 13: they preserve their political rights.

³ The jurisprudence of the Châtelet only appointed a judicial council upon the request of a feeble-minded person, — a very impractical solution, because "where can you find a madman who is wise enough to have himself placed under a disability?" *Fenet*, "Trav. Prép.," II, 96.

⁴ *Argou*, I, 9; *Denisart*, see "Conseil"; *Brillon*, "Dict. des Arrêts," see "Prodigue." Application to litigious people.

⁵ The marriage of a demented person during a lucid interval is valid; but Parliament, upon an appeal as against an abuse of power, can order that the marriage shall be rehabilitated, — that is to say, celebrated over again, and can cause the contract of marriage to be drawn up according to the Custom of the locality and the desires of the relatives: "Jostice," p. 24 (nullity); *Bourjon*, *loc. cit.*

⁶ *Stobbe*, § 277 ("Pflegschaft").

⁷ "Const. du Chât.," 74-84; "T. A. C., Bret.," 79; ed. *Planio*, p. 366 (reform of 1405, choice of custodian).

represented him in the same way as a guardian, and this is what happened in the case of maniacs or imbeciles; sometimes he is limited to helping the one under the disability in court,¹ and to giving his consent to alienations of immovable possessions or some other important steps; this is done in the case of minors who are emancipated and prodigals who are not radically under a disability.

As we see, the duties of the custodian are not identical with those of the guardian, and his responsibility, moreover, is not the same. But custody does not differ from guardianship in its nature; like the latter, it is a public charge in the interest of those under a disability; like the latter, also, it is conferred. It is for this reason that we say **guardian and custodian are but one.**²

The old law had many other custodians (for a posthumous child, for possessions without an owner, which have been given up or abandoned, for the absent, for the accused who is deaf and dumb or who refuses to answer, for the body or the memory of a deceased person, for possessions which have been confiscated): these represented persons who could not or would not act for themselves.³

¹ From whence the name *custodian of actions*. Cf. guardian "ad hoc" or custodian given a minor who is not emancipated and who has actions to bring against his guardian: *Beaumanoir*, III, 18; *Boutaric*, "Inst.," I, 23, 5; *Ferrière*, 4, 5, 284; "L. d. Droiz.," 899, 900; "R. h. Dr.," 15, 175.

² *Loysel*, 180. After the thirteenth century the terms "guardian" and "custodian" are used interchangeably; the same personage is called a guardian and a custodian; "cura puerorum" is understood to apply to guardianship: "Olim," III, 128, 157, 1110 (in 1304 *et seq.*); *Dumoulin*, "Usur.," 39, 300; *Coquille*, "Quest.," 178; "Arrest," "Sane," etc.; "Petrus," I, 2 *et seq.*, however, still makes the Roman distinctions. The gibe cited in the text gives one to understand that in countries of Customs the guardian remains in power until the coming of age of his ward and, consequently, plays the part of the Roman custodian ("curator"). In the Customs where guardianship ceases at the age of 20 (for example, "Montargis," 7, 7) they abolish custody after that age also: *Viолет*, p. 519. Same rule in Germany: "hodie jura tutelæ et curæ confusa esse," — *Heusler*, II, 508. — The Civil Code calls the custodian of the insane man his guardian, Art. 505.

³ See "Répertoire et Dict.," *Argou*, I, 9.

CHAPTER TWO

OWNERSHIP AND REAL RIGHTS

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TOPIC 6. ACQUISITION OF THE OWNERSHIP OF IMMOVABLES —
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TOPIC 1. DIVISIONS OF PROPERTY

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§ 215. **General Remarks.** — From the Frankish period to the Revolution the system of the ownership of land is characterized by the multiplicity of rights which bear heavily, at one and the same time, upon each piece of real property: 1st. Rights of the village or the neighbors, remains of agrarian joint ownership, or the collective ownership of the village: from which are derived **rights of commons**, rights of pasturage and servitudes of vicinage. 2d. Rights of the family, remains of the family joint ownership: from which are derived the splitting up of possessions into **personal belongings** and **acquests**. 3d. Rights of joint owners, joint

possession, and joint ownership being created, so to speak, spontaneously. 4th. Rights of the lord, from which arises the distinction between **fiefs, manors, servile** and **allodial tenures**. 5th. Rights of the king or the State, rights of the Church and persons in mortmain who are connected with the Church or the State: from which arises the distinction between the **public domain** (domain of the crown), the ecclesiastical inheritance,¹ and possessions of simple individuals.²

§ 216. (I) **Movables and Immovables**. — One category of possessions, *movables*, by their very nature escape from these complicated rights. These objects, which are perishable and subject to continual moving about, only lend themselves to more simple relations than those which came into existence as regards immovables. Also, for a long time the law remained, as far as movable property was concerned, in that obsolete phase of its development which could be reduced to the suppression of offenses: he who has a movable does not thereby have the advantage of claiming, or of a contractual action; he is limited to an action "ex delicto" against the thief or unfaithful depositary, or the borrower who refuses to make restitution to him. We shall see further on how legislation upon this point was altered. Over movables the individual has a right of disposal which is more efficacious than that which he has over land: food, arms, clothing, are a part of himself, so to speak: "*mobilia ossibus inhærent*."³ The facility with which movables may be carried about, the restrictions brought to bear on the rights of the owner of land, have maintained throughout the Old Régime important differences between the system of movable property and that of landed property: ⁴ movables have no duration and are not capable of being mortgaged; movables can be freely disposed of, whereas, the alienation of immovables is sub-

¹ As to the possessions of the Church (mortmain) *cf.* *Salvioli*, § 216 (bibl.); *Pertile*, § 146. — *Deghewiet*, p. 83, contrasts sacred or ecclesiastical things with profane or secular things: *Astruc*, p. 208; "*Petrus*," I, 60, 65.

² *Cf.* Institutes such as those of *De Launay*, *Fleury*, *Boularic*, etc.

³ *L'Hommeau*, p. 356. — English law: (I) *Real property*: perpetual rights bearing upon immovables. (II) *Personal property* (goods and chattels): 1st, chattels real, for example, lease for a term of a piece of land; 2d, chattels personal, domestic animals, household goods, jewels, arms, etc.; there are also included *choses in action*, that is to say, incorporeal things, such as claims, copyrights, commissions in the army, etc. Personal property does not come within the feudal system. Real property is not absolute; it is limited in theory by the ultimate ownership of the State.

⁴ Differences which have been exaggerated by maintaining that as to movables a mere detainer of them took the place of real rights (*Franken*, "*Franz. Pfandr.*," pp. 267, 292). See a criticism of these ideas in *Heusler*, § 79. *Cf. post*, "*Ownership of Movables*." — As to coinage, *cf.* bibl. in *Schroeder*, pp. 184, 510, and *Amira*, p. 175.

ject to every kind of restriction; debts are payable out of movables, but not out of immovables, for this would be an indirect means of alienating the latter. Movables can be confiscated, but not immovables, for the same reason; the rights of the husband or the guardian are much more extensive over movables than over immovables; the inheritance of movables is founded upon the presumed will of the deceased, whereas the inheritance of immovables is planned, taking into account the rights of the various interested parties; the alienation of immovables is complicated by formalities, whereas movables are freely transmitted from hand to hand; movables are controlled by the custom of the domicile of the owner, immovables according to the place where they are located. The majority of these rules were unknown to Roman legislation, where the distinction between movables and immovables only affected matters of secondary importance (system of marriage portion, special prohibition, period of prescription, theft).

§ 217. **Basis of this Division and its Extension.** — This division of possessions corresponds to the economic state of the early Middle Ages. It went even further back, if we admit that ancient Germania passed through a system of jointly owned property; the land would have belonged to the community, the movables to the individual. Following the invasions, this division is not formulated in theory; but in the documents of this period the land and its accessories are often contrasted with other possessions. The ownership of land has its own special rules in matters of inheritance, in the relations between spouses, with regard to that which concerns alienations and credit; the division is already founded along these important lines. Following this, this division dominates the whole of the Feudal and Customary law; industry and business have pretty nearly disappeared; the precious metals are scarce; the land is found to be the only source of wealth:¹ “*res mobilis, res vilis.*”² As soon as immovable possessions be-

¹ *Pollock and Maitland* rightly point out that the formula “*vilis mobilium possessio*” has been mistakenly exaggerated. This formula is true relatively. The Abbot of one of the big monasteries would have been very much astonished had he been told that the thousands of head of cattle feeding upon his lands had no value. But, if one had wealth consisting of movables, it was assumed that one had lands. — As to the characteristic of movables that they may be restored in kind, which has allowed of their being used as money (“*pecus*,” “*pecunia*”) cf. *ibid.* and *Champeaux*, “*Thèse*,” p. 57 *et seq.* (criticism by *Stutz*, “*Z. S. S.*,” 1899).

² “*Gl. Dominia Rerum*” on “*Pr. Inst.*,” 2, 6: “*quia mobilium rerum vilis est possessio*”; “*Gl. Neglecta*,” on I, 47, D, 41, 2: “*possessio rei mobiliis est vilis et abjecta, eo quod facile perditur etiam ab ignoranti.*”

came the most valuable of all, there was established a system which was designed to preserve them in families, and it is with the possession of the soil that political authority was connected.¹ Far from becoming weakened, this division was accentuated; it even took in incorporeal things which are not susceptible of being moved about and, as a consequence, are neither movable nor immovable, excepting in countries of written law, where the influence of the Roman law was sufficiently strong to make of them a category by themselves.² In the eighteenth century the economists, who, this time, through mere chance, agreed with the jurists, changed the old prejudice into a learned theory. In our day this "summa divisio rerum" has succeeded in being upheld, although the majority of the reasons which led to its establishment have ceased to exist. It has hardly any other reason for existing than the necessity of facilitating trade in movables.

§ 218. **Movables and Chattels.** — Movables are things which can move or be moved, which may be easily displaced and carried about, the "fahrende Habe" of the German law as contrasted with immovables or *things not movable*.³ In the north of France, instead of movables and immovables, in the common language, they say "chatel" or "cateux" ("catalla," Eng. chattels) and "héritages" (Eng. inheritances) or even, as in Normandy, "fiefs."⁴ The division is theoretically formulated in the thirteenth century. For Beaumanoir, immovables are things which are everlasting and which produce annual income; perpetuity and the production of issues characterize immovables even more than the important fact of immobility; it is these two qualities which make up their value, whereas movables are perishable and do not bring in anything. For this reason there were immovable possessions which were very much like movables; certain of the Customs, for ex-

¹ Among the ancient Scandinavians the possession of a piece of immovable property was the essential condition of one's having a right to property in the popular assemblies: "R. h. Dr.," 1865, 394; "Auct. Vetus de Benef.," I, 37 (testimony); "Sachsensp.," 1, 5, 1; 34, 1; *Pertile*, § 141.

² *Gui Pape*, q. 291; *Julien*; "Elém. de Jurispr.," p. 148, etc., *Astruc*, p. 323; constituted rents are movables in Languedoc, cf. *Deghewiet*, p. 162: looked upon as immovables. "Siete Part.," 5, 5, 4; 3, 2, 1 (valuable movables likened to immovables): "Confér. des Cout., de Guénois," p. 363.

³ *P. de Fontaines*, 33, 12; *Beaumanoir*, 23 (movable and inheritance); "Gr. Cout.," 2, 12, 18; *Boutaric*, I, 74; *Lamoignon*, "Arr.," p. 54; *Bracton*, I, 1, c. 1, "De Rer. Div." — German law: "haba, pecunia, Liegendes" and "fahrendes Gut, Liegenschaft Fahrniß"; *Grimm*. "R. A.," II (4th ed.). — On the word "averium," "averia," see *Du Cange*.

⁴ "Summa, Norm.," 87, 2; "Assise au Comte Geoffroy," Art. 5. — *Blackstone*, II, p. 246 ("Inheritances").

ample, that of Artois, qualified them as chattels and treated them as movables (inheritance, etc.). Such were trees which did not bear fruit, and buildings appertaining to cultivation which could be moved about, like barns and cattle-sheds. They did not precisely constitute a third category of possessions; they were in a certain degree immovables out of their sphere, for the reason that they did not come up to the accepted idea of the value of the immovable inheritance.¹

§ 219. **Inheritances or Immovables** are:² 1st. The land and everything which is an integral part of the soil, buildings,³ crops growing on branches or roots⁴ (the "immovables by nature" of the Civil Code). 2d. The movables which adhere to the immovables in the quality of accessories or appendages of the latter,⁵ but only,

¹ Chattels ("catalla," "capitalia," "cheptel"): (a) primitive meaning, head of cattle, herd; for example, right to the best cattle ("Besthaupt") in the inheritance of a person in mortmain (Civil Code of 1800, "cheptel"); (b) as in the old times the majority of movable possessions consisted in herds of cattle, in the end all income and movables came, in a general way, to be called by the name "catalla"; cf. English law: *goods and chattels*; Glanville, in Houard, I, 442; P. de Fontaines, 33, 12; movables and chattels; (c) special acceptance, possessions which are immovable in their nature but treated like movables in matters of inheritance: "Artois," 106; "Lille," 49; "Hainaut," 101, etc. Boutaric, I, 74 (no wise men draw any distinction between movables and chattels). However, a legacy of the movables does not include the chattels: see Ragueau (Brunel), "Observ.," 1757, p. 847; "Roisin," p. 72.

² "L. Feud.," 2, 1, 1; "Jostice," p. 268.

³ For a long time in Germany and Belgium the house is classed among the movables, because it is made of wood and capable of being transported: Chaisemartin, p. 103; Huber, IV, 683. Market for houses at Moscow in the eighteenth century. — "Moulins," Beaumanoir, 23, 37; Boutaric, I, 74; "Paris," 90; Pothier, 235. As to the Swiss "Urhäb," a collection of objects required for household use in the old days, cf. Huber, IV, 682, 6.

⁴ Various systems with respect to crops: 1st. Movables when they are separated from the soil: "Gr. Cout.," 2, 12; "Paris," 92, etc. 2d. Movables by anticipation from the time they become ripe: "Reims," 19; "Artois," 141; Loysel, 214; Pothier, "Choses," no. 240. Cf. L. 22 Frim., year VII: execution on standing crops. 3d. The wheat is a movable as soon as it has been sown, the grapes as soon as they have been formed: Beaumanoir, 23, 5; 27, 13. Cf. as to this "Acquiring of Crops," Huber, IV, 684: "Saat sei fahrende Habe." Sale of the standing crops, rights of mortgage creditors. — In leases of possession at will (Lower Brittany), *édifices and superficies* (buildings and crops) are the property of the tenant and treated as immovables in his patrimony (inheritance, community, etc.); they are treated as movables with respect to the lessor. Law of June 7th-August 6th, 1791, Art. 9.

⁵ As to the theory of **Accessories** or dependencies, "Zubehörde," "Pertinenz," cf. Stobbe, § 65; Heusler, § 72; Huber, 149; Kohler, "Jahrb." of Ihering, 1888, 22. — Roman origins: Dig., 19, 1, 13-18; 33, 7 (accessories included in a sale, a legacy). During the Frankish period there is often a question in deeds as to the accessories of estates (for example, "mancipia," colonists, etc.). The wine-press, the urns to hold the wine, are looked upon as accessories of the house: Heusler, I, 359. — It was reasons of an economic nature that were opposed to separating the accessories from the main property. It was thought that this result was obtained by making them like immovables. "Accessorium sequitur naturam rei principalis." — Is the act of the proprietor

on principle, if there is a physical connection (fastened by iron or nails, affixed in plaster, "Paris," 90);¹ it is only as an exception that the common law of the Customs looks upon an encumbrance for the benefit of the land as carrying with it the quality of immovability (existing category of "immovables by name").² 3d. Rights over the land which are like the ownership because of their duration (servitudes, quit-rent, and rents) and rights which, according to the feudal conception, were connected with the land itself (right of administering justice, toll, socome).³ These incorporeal immovables, as they are already called by the "Grand Coutumier de France," are rather rights than the objects of rights;⁴ in classing them among immovables our old law followed the example of the Romans, who made of ownership a corporeal thing, because they did not separate it from its object. It is true that many of these incorporeal immovables had as their object mov-

necessary for this? Neither the "Gr. Cout. de Fr." nor *Boutaric* demand it; *contra: Lamoignon* in his "Arrêtes"; *Pothier*, "Choses," no. 244; "Communauté," 47, 63.

¹ "Gr. Cout. de Fr.," 2, 11; *Boutaric*, I, 74; *Loysel*, 217; *L'Hommeau*, p. 366. Cf. German expression: "erdfest und nagelfest."—Criticism by *Pothier* "Communauté," no. 47 *et seq.*: there are things which, without being attached firmly, are looked upon as forming a portion of the house, and others which, although fastened firmly, are not considered as a portion of the house. As to looking-glasses, *ibid.*, no. 55. *Pothier* does not distinguish between immovables according to the purposes for which they are to be used and immovables according to their nature: "Communauté," nos. 54, 58. Cf. Civil Code, 524, 525.

² Straw and manure are looked upon as being incorporated in the farm, artillery in the castle, ornaments in the chapel, looking-glasses, pictures, statues, in the house; building materials are looked upon as being separate and intended for reconstruction (cf. Civil Code, 532; *Loysel*, 218). Pigeons in pigeon-houses, rabbits in rabbit warrens, and fish in ponds are regarded as immovables: "Gr. Cout.," 2, 18; "Paris," 91; "Orléans," 74; "Jostice," p. 268 (serf-heritage); *Gui Pape*, q. 91. Fish in a basin (reservoir), pigeons in an aviary, and rabbits in a rabbit-hutch are considered as movables: *Loysel*, 215; *Merlin*, see "Animaux." Bees and beehives are movables according to *Pothier* and immovables according to *Chopin*, *Lamoignon* and *Merlin*. Because of excessive timidity the immovability of things has not been made to result from the mere fact of what they are intended for: objects serving for cultivation, domestic animals, agricultural utensils, seeds, printing-presses, etc., are looked upon as movables: *Pothier*, "Cout. d'Orléans," "Fiefs," no. 235 (which points out the disadvantages of this doctrine). *Lamoignon* in his "Arrêtes," wants to make them immovables. The Ordinance of 1747 follows this doctrine in a special case in the matter of substitutions (cf. Art. 1064 of the Civil Code) and the Declaration of March, 1685, with regard to the negroes in the colonies: *Masuer*, 11, 18; 30, 25 (serfs). Cf. the old Swiss law: everything which is necessary for the development of the land, straw and manure, domestic animals, "mancipia" (body servants), rights of use on "allmends," houses, granaries and barns: *Huber*, IV, 688.

³ *P. de Fontaines*, 33, 12; *Masuer*, 30, 24; *Blackstone*, II, p. 250 (Fr. trans.): "incorporeal hereditaments."

⁴ Controversy on this point. Cf. *Heusler*, *loc. cit.*; *Pollock and Maitland*, II, 123.

ables, for example, the collecting of a sum of money (toll, etc.); but they were almost always annexed to an inheritance; by reason of their value or their duration they were similar to immovables; it is not surprising that they were classified as belonging under the system of the ownership of land.¹ Thence sprung the relatively modern conception of immovables according to the use to which they are applied, formulated in the rule: "Actio quæ tendit ad quid mobile mobilis; ad quid immobile, immobilis."² 4th. Finally, for these same reasons, rights like established rents and salable offices which had movables as their object, but which were immovables or feudal in their origin, were comprised within the class of immovables.³

§ 220. (II) **Personal Belongings and Acquests.** — Of immovables, some come to us from our relatives by way of intestate inheritance; these are *Personal Belongings* or hereditary possessions;⁴ others come to us in other ways, for example, we buy them; these are *Acquests*.⁵ This distinction, which was unknown at Rome, appeared in the forms and deeds of the Frankish period ("alodis parentum" as contrasted with "comparatum" "conquisitum");⁶ it is made during the feudal period in every country of Customary law,⁷ and even in countries of written law in many places.⁸ It is

¹ *Heusler*, I, 337, example of disposal, sale, gift, etc., affecting an office and right to administer justice, a right of fishing, a right of way, etc., — "L. Feud.," 2, 1, 1. — *Deghewiet*, p. 163, places seigniorial rights, offices, rights of hunting, together with servitudes, among incorporeal things.

² It may be asked whether this at first affected real rights as well as claims: *Loysel*, 210, 211: "noms, raisons et actions"; *Pothier*, "Comm.," no. 69. Cf. trans. of the Civil Code, 526: "actions which tend to reclaim"; "Cout. d'Aoste," 5, 16: actions requisite in dealing with immovables. — Geneva, Edicts of 1713, 24: "names, debts and actions are neither movables nor immovables." Cf. countries of written law. — In English law chattels real, although classified as personal property, are like real property. They are rights affecting immovables, — for example, the lease of a domain, but for a limited time: *Littleton*, 281.

³ *Loysel*, 219, 444 (rings, jewels, etc.); *Pline*, "N. H.," 9, 35; "Cout. d'Aigle," 1772, 2, 4, 3 (land on which stands a shop); *Viолlet*, p. 620. — *Clémentines*, "De V. S.," 5, 11, 1; *Kraut*, "Grundr.," p. 144 (Statute of Frankfort). — "Offices," I; *Bourjon*, I, p. 360.

⁴ *Grimm*, "R. A.," p. 493.

⁵ *Du Cange*, see "Proprium Wisig.," 4, 5, 1: "proprie res" as contrasted with those which are conferred by the sovereign. "Terra aviatica": "Rib.," 56, 4; "Sal.," 72. As to the "terra salica," *post*, "Inheritance." *Ragueau*, see "Propre," "Naissant," "Papoage"; *P. de Fontaines*, 15, 12: principal heritage. — Cf. German "Eigen," from whence "Eigenschaft" and "Eigenthum," property (fourteenth century). "Stammgut," possession belonging to the lineage ("uodil," "odal"). "Erbe," "Erbeigen," as contrasted with "Kaufeigen": "L. de Manu," 9, 209.

⁶ *Marculte*, 2, 7 et seq.; *Thévenin*, "Textes," Table.

⁷ *P. de Fontaines*, 15, 12; 33, 12; *Beaumanoir*, 14, 31; 44; "Gr. Cout. de Fr.," 2, 12; *Loysel*, 222 et seq.; *Lamoignon*, "Arr.," p. 66.

⁸ "Bordeaux, A. C.," 59, 85; "Agen," 34; "Tonneins," 81, etc. Personal

to be connected with the formation of the family;¹ the latter was a true legal person, with an inalienable inheritance² (or pretty nearly so),³ almost like the domain of the State; its existing head was less the owner than the manager. The family was disintegrated little by little, but a latent right of joint ownership remained for its profit, which arose at certain times and under certain circumstances; instead of affecting all the immovables without any distinction,⁴ this right was isolated and affected only *inheritances* properly so called, possessions which had been acquired by inheritance.⁵ The other possessions, resulting from the personal labor and industry, and the economy, of the individual, belonged to him more absolutely; he was left free to dispose of them.⁶

§ 221. **Alienation "inter vivos"** of personal belongings was only valid in olden times⁷ when it was done with the consent of the family,⁸ that is to say, according to the Customs, with that of the

belongings are called "bien papoaux avitius," "terre de lignage," etc. — However, in a general way, owing to the influence of Roman law, the system of personal belongings was never in vogue in countries of written law.

¹ Everything has been said that can be said as to the difficulty which the system of personal belongings caused in transactions in immovables; but, if it is to be fairly judged, one should take into account the advantages of every kind which the old-time constitution of the family offered. — *Toullot*, "Thèse," 1886 ("Copr. de Famille").

² Cf. *Jobbé-Duval*, p. 66 *et seq.* ("Dr. Comparé"); "Fribourg," 1120, § 28; "Fueros de Najera," "Miranda." Inalienability among the Slavs of the South in localities where family communities existed; in the towns where these communities have disappeared the repurchase by a person of the same lineage is made use of.

³ Cf. as to this, "The family possessions which cannot be distrained upon." "Homestead," "Réf. Sociale," Feb. 1, 1894.

⁴ Originally, every immovable belonged to the family, even the acquest.

⁵ Acquests soon became changed into personal belongings, because the father's acquests are the child's personal belongings.

⁶ "T. A. C., Norm.," 13, 2.

⁷ From the Frankish period on, however, we find documents recognizing the owner as being free to alienate (influence of the Roman law and of the Church): "Burg.," 1; "Bai.," 1, 1; "Alam.," 1; "Thuring.," 13; *Sumner Maine*, "Anc. Droit," p. 264. Cf. "Dipl.," II, 280 (charter of Count Englebert, 709); *De Rozière*, 272; "Cart. de Redon," nos. 226 *et seq.*

⁸ "Roth.," 168 *et seq.*; "Burg.," 1, 1; 24, 5; "Bai.," 1, 1; "Sax.," 62 *et seq.*; *Lacomblet*, "Urk. d. Niederrh.," 127 (in 996). Examples of intervention on the part of the relatives abound. The frequent intervention of the wife or of the husband was to be accounted for because of their reciprocal rights (dower, etc.). Cf., however, *Jobbé-Duval*, *op. cit.*; "Dipl.," I, 24 (sixth century); "Mém. Antiq. Ouest.," 1847, XIV, 75, 18; "Jostice," p. 169. — One of the most curious examples of family solidarity in either civil or criminal matters (and, consequently, one which is not affected by any matter of inheritance) is met with in the right of "finport" of the "T. A. C., Bret.," p. 142, 192, etc., ed. *Planio*: the plaintiff at law was held bound to join as parties all those of his relatives who could have taken any part in the action; if this was not done, the defendant did not have to reply: *Giraud*, "R. de Lég.," 1843, p. 599 ("Lois Galloises"). This right was not abolished until 1539 on the occasion of the first official

heir presumptive alone or with that of the near relatives.¹ As an exception, this sort of alienation was authorized without the intervention of the relatives in cases of extreme poverty (*poverty sworn to*).² To the needs of the body those of the soul were likened, and disposals "*pro remedio animæ*" were equally held as being lawful.³ As often happens, the exception in its development overcame the rule; however, the latter was very far from disappearing entirely.⁴ Practice for a long time⁵ retained the custom of the intervention of relatives in acts of alienation, and the threatening clauses by means of which it was sought to prevent their opposing these deeds. On principle, however, any alienation was permitted on the condition of previously offering the personal belonging to the relatives;⁶ they were given the preference over purchasers

drawing up of the Custom of Brittany: *Chénon*, "L'Ancien Dr. dans le Morbihan," 1894, p. 19 (bibl.).

¹ *Beseler*, "Erbvertr.," 1, 48, and *Lewis*, "Succession d. Erben.," p. 7, teach that the right of the relatives did not exist before the eleventh century excepting in Saxony ("Sax.," 62, 64; "Sachsenspiegel," 1, 34, 52). But wherever there are family communities it exists for the benefit of the members of these communities ("Ganerben," "coheredes"); the employment of the partition "*inter vivos*" restricted the number of the latter; only descendants were able to live in a community and had to give their consent to do so; collaterals who were excluded from the community by the effects of the partition could not raise any claim. When partitions fell into disuse the right of more distant relatives once more made its appearance. In Saxony, where communities did not exist, the reservation gave the heir the same power: *Heusler*, § 89. It was not a rare thing for the consent of all the relatives to be obtained "*ad majorem cautelam*." — If this consent was not obtained, the relatives who should have given it had the right to take back the property from the person acquiring it within a year and a day: "Sachsensp.," 1, 52, 1. Controversy as to the nature of this action, which must be looked upon as a real action.

² *Ragueau*, see "Jostice," 169, 256; "Fors de Morlaas," 31, 71 and 80; *cf.* "For." of 1552, "R. de Contr.," Art. 6; *Cordier*, "R. h. Dr.," 1868, p. 551; "Fribourg" in 1120, § 28; "Artois," 24; "A. C., Lorris," c. 16; "Azun," in 1306, 87 (*Lagrèze*, "Hist. du Dr. dans les Pyrénées," p. 450); *La Taumassière*, "C. de Bourges," XIV, p. 439. By making an heir presumptive participate in the sale, difficulties as to knowing whether there had or had not been any necessity of making an alienation were avoided: *Dumoulin*, on "A. C., Artois," 50; *Brodeau*, on "A. C., Boulenois," Art. 124. Various Charters. — In case an alienation were made because of poverty sworn to it was natural to give the preference to relatives.

³ "Liut.," 19, 73; "L. Alam.," 2, 1; *cf.* "L. Feud.," 2, 3, 1 and 9, 1. — "Capit.," 818, c. 6 (1, 282); "Cap.," 803, 6; 817, 7.

⁴ Survivals in the fifteenth century: "Gr. Cout.," p. 280; *Ragueau*, "Gloss.," see "Pauvreté Jurée." — Sixteenth century: "Artois," 76 (necessity sworn to or consent of relatives or reinvestment): "Boulenois, A. C.," 73; "N. C.," 124; *Ponthieu*, 19. — *Cf. Langle*, 29 (prohibition of making a will contrary to the wish of near relatives). — *Soule*, 17, 1, 2; 26, 4; *Labourt*, 5, 1, 2; 11, 4; "Navarre, Rubr.," 20, 3. Repurchase of domestic animals: *Labourt*, 6, 1, 2; *cf. Cordier*, "R. h. Dr.," XIV, 597. — "Barèges," in 1670, 4, 5.

⁵ Acts of eleventh century: *Pertile*, III, 419.

⁶ "Jeremiah," xxxii, 7; "Stad. Fam. s. Petri Worm.," Art. 2, 6; "L. Sax.," 64. "Offer to the next of kin," that is to say, to the nearest relative ("T. A. C., Bret.,"). *Cf. post*, "Repurchase."

who were strangers; but if they refused to avail themselves of this right of pre-emption, an alienation made to strangers could be opposed to them. In the end every alienation was made valid, even if it had not been preceded by an offer to the relatives; but the latter had the power to substitute themselves for the purchaser and to take the bargain upon themselves¹ (*repurchase by person of same lineage*) within a period of a year and a day.²

§ 222. **The Same.** — Alienation by means of a will was still more liable than alienation "inter vivos" to deplete the family. For a long time there was no reason to apprehend this danger, because the will was unknown or very rare; the day when this act came into practice the course of restraining the rights of the testator was pursued; the Custom fixed upon one-fifth of his personal belongings as the rather small portion which he was free to dispose of by will (**reservation of four-fifths**). One may be surprised that gifts were not treated like wills. Our old authors justified the distinction by saying that as gifts were the outcome of natural law, and wills of civil law, the law had not been able to limit the freedom of giving as it has limited the freedom of bequeathing by will. But these considerations are of too modern a character to account for the old distinction. The legislator of former times would have had no scruples of this sort. That which prevented him from establishing a reservation as far as gifts were concerned was that the rule "to give and to keep is invalid" constituted for the donor a powerful brake, without reckoning the instinctive repugnance, fortified by custom, against stripping oneself before dying.³

§ 223. **Inheritance of Personal Belongings.** — When the inheritance of a person took effect, his patrimony was divided into two parts: on the one hand, movables and acquests which devolved upon the nearest relatives, because this was probably the wish of the deceased; on the other hand, the personal belongings, which the family took without its being necessary to take into

¹ An inheritance acquired by way of a repurchase belongs to the person of the same lineage who buys back the property; were this not so, the object of this institution would not be properly attained. — Offices, immovables of recent date and of a special nature, were not subject to the repurchase, nor were constituted rents. The reservation, on the other hand, was applied to them.

² Heusler, 90, looks upon the repurchase as being as old as the offering of the property to the relatives. Cf. *post*, "Repurchase." *Contra*, Jobbé-Duval, p. 87 (Swedish law).

³ "He who gives his property before he dies is preparing himself to suffer greatly soon."

account the presumed will of the dead man.¹ The rule: **Personal belongings do not ascend**, first of all excluded ascendants from inheriting personal belongings because this sort of inheritance seemed unnatural; following this, it was extended in this sense, that personal belongings coming from the paternal line should not go to the maternal relatives, and vice versa: "**paterna paternis, materna maternis.**"² Thenceforth the mass of personal belongings must be divided (system of the *Gap*) between the two lines from which it came.³ The assigning of personal belongings to each line varies according to the Customs; some, *Customs relating to the stock*, only summoned the descendants of the first one to acquire these belongings in the direct line;⁴ others, *Customs of side and line*, gave them to one of his relatives, either in the direct or collateral line; the third class, *Customs of side alone*, gave all the maternal possessions to the nearest maternal relative, without seeking the origin of the property and without seeking to know who was the first one to acquire it; it was the same thing with property coming from the paternal side, which was given to the nearest relative on the father's side.

§ 224. **Jointly held Personal Belongings.** — Care must be taken not to confuse *inherited personal belongings*, the only ones which are in question here, with *jointly held personal belongings*. The latter are undoubtedly, first of all, the personal belongings which are inherited from each spouse; but they also include acquets which were possessed by them before the marriage. These acquets, which are personal belongings jointly owned, are contrasted with *jointly acquired property*, or possessions acquired during the marriage, and, as a consequence, by both of the spouses. In the same way, *personal belongings by agreement*, established by the contract of marriage, are only personal belongings so far as they relate to the spouses between themselves; they are not subject to the system of the inheritance of personal belongings.⁵

§ 225. **The Same.** — Inherited personal belongings are real or fictitious: 1st. **Real personal belongings.** — (a) Immovables ac-

¹ It is often found that an order presumed to be based upon affections is not followed, because of the greater interest of the family.

² The English law adhered to the old rule of the exclusion of ascendants by collaterals until 1833.

³ Local variation, for example, succession by agnates: *Argou*, 2, 24.

⁴ Same rule in the English law: one must show that one is the nearest relative of the purchaser, — that is to say, of the first person acquiring the property, and not of the person who was last in possession.

⁵ *Pothier*, "Tr. des Propres," nos. 1, 23 (ed. *Bugnet*, VIII, p. 572).

quired by intestate inheritance. A distinction is drawn between *past* personal belongings and *present* personal belongings, the former being derived from the ancestors, the latter collected by the son from the inheritance of the father: ¹ "the acquêt of the father is the personal belonging of the child." ² — (b) Immovables acquired by way of gift or legacy from a person of whom one is the heir presumptive: ³ this is only an advancement of heirship; consequently, it is perfectly natural for possessions acquired in this way to be treated by way of anticipation before the opening of an inheritance to which one may be called, as inherited personal belongings; at the same time, the Customs of Paris and of Orléans draw a distinction: if the gift takes place in the direct line the possession is a personal belonging; if it takes place in the collateral line, it is an acquêt in conformity with the rule: "the acquêt is not as good as the gift." ⁴ — 2d. **Fictitious personal belongings or those received by representation.** These are acquêts which by way of **actual subrogation** ⁵ take the place of personal belongings. Thus, the inheritance acquired in exchange for a personal belonging is a personal belonging like the latter; ⁶ the immovable acquired as a reinvestment, that is to say, with the price of the sale of a personal belonging, is also subrogated to the latter, — at least, for the benefit of minors; ⁷ as to those who have attained majority the matter is in dispute. ⁸

§ 226. **Proofs.** — The tendency to restrict the rights of the family, of which we have already seen the effects with regard to the system of personal belongings, is also felt as far as proofs are concerned. The old law seems to have considered all immovables

¹ "F de Béarn," "R. de Contr.," 5: a family possession if it has been owned by three persons of the same lineage.

² *Beaumanoir*, 14, 31; *Loysel*, 223.

³ These possessions have come into the family "jure sanguinis"; the fact of the donee being a relative was the motive of the gift: — certain Mss. of the "Gr. Cout.," 2, 34 (p. 350, n. 2): gift or even purchase; "Anjou," 513; "Maine," 507; "Nivernais," 26, 14; "Bourbonnais," 283; *Loysel*, 221, 224: the property is a personal belonging. — "Paris," 246 (acquêt); 133 (personal belonging with regard to repurchase); *Desmares*, 145, 298, 397.

⁴ *Loysel*, 655, 656.

⁵ *Flach*, "R. h. Dr.," XIV and XV.

⁶ *Loysel*, 225; *Beaumanoir*, 44, 6; "Gr. Cout.," 2, 12, p. 243; *Lamoignon*, "Arr. des Propres," 23; *Boutaric*, I, 74; "Paris," 143; "Orléans," 385: in case there is a settlement, the property is an acquêt to the amount of the "tourne" but the heir who has the personal belongings may keep them. — Cf. *post*, "Repurchase."

⁷ No subrogation of absolute right, as a general thing: "Paris," 94.

⁸ *Loyseau*, "Offices," 2, 7, 54 (one has no right to disturb the legal classification of possessions). — *Tiraqueau* and *Renusson* admit the subrogation by agreement.

as personal belongings until the contrary was proved. Loysel, on the contrary,¹ lays down an opposite rule: "all possessions are looked upon as acquests."²

§ 227. (III) **Things which do not Come Within Trade. Royal Prerogatives.**³ — The royal or seigniorial domain and rights we have previously discussed; ⁴ it is a subject to which we shall not return,⁵ but it is indispensable to say a few words here upon the theory of *royal prerogatives* in their relation to private law.⁶ In 1158, at the Diet of Roncaglia, an official enumeration of them had already been given, which was a simple codification of previous custom: "Regalia sunt hec: Arimannie,⁷ vie publice, flumina navigabilia et ex quibus fiunt navigabilia, portus, ripatica, vecti-

¹ "Placités de Normandie" (*Laurière*, on *Loysel*); "A. C., Paris," 1, 5.

² 222; *Pothier*, nos. 72, 107.

³ The "regalia" are dealt with in the communities of the "libri Feudorum" and generally in all the authors who deal with the domain and the seigniorial rights. The notes by *Gregorio Lopez* on the "Siete Part." refer one to the writings of the Post-Glossators, see Table, "Regalia." Treatises by: *Peregrinus*, *De Luca*, *Carpzow*, etc. More recent works by *Hüllmann*, "Regalien," 1806; *Strauch*, *id.*, 1865. General treatises: *Heusler*, § 73; *Schroeder*, "Z. S. S., G. A.," II, 62; "Handb.," see Table; *Stobbe*, § 64; *Hübel*, § 120; *Brunner*, "D. R. G.," § 68; *Thudichum*, § 75 et seq.; *Amira*, § 61; *Siegel*, § 86; *Pertile*, § 147; *Salvioli*, § 219. — On the "res religiosæ," church furniture, etc., cf. *Hübel*, IV, 690; *Duval*, "Institut. du Dr. Fr.," I, 2, c. 1; *Deghewiet*, p. 83; *Faber*, "Inst. de Rer. Div.," *Pasquier*, *ibid.*; *E. Mayer*, "Deut. u. Franz. Verfassungsg.," 1899.

⁴ See "Domain of the Crown" [*Brissaud's* "Public Law." — TRANSL.]

⁵ The Law of Nov. 22 and Dec. 16, 1790, gave the ownership of them to the nation. From the Revolutionary laws there resulted the distinction between the public or inalienable domain and the private or alienable domain. See especially Law of 15th and 16th Flor., year X.

⁶ By prerogatives we here understand a group of rights bearing upon things left to the use of the public or upon things which are treated like them; the Feudal law sees in them the property of the king. Cf. "jura majestatis," at Rome. *Heusler*, § 74, characterizes them by two traits: they are rights of public power ("Regierungsrechte") and of use ("nutzbare"), inheritable, alienable, etc. He outlines their history in approximately the following manner. From the time of the Carolingians the prerogative of public ways and rivers is maintained in the imperial statutes; from this there sprang up or were developed the innumerable tolls of feudal times; the right of fishing only belongs to the king where the river is bordered by the royal domain; one can still say with the "Sachsensp.," 2, 28, 4: "Ströme sind gemein zu fischen darin." The prerogative of mines makes its appearance at a sufficiently early period (cf. Act of 1122) to raise the question whether the ownership of the soil ever carried with it that of the mine. The prerogative of hunting was introduced with difficulty, "Sachsensp.," 2, 61. Under the Ottos the peasants lost the right to carry arms; they also lost the freedom of hunting. Once access to the forests was prohibited for purposes of hunting, it also became necessary to prohibit it for the carrying away of wood; and thus the idea that forests, which were formerly left to the use of all, were the property of the king, was arrived at: *Grimm*, "R. A.," 248. All these prerogatives consisted in rights over things which because of their very nature are not included within the property of the treasury.

⁷ *Du Cange*, see "Herimanni."

galia que vulgo dicuntur tholonea, monete, mulctarum penarumque compendia, bona vacantia et . . . bona condemnatorum . . . argentariæ . . . piscationum redditus et salinarum . . . dimidium thesauri inventi in loco Cesaris, non data opera, vel in loco religioso."¹

The point of departure of this theory is in the conferring upon agrarian communities, or the owners of large domains, of uncultivated lands and possessions which are ill suited to individual ownership: public ways, waters and forests, shores, mines, quarries and treasures. The Feudal law, which did not distinguish very clearly between sovereignty and ownership, saw therein an ownership belonging to the sovereign, the king, or the lord; it did not limit itself to giving him a police power over this category of things. Care, however, was not always taken not to fall into an exaggeration which, in order to correspond with the logic of the feudal system, and perhaps of the old law, it was difficult to understand in the light of modern principles. That the earth, and even the sea, belonged to the king,² is a rather widespread conception among the old jurists; private ownership puts a restraint most often upon the right of the State, but on the slightest provocation the latter reappears; for example, it applies to lands abandoned by their owner; the cases where it is thus understood as though by accident are set aside. Its ordinary domain takes in the category of possessions which we have just enumerated, and upon which private ownership has not placed its stamp. To strict logicians, the king or the State appeared as the only proprietor of the land, private ownership as a limited and rather precarious concession, the prerogatives as an attribute of the right of ownership of the State over the possessions abandoned to the use of everybody.³ Against these theories the Roman doctrines, which

¹ "L. Feud.," 2, 56. — See *Du Cange; G. Blondel*, "Et. s. les Dr. Régaliens et la Const. de Roncaglia, Mél. Paul Fabre," 1902, 236.

² Let us recall the controversy between Grotius and Selden on the subject of freedom of the seas; from the fourteenth century on, Angelus of Perusia upholds Grotius' thesis. During the thirteenth century, Venice proclaimed her rights over the Adriatic (each year on Ascension Day the Doge marries the sea): *Pertile*, III, 169; *Pasquier*, "Inst.," p. 170.

³ *Schroeder*, "Handbuch," p. 206; "Die Franken," "Z. S. S.," *loc. cit.*, admits the existence of the prerogative of the soil ("Bodenregal," "Obereignenthum") from the Frankish period, and causes the other prerogative rights to spring therefrom logically. Cf. "L. Sal.," 14, 4. The origin and the history of the latter thus become very simple. But this theory does not seem to be very well established. Among the more recent authors it is not accepted, — for example, neither by *Heusler* nor by *Brunner*. The system of prerogatives, with the extension which it is given by *Schroeder*, does not seem to us to date

were more individualistic and more favorable to private ownership, did not cease to fight; public law, in breaking away from the feudal ideas, divided sovereignty from ownership; of the royal prerogatives there remained scarcely anything but the police power.

§ 228. **Prerogative over the Ground.**¹ — **Possessions without an owner**, uncultivated lands and estrays, belonged to the chief justice (Loysel, no. 277). By possessions without an owner are understood lands that have no master, that is to say, lands which have not yet been appropriated, or those which have been forsaken by their owner.² *Inheritances by way of escheat* are treated like possessions without an owner;³ but this is not so with regard to *common lands*,⁴ and still less with regard to possessions whose master has a disputable right to them; these are not possessions which are not in occupation, and the lord justice is not authorized to reclaim them; as soon as they are occupied by a tenant, however irregular may be his claim, the property cannot be said to be without an owner. The Law of August 13, 1791, substituted the king for the lord justice, drawing its inspiration in this matter from the precedents of the monarchic period (*cf.* Civil Code, 539, 713).⁵

back further than feudalism. *Cf.* "Freeholds," "Right Universally Reserved to the Sovereign in Feudal Lands." *L'Hommeau*, p. 92.

¹ If lands without an owner are regarded as "res nullius," then individuals may occupy them without the necessity of any formality. On the other hand, if we admit that they belong to the royal communities or to the sovereign, their occupation is only valid when it shall have taken place with the consent (expressed or implied) of the latter. The documents are not very explicit: see *Thévenin*, "Textes," Table. "Præcept. pro Hispanis" in 812 ("Cap.," I, 169). As to the "aprisio," "captura," "neubruich," *cf.* *Beseler*, "Der Neubruich nach den Alt. Deutsch R.," 1868 (in the "Sybolæ Bethm. Holweg. Obl."); *Waitz*, "V. G.," IV, 136; *Amira*, p. 170; *Meitzen*, "Siedlung. u. Agrarwesen d. Germanen," 1895; *Blumenstock*, I, 260; *Heusler*, § 91. See also "Freeholds," ("Right Universally Reserved to the Sovereign in Feudal Lands"); *Brunner*, I, 205; II, 75; *Mayer*, § 10.

² *Heusler*, I, 65, cites an Act of 1018: "Silvam in cultam et ob hoc nostre proprietati deputatem." *Schupfer*, "Allodio," 37. It is not a rare thing to find in the various legislations rules which recall the "adjectivo" or the "épi-bolé" of the Lower Empire: at the end of a certain time lands which are abandoned by their owner return to the State, which then grants them to others. The legislation of the emperors of Germany and that of the popes contain provisions of this nature. They are above all measures of a fiscal nature like the laws of the Lower Empire: *Pertile*, IV, 274. *Sixtus IV*, 1476, authorizes the first comer to cultivate the lands of estates left uncultivated, and, also, this could be done against the will of the owner. Prerogative of pasture in Italy (*ib.*, IV, 417). — *L'Hommeau*, p. 223; *Astruc*, p. 273; *Pasquier*, "Inst.," p. 189.

³ See *Ferrière*, *L'Hommeau*, p. 222 ("Abandoned Possessions").

⁴ *Pertile*, III, 336.

⁵ *Cf.* Law of the 3d Frim., year VII: if an individual abandons his land

§ 229. **Expropriation.**¹ — The conception of the superior right of the State over the ground easily justified expropriation.² The latter was only too often made use of without the excuse of necessity; guarantees in favor of the owner scarcely made their appearance until towards the seventeenth century, on the occasion of extensive public works. And, moreover, there is no precise legislation upon this point. Abuses were always possible. It is in order to condemn them that the "Declaration of the Rights of Man" proclaimed in Art. 17 that private ownership was inviolable and sacred; it only authorized expropriation for a reason of public *necessity* (the Civil Code, Art. 545, says: public advantage) and upon condition of an indemnity.

§ 230. **Confiscation.**³ — Penal confiscation gives public authority an easy means of taking possession of the property of individuals. It was only abolished by the Charter of 1814.

§ 231. **Property of the Enemy.**⁴ — The old law did not recognize the enemy's property. The taking of booty was one means of acquiring property for the benefit of the conquering State, or even for the profit of the individual who took it ("occupatio bellica"). As a general rule, this acquisition takes place for the benefit of the State;⁵ however, the practice of ransom, which was still widespread in the sixteenth century, the sacking of towns, which was still authorized in the eighteenth century, bear witness to the existence of an individual right.⁶ In our day the private property of the enemy is as much respected as national property,

because it does not produce enough to pay his taxes, the abandonment accrues to the advantage of the Commune, and not of the State. Cf. *H. de Pansey*, "Des Biens Communaux." In the enumeration of waste lands of the Law of 1791 we find "garrigues" (uncultivated lands), "flégards" (common passage-way), and "wareschaix" (waste lands for public pasture): *P. Errera*, "Les Waréchaix," 1894 ("Soc. Archéol. Bruxelles"); "Les Masuirs," 1891.

¹ *Post*, "Servitudes"; *Tamassia*, "Arch. Giur.," 1885; *Salvioli*, § 224 (bibl.); *Pertile*, § 143; *Schupfer*, "Allodio," § 29; *Meyer*, "Expropr.," 1868; *Gierke*, "Althusius," p. 268.

² Italy: *Cassoli*, "Var.," V, 20. The statutes of the Italian towns provide for cases of expropriation: construction of walls, towers, etc. (1156 at Genoa, etc.). Fixing of the indemnity by arbitrators. Cases of expropriation in the interest of individuals are met with, cf. *Pertile*, III, 360 *et seq.*

³ *Loyse*, 839 *et seq.*; "T. A. C., Norm.," c. 88; "Summa Norm.," 20, 22; "T. A. C., Bret.," ed. *Planio*, see Table; "Lorris," IV; *Britz*, p. 656; "Siete Part.," see Table; *Gui Pape*, p. 341; *Astruc*, p. 260; *Pasquier*, "Inst.," p. 183. — *R. Caillmer*, "Etudes sur la Confisc. et l'Admin. des Successions," 1901; *E. Mayer*, § 17.

⁴ *Benedix*, "De Præda inde ab Antiquitate," 1874; *Mas-Latrie*, "Dr. de Marque au Moyen Age," 1875; *Pertile*, III, 166; *Pasquier*, "Inst.," p. 176.

⁵ The vase of Soissons: *Brunner*, II, 76.

⁶ *Pothier*, "Prop.," no. 88 *et seq.*; *Gui Pape*, "Dec.," 113; cf. 32 (reprisals).

because war is considered as a struggle between States, and not between individuals.

§ 232. **Prerogative of Mines.**¹—The current axiom that property in the ground carries with it property in what is above it and what is under it (Cinus of Pistoia: "cujus est solum, ejus est ad cælum usque ad inferos"), conflicts with the feudal conceptions which make mines, and even treasures, the property of the king or the lords. Already, under the Lower Empire, the State collected a duty on the products of mines; and it was the same in the Frankish Empire;² the Constitution of Frederick I, 1158, classes "argentariæ" among the "regalia." The king or the lords took for themselves the exclusive right³ of developing mines, or, at least, granted the right to develop them; this latter, however, did not become a fiscal monopoly. The revival of Roman law weakened this doctrine. If it still finds partisans the latter rather defend it as being based upon considerations of public advantage. It is these same considerations, combined with the idea of regard for the rights of the owner of the ground, which lead to the following system, which is a compromise: the owner of the ground has the right to develop the mine upon condition of having an authorization from the State, and under the obligation of paying the (Roman) tithe of what it produces; if he does not avail himself of this right, the State may grant it to a third party in the same way, and on condition of an indemnity being paid by the latter to the owner of the ground. This is approximately the solution which was arrived at by the Law of April 21, 1810. The Revolutionary law seemed entirely to abandon this system by deciding that mines should be at the disposal of the nation (Law of July 12-19, 1791); but with remarkable inconsistency it allows the proprietor of the ground to develop the mines to a depth of one hundred feet; below that he shall have a preference over everybody else. The Civil Code, leaning still more in this last direction, recognizes, on principle, the right of the owner of the ground.

¹ *Greuter*, "De Regali Metallorum Jure," 1867; *Virnich*, "De Juris Regal. Metal. Orig.," 1871; *Böhlau*, "De Regal. Nov. et Salin. j.," 1855; *Arndt*, "Zur Gesch. d. Bergregals," 1879; *Abigneute*, "Il Sottosuolo," 1886; "La Propr. d. Sottosuolo," 1888 ("C. R." in "Z. S. S., G. A.," 1891); *Stobbe*, § 141 (bibl.); *Pertile*, IV, 424; *Salvioli*, § 221; *Viollet*, "Ét. de St. Louis," see Table.

² "Ordinatio Imperii" of 817, c. 12. — Thus the idea of the prerogative of mines is previous to the eleventh century. Cf., however, *Brunner*, II, 76. It was often only applied to gold or silver, the only noble or precious metals; "Sachsensp.," 35.

³ Numerous examples of concessions; cf. *Stobbe*, *op. cit.* and *loc. cit.*

§ 233. **Treasure** is, like a mine, one of those hidden sources of wealth, the true owner of which is the lord or the king: ¹ "nobody has wealth in gold unless it be the king, and wealth in silver belongs to the barons and to those who administer high justice upon their lands" ("Etablissements de Saint Louis," I, 94). In the face of these feudal rules, the Roman tradition of partition between the discoverer and the owner of the ground is maintained, with variations; one quarter belonged to the discoverer, the rest to the king, according to a Capitulary; Loysel adopts a different proportion (no. 280): "As to the other treasures (not consisting of gold) hidden in olden times, one-third should belong to the chief justice, one-third to the lord of the land, and one-third to him who has found them."

§ 234. **Estrays, Waifs**,² movable property lost by its owner, could not easily be acquired by the discoverer during the barbarian period; the Germanic law compelled a man who found something which had been lost, under penalty of being treated as a thief, to tell this fact to the judge or to proclaim it in a loud voice before the public Assembly; it was only if the owner did not put in an appearance that the discoverer could keep it for himself.³ The Feudal and Customary law substituted the right of the lord for that of the individual.⁴ Royalty took away from the lords justices the right of taking estrays on the coasts and in

¹ *Cassiod.*, "Var.," IV, 34; "Capit.," I, 215; cf. "L. Rom. Wis.," 10, 10; "L. Feud.," 2, 56; "Const. Sic.," 3, 31; "Ass. de Jérus.," "C. d. B.," 283; "Summa Norm.," 17; "T. A. C., Bret.," 153; *Loysel*, 279, 281 (bibl.) — Cf. *Landsberg*, *op. cit.*, § 20; *Pertile*, § 138; *Schupfer*, "Allodio," 39; *Britz*, p. 658; *Astruc*, p. 266; *Pasquier*, "Inst.," p. 240.

² Etymology: "animaux effrayés" (animals which have been scared), "Expavidus," "Res erraticæ": "Ass. de Jérus.," "C. d. B.," 230, 259; "Summa Norm.," c. 18; "T. A. C., Bret.," 149; *Beautemps-Beaupré*, "C. d'Anjou," III, 178; "Lorris," IV; *Britz*, p. 654; *Astruc*, p. 252; *E. Mayer*, § 10.

³ "Wis.," 8, 4, 14; 5, 6; "Rib.," 75; "Fris. Add.," 8; "Roth.," 343 (declaration); "Const. Sic.," III, 30; "Stat. de Corse," II, 24. Italian Statutes: *Pertile*, III, 209; "Sachsensp.," 2, 26, 1; "Schwabensp.," 347; *Landsberg*, *op. cit.*, § 20; *Schupfer*, no. 39.

⁴ As to maritime estrays, the owner cannot reclaim them (until the fifteenth century in France). Rights of wreckage, "lagan," wreck, "Strandrecht," etc.: *Fonsagrives*, "R. Marit.," 1884; "K. V. J.," IV, 3, s., p. 78; *Pertile*, § 98, 138; *Salvioli*, § 166; *Waltz*, "V. G.," IV, 135; *Brünneck*, "Recht auf Zueignung v. d. See" etc., 1874; *Pardessus*, "Coll. des Lois Marit.," I, 315. Cf. *L. Delisle*, "Rec. de Jug. de l'Echiquier," no. 450; *Boutaric*, "Actes du Parl.," I, 343; *Bigelow*, "Placita Anglo-Norm.," p. 143; "T. A. C., Norm.," 67; "Summa," c. 16; *Rymer*, "Fœdera," I, 12; *Balasque and Dul.*, "Et. Hist. s. Bayonne," I, 327. — As to estrays on land: *Beaumanoir*, 58, 4 and 69, 24 (the thing is not an estray so long as it is pursued); *L. Delisle*, "Rec. de Jug. de l'Echiqu.," no. 541; "Reg. Crim. de la Just. de St. Martin-des-Champs," pp. 128, 143; *Pasquier*, "Inst.," pp. 171, 261; *Ragueau*, see "Guesver."

large bodies of water (Ordinances of 1669 and 1681). Estrays on land continued to belong to the lord, at least in a case where the owner did not reclaim them after a certain delay;¹ the Revolution abolished this seigniorial right with the other feudal rights, without regulating the disposal of estrays on land (Law of April 13-30, 1791).

§ 235. **The Prerogative of Forests.**² — Besides the rights over woods,³ this prerogative affects game.⁴ Game and fish belong to no one in the Roman conception; the first comer can take them for himself.⁵ According to the feudal ideas, on the contrary, game and fish are appurtenances of the waters and forests, consequently, the property of the lord or the king, to whom the latter belong.⁶ The lord has a right, says the old German proverb, over

¹ Publication, see details in *Ferrière*, see "Epaves" (bibl.); *Delamare*, "Tr. de Police."

² *Rendella*, "Tract. de Pascuis, Defensis, Forestis et Aquis," 1618-1734; *Bérenger*, "Antic. Storia Forest. in Italia," 1659.

³ *Post*, "Real Rights." — "Roth.," 240, 319; "Liut.," 82, 116; *Waitz*, "Deutsche Hufe," p. 36. — The law of the Ripuarians seems not to make any distinction (?) between the "silva communis" and the "silva regis" (vol. 76). — The king places a "silva in bannum et ex ea sicut Franci dicunt, forestam (facit)": *Waitz*, "V. G.," IV, 109. Forests, preserves, warrens, "bédat" (Ital., "bandite," "vizze"); "Capitul.," Table, see "Foresta"; see *Du Cange*; *Thévenin*, no. 159; *Brunner*, II, 75. *Dietz* derives "foresta" from "foris," "foras." See details in *Pertile*, IV, 404.

⁴ As to the right of hunting, cf. *Medicis*, "De Venatione Pisc.," in the "Tract. ill. Ict.," 17, 391; *De Launay*, 1681; *Gamare*, 1681; *Marchand*, 1769; "M.," 1775; *Dufrénoy*, "Thèse," 1896; *Boulin*, "Dr. de Chasse," 1887; *Faidez*, "Hist. du Dr. de Chasse," 1877; *Steiglitz*, "De Jure Venat.," 1828; "Enciel. Giur. Ital.," see "Caccia"; *Pertile*, § 138; *Salvioli*, § 220; "K. V. J.," IV, 3 s., p. 69; *Lur*, "Erwerb. d. Eigenth. an Jagdb. Thier.," 1896; *W. Sichel*, "Z. Gesch. d. Bannes," 1886; *Schupfer*, "Allodio," 38; *Brünneck*, "De Dominio Ferarum," 1863; *post*, "Grundr.," p. 706. — "Beaune," p. 81; *Britz*, p. 650; *Gui Pape*, q. 218 (bibl.); *Astruc*, p. 224 (hunting in Languedoc). As to offenses relating to forests cf. *Salvilles*, "N. R. H.," 16, 90; "Sachsensp.," 61; *E. Mayer*, § 13 and 14, § 10.

⁵ Cf. "Roth.," 309 *et seq.*; "Sachsensp.," 2, 62, 1; "Petrus," III, 44; *Pasquier*, "Inst.," p. 193; *J. Faber*, "Inst.," fo. 31, 1582.

⁶ Already in the barbarian laws hunting and fishing are sometimes looked upon as attributes of the right of ownership, in the same way as the gathering of the issues: "Sal.," 33, 98; "Rib.," 42, 1; 73; "Bai.," 22, 11; "Alam.," 102, 12; "Roth.," 309, 320; "Capit.," 802, 39; 813, 18; 817, 7; 826, 3, 6; "Schwabenspiegel," 236. Frequent granting of the "piscatio" or of the "venatio." — Freedom to hunt and fish, which is in accord with the old Customs of the system of collective ownership, is already attacked as a consequence of this; it is found to be in conflict with ownership on a large scale and the attributes which that carries with it. Thus we arrive at the feudal period, — the date varies according to locality, — during which fishing and hunting are included within the prerogatives; this is the very opposite of the old custom. The enumeration of the "regalia" in Roncaglia only includes fishing; but hunting was likened to it. Consequently, the freedom to hunt or to fish was often granted by the lord, but ordinarily he reserved for himself a portion of the game or the fish taken; the big fish — for example, the sturgeon — belonged to him; he had a right to a haunch of venison: "T. A. C., Norm.," c. 68. — Italy: details in *Pertile*, IV, 411.

the sound of the bell, the bird in the air, the fish in the waters.¹ From these rights there resulted as a residue the right of the nobles to hunt and the Customs or laws on the policing of hunting and fishing.²

§ 236. **Prerogative over Waters** (and public ways).³ — The law of the Frankish period contrasts "flumina publica" with "aquæ aquarumque decursus," pretty nearly in the same way as it distinguishes "viæ publicæ" from "viæ convicinales" (the former are roads "ubi rex vel dux egreditur," "Heerstrasse," road of the king; the latter, paths which serve the neighbors for their daily intercourse and their work).⁴ Roads and rivers given up to the use of everybody are outside of commerce, thus differing from those which are left to private use. Must one go further and maintain that they belong to the king or the lords?⁵ The ordinary doctrine is thus formulated by Loysel, 232: "The highroads and navigable rivers belong to the king; the little rivers and roads belong to the lords of the land, and the brooks to individual tenants."⁶ From thence there arises for the king and the lords the right to islands which may be formed in the midst of rivers

¹ "Jostice," p. 268. As to swarms of bees, "Wis.," 8, 6, 1; "Roth.," 319; "Bai.," 22, 8; "Petrus," III, 45. See also the Romanists, — for example, *J. Faber*, in his "Int.," *Pasquier*, "Inst.," p. 199; "Et. de St. Louis," I, 172; see *Ferrière*, *Guyot*, *Fournel*, "Voisinage," *ibid.* The "Schwabenspiegel," 301, allows of their being pursued for three days; the "Sächs. Weichb.," 118, authorizes the first comer to take possession of them immediately.

² As to the latest stages of legislation, cf. *Pothier*, "Propriété," etc.; *Ferrière*, see "Chasse," etc. (bibl.). The Ordinance of 1681 regulates deep-sea fishing and the gathering of the products of the sea.

³ *Wodon*, "Dr. des Eaux," 1874; "Dig. Ital.," see "Acque"; *Sclopis*, "Acad. Sc. Mor.," IV, 289; *La Mantia*, "Demanio s. Spiaggie" (Sicilian law), 1889; *Pertile*, IV, 395; *Salvioli*, § 222; *Geffcken*, "Wasserrecht," "Z. S. S., G. A.," 1900, 173; *Stobbe*, § 64, I, p. 535; § 144; *Astruc*, "Tutelle," p. 191 (waters, fishing); *E. Mayer*, § 9.

⁴ "Bai.," 10, 19; "Alam.," 83; "Roth.," 151; "Wis.," 8, 24 *et seq.* Numerous Acts where there is some question as to lands with "exitus et reditus," etc. — *Waitz*, "V. G.," IV, 114 ("nostra est regalisa qua"); "Const. de Frédéric I.," 1158 ("L. Feud.," 2, 56); *Beaumanoir*, c. 25; *Pasquier*, "Inst.," p. 164.

⁵ During the feudal period the king and the lords justices are contending with one another for the navigable rivers; during the monarchic period the conflict was settled in favor of the king. Ordinance of 1669, 27, 41. But the conflict still continued with regard to unnavigable rivers between the lord justice, the lord of the land, or even mere copyholders themselves. Cf. *Boutaric*, I, 73; "Et. de St. Louis," I, 131; "Lorris," VI; *Loysel*, *loc. cit.* (and bibl.); "Beaune," pp. 87, 88.

⁶ "Wis.," 8, 4, 29; "L. Feud.," 2, 56: "flumina navigabilia." Dimensions: *Loysel*, 232 *et seq.* (bibl.); *Grimm*, 552; *Ferrière*, see "Chemin. For de Navarre," 6, 4, 5; "Sachsensp.," II, 28; *Pothier*, "Prop.," no. 264. *Championnière* in 1846 devoted a very learned book, "De la Propr. des Eaux Courantes," to maintain the theory that the small rivers belong to the riparian owners; and his doctrine, which is opposed to that of the Court of Cassation, was sanctioned by the Law of April 8, 1898. — *Pasquier*, "Inst.," pp. 166.

and seas,¹ to alluvium and the bed of the river, and the power of establishing fisheries, tolls, mills² and harbors. To this feudal conception is opposed the system which makes the running waters a thing owned in common, over which the king only exercised police power in the general interest; there would result from this for the profit of individuals, freedom of fishing, of navigation, and the right of occupying islands, etc.

¹ *Landsberg*, *op. cit.*, § 21; *Pertz*, "Dipl.," II, 461. Cf. "Sachsensp.," II, 56, 3; *Stobbe*, II, 162; *Loysel*, 239 (bibl.); *Chaisemartin*, p. 172; *Loysel*, 236. As to alluvium, cf. *Chardon*, 1830; see "Dig. Ital." old, authors: *Bartole*, "Tibériade"; *Carmagnola*, 1793, etc.; *Pasquier*, "Inst.," 188.

² From the Frankish period on, granting of the right of erecting mills: *Pertile*, IV, 400 (dipl. of 1159); "L. Feud.," 2, 56; "T. A. C., Norm.," c. 60; "T. A. C., Bret.," 249; "Et. de St. Louis," I, 111; *Beautemps-Beaupré*, "Cout. de l'Anjou," I, 134; *Pasquier*, "Inst.," pp. 270, 169.

TOPIC 2. SYSTEM OF OWNERSHIP OF MOVABLES

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| § 237. "Mobilia Non Habent Sequelam."
§ 238. The Barbarian Period.
§ 239. (I) Voluntary Dispossession.
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§ 237. "**Mobilia Non Habent Sequelam.**" — If our old law always recognized ownership of movables,¹ it did not protect it, according to current opinion, by way of action; contrary to the Roman rules, it started from the principle: **movables cannot be followed**. Whence comes this peculiarity? What is the origin of the sneer contained in Article 2279 of the Civil Code: "As far as movables are concerned, possession equals title"? A delicate problem, the solution of which is still widely discussed.

The point of departure of our old legislation is in the system of the protection of rights by actions "ex delicto" and the exclusion of all other means. The owner of the movable object had in primitive times only the ordinary resources for recovering it: private vengeance at first, and then the action "ex delicto," which takes the place of the latter. Sometimes the movable was stolen, or else it was lost, and the finder kept it for himself without taking the precautions demanded by custom, which caused him to be treated like a thief. Sometimes a person who had received the object, at the same time pledging himself to restore it, refused to keep his promise. In both these cases the owner was stripped, or, which is the same thing, deprived of his ownership; the one who plundered him, the man who committed the wrong, was subject to an action "ex delicto," but he alone was liable; the third

¹ As to the acquiring of issues, *cf. post*, "Ownership of Land." Custom of placing a *mark* ("Hausmarke," family mark) upon movable objects for the purpose of recognizing them, in the same way as one's effects are numbered in a regiment. Prohibition of "intertiare" in the case of objects which have not some "probabile signum" in the "L. Rib.," 79, 2; *cf.* 33; "Sal.," 9, 2; 27, 19; 33, 2 (punching holes in the ears of cattle); "Burg.," 33, 1; "Roth.," 348, etc. *Cf. Geffcken*, "L. Sal.," p. 185 (texts and bibl.); *Schroeder*, p. 14; *Homeyer*, "Haus u. Hofmarke," 1870. — Rights of marking or of reprisal during the Middle Ages: "Bergerac," 104; "Toulouse," 4, 9; "Statuts de Marseille," 1253, 3, 5 and 4, 26. Letters of marque: *Du Cange*, see "Marcha"; *Ragueau*, see "Marque"; *Ferrière*, etc., *ibid.*

party who acquired the object, into whose hands it had passed (purchaser, donee, etc.), escaped therefrom, whether he acted in good or bad faith:¹ from which it follows that the owner could not always recover his property. Civil actions, in time, were added to or substituted for actions "ex delicto." It was only with great difficulty that they were freed from the penal element which they contained: a proof of the obscurity and inadequacy of the early authorities.

§ 238. **The Barbarian Period.** — Though the documents may be very obscure, an examination of them leaves the impression that one is not very far from a primitive state of things; against the man who "*malo ordine possidet*," the owner of a movable is only given penal actions, or actions given under analogous conditions and subject to the same restrictions. Detailed controversies concerning which there is some doubt do not seem to be of such a nature as to shake this general result. Let us draw a distinction, so that we may clearly understand the economy of the Barbarian law, between the case where the owner of the movable has voluntarily dispossessed himself of it and that where the movable has been taken away from him against his will, — that is to say, has been lost or stolen.

§ 239. (I) **Voluntary Dispossession.** — An object was lent, bailed, or given as a pledge, etc. The owner had an action for its restitution² against the borrower, the depositary, the pledge-creditor. He would either obtain the thing itself, or its value if the thing had perished or the "*accipiens*" had disposed of it. In this latter case, if the "*accipiens*" were insolvent, the owner would gain nothing by suing him. He would need an action against the third party who withheld the property. He was not given the action "*in rem*," either because the Barbarian law did not recognize the reclaiming of movables, or else, which seems more correct, because reclaiming existed, but it was subordinated to the same conditions as were actions "*ex delicto*";³ only a few

¹ Unless he can be accused of actual complicity, which admits of his being treated similarly to the delinquent himself, which would be a very rare thing.

² Action "*de re præstata*," according to the "*L. Sal.*," 51. *Post*, "*Contracts*." This action had first of all a penal character, just as the "*actio depositi*" in Rome: according to the Salic Law it would seem rather to be a civil action "*ex contractu*." The formula, "*quia res meas noluisti reddere*," does not imply that the plaintiff is bound to prove his ownership; it is sufficient if he show a loan. *Cf. Geffcken*, "*L. Sal.*," p. 203, and authors cited.

³ *Heusler* considers as real every action including the formula, "*Malo ordine possides*"; and it is an action of this kind that is mentioned here. It may be qualified as a reclaiming, but it is a very different kind of reclaiming

laws which had been affected by the Roman influence granted the action "in rem" against third parties.¹ How are we to explain this peculiarity of the Barbarian law?² It seems as though a stronger means of protecting the ownership of movable property ought to have been introduced into this legislation.³ Two principal explanations have been offered.

1st. The action against the bailee, who is responsible even for accidental loss or injury, suffices for the owner of the

from the Roman "vindictio." One can also say with *Jobbé-Duval* that there is no reclaiming; the practical result from the point of view that we take is the same, *cf. Pertile*, IV, 255; *Hermann*, p. 69.

¹ It is well understood that he does not have besides this the personal action "ex contractu" or "ex delicto," for there is no question of any contract or tort between him and the owner. The existence of the reclaiming of movables admitted by the legal historians from the beginning of the nineteenth century, *cf.*, for example, *Eichhorn*, 261, was again recently upheld by *Hermann*, p. 69, who criticises the majority of the accepted ideas and sees in the contrary theory an opinion derived from the doctrine of *Albrecht* upon the "Gewere." Principal arguments: (A) Nowhere do the barbarian texts formulate the rule of the exclusion of the reclaiming. (B) On the contrary, there are laws which formally concede it to the owner: "Euric," 289; "Wis.," 5, 48; "Bai.," 16, 4; "Alam.," 90; "Rib.," 72, 1; "Burg.," 83, 1; "L. Pap. Roth.," 232, 5; "Ina.," 35, 1. — Having accepted this starting point, we must now explain the development of the rule: "Movables cannot be followed," which figures in later texts, and the fact that it is found in the very legislation where the Germanic element occupies a preponderating place. *Hermann* offers us ingenious conjectures. One can also see that the maxim did not have the power which was attributed to it; it would only contemplate certain restrictions upon reclaiming, — for example, the lack of the right of distraint in matters relating to mortgages or the practical impossibility of recognizing movables that have no particular mark or sign about them. Jurisprudence, drawing its inspiration from these precedents, and wishing to give a more complete satisfaction to the growing interests of commerce, must have suppressed this reclaiming by the owner and thus arrived at Art. 2279 of the Civil Code.

² On the other hand, the reclaiming of movables appears in many of the old legislations, for example, "L. de Manu," 8, 201: Kabyle Customs according to *Hanoteau and Letourneux*, "La Kabylie" II, 223.

³ The partisans of this system reply to the arguments of the preceding view by saying that the texts which it depends upon have been subjected to the Roman influence, and that if a refusal to allow a reclaiming is not expressly formulated in the documents of the barbarian period, this is to be accounted for by reason of the general motives given in the text (*cf.* silence of the English texts of the feudal period). — As supporting their thesis they give the following special reasons: (a) The old procedure did not include many sorts of action; had it admitted the reclaiming of movables, the text would have systematized it in its application against third parties; their silence upon this point is decisive; *cf.* action of theft. (b) The exclusion of this reclaiming in the system of the barbarian laws, where the civil and criminal action are confused, and where there is only room for complaints ("clamores"), is readily understood. (c) The Customary maxim, "Movables have no consequences," is not set forth in the later sources of the law as being an innovation, and the economic condition of the twelfth century would not be sufficient to account for an innovation such as the exclusion of this reclaiming. (d) Finally, they cite the laws of *Hoël le Bon*, "Code Vénédotien," n. 32 (*cf. Hermann*, p. 84). — These reasons, although in our opinion well founded, leave the controversy still open.

movable: "where you have placed your confidence you must seek it," says an old German gibe;¹ he has only himself to blame for having misplaced it; he could not be unaware of the fact that he was laying himself open to many risks;² and third parties who dealt with the possessor, who saw him with the object in undisturbed possession, perhaps for a long time, and whom not one notorious fact, like loss or theft, had put on their guard, could not be bound to make inquiry as to his title. 2d. According to another opinion, the reason for the absence of the action is accounted for by the characteristics of the old procedure; the old Custom provides for formal procedure based upon solemn acts, such as the giving of the "festuca," or upon material facts, such as the delivery of an object; outside of offenses and acts of this kind, no procedure is thought of; now, here, the offense cannot be blamed on the third party who withholds the object; between him and the owner there has been neither a material act nor a solemnity upon which it would be possible to base an action. In our opinion, the reason relating to procedure and the practical reason gave each other mutual support.³

¹ *Chaisemartin*, "Proverbes du Dr. Germ.," p. 195; *Glanville*, 10, 13, 2; *Hermann*, p. 129.

² The "accipiens" may destroy the object, cause it to disappear, and refuse to do anything in case it is stolen or lost. It is to the advantage of the owner to allow the "accipiens" to bring the uncertain action of theft against the thief.

³ Other explanations, cf. *Jobbé-Duval*, p. 85. — 1st. "Mobilium vilis possessio": *Renaud*, "R. de Lég.," 1845, 371. — 2d. Importance of possession in the Germanic law; the owner who does not have possession is absolutely deprived of the thing (excepting it be stolen). Cf. *Albrecht*, "Gewere," p. 91. It ought to be the same with regard to immovables. — 3d. The owner of the movable has acted foolishly, whereas the person who acquired the movable in good faith is in no way to blame: *Walter*, "D. Rechtsg.," n. 705. — This is all very well in our time, but the old law reasons in rather a different manner; it says to the owner: "Where you have placed your confidence. . . ." It does not punish the careless owner who has not securely tied up his horse by forbidding him to reclaim it from a person who purchases it in good faith. When the object which has been lent has been stolen from the borrower and, consequently, the owner is in no way to blame, he has no action against the thief. — 4th. The borrower has a right to alienate the object received in the same way as the fiduciary acquirer at Rome: *Gerber*, "D. Privatr.," § 102. This theory is confused with the one set forth in the text in the first place. — 5th. There is a presumption of ownership in the third party who acquires the movable when the movable has neither been stolen nor lost: *Bar*, "Beweisurth.," 150. No doubt, but why should the true owner not be allowed to overthrow this presumption? — 6th. Executory character of the Germanic procedure (cf. "pignoria capio" in Roman law); the proceeding is more in the nature of a distraint than of a contest over conflicting interests ("Betreibungsverfahren" in the Swiss Cantons). Now, there is no executory right as against the third party who acquires, and thenceforth no distraint is possible (*Heusler*, *op. cit.*). — *Jobbé-Duval*, p. 89, objects that in the sixteenth century reclaiming was admitted in France, and that, nevertheless, very often the proceeding began by a distraint. It is none the less true that there is a close connection between

§ 240. (II) **Loss or Theft.**¹ — Let us first of all observe that the finder is treated like the thief when he does not fulfill the customary formalities intended to notify third parties of the fact of the discovery; so that what we shall say with respect to theft is applicable to loss.² According to the Frankish law, the victim of a theft starts a search for the object which has been taken away from him;³ he summons his neighbors and calls upon them to help him, places himself at the head of a group of them ("trustis")⁴ and follows the trail of the animal or of the object, which has been stolen ("**vestigium minare**").⁵ If the tracks lead to a house, the man who has been robbed carries out a search of the house ("scrutinium") under conditions which recall the "perquisitio lance licioque" of the Roman law.⁶ Once the object has been found as a consequence of this proceeding, which constitutes a remarkable case of "Selbsthülfe," the "vestigium minans" shows that this object bears his mark, follows this mark, and declares that the thing belongs to him. Only if the search has taken place at once and without any interruption, and the object has been found within a short period (three nights), shall the **offense** be regarded as **flagrant**;⁷ the man robbed shall be authorized to take

this opinion and the one which is set forth in the text: if the old procedure starts out with a distraint, this is rather due to the reasons set forth in the text.

¹ See "Obligations," "Offenses." See, especially, *Brunner*, "D. Rechtsgesch.," II, § 139; "Antiq. Glossar.," see "Diebstahl."

² "Rib.," 75, 80, "Roth.," 343; "Wis.," 8, 4, 14; 5, 6; "Bai.," 2, 12; "Alam.," 84; "L. Guill. le Conq.," I, 6 (*Schmid*, p. 324); "Magd. Fr.," I, 13, 1. — *Hermann*, p. 158 ("per tres marcas"); *Chaisemartin*, p. 492: to hide something which one has found is the same thing as to steal. — Cf. "Estrays," "Petrus," 3, 4.

³ Assuming that the thief is not known; otherwise, it would only be necessary to begin the action of theft against him.

⁴ "Sal.," 66; *Hessels*, "Gragas," ed. *Schlegel*, 2, 193; Cf. "Dec. Chlot.," § 16: official search by the chief of the hundred at the head of a "trustis," probably in a case where it was necessary to go outside of the hundred; responsibility for the theft upon the hundred where the traces led if the object was not found. Cf., "Burg.," 19, 2 ("vegus," "veius" = "index viæ"); "M. G. H., L. L.," 3, 467; "Wis.," 7, 4, 2; "Liut.," 81.

⁵ "Sal.," 37; "Rib.," 47; "Burg.," 16; "Roth.," 208. Cf. *Gaius*, III, 193; *Virgil*, "Æn.," VIII, 209; *Hermann*, p. 32; *Brunner*, II, 496; *London*, p. 363. The trail may be followed in Greece among the Scandinavians, etc.: *Grimm*, "E. A.," 639; *Dareste*, "Etudes," p. 299; *Post*, "Ethnol. Jurisp.," II, 418.

⁶ In the old times the "vestigium minans" was authorized to enter the house by force, but he was held liable to pay a fine if the object was not found therein: "Alam.," 5, 3; "Bai.," 11, 2; "D. Tassil.," 4, 13; "Cout. de Jutland," 2, 97; "Cout. du roi Christophe," 13, 2. According to another system, violence was forbidden, but whoever offered opposition to the search was treated like a thief: "Rib.," 47; "Burg.," 16, 103; *Brunner*, II, 497. Cf. action "furti prohibiti." During the feudal period, wager before search. — Penalties against whoever hides the stolen object in another man's house ("firinbero"): "Sal.," 16, 1; 17, 1; 34, 4; "Rib.," 45; *Gaius*, III, 187 ("a. furti oblati").

⁷ The difference between flagrant theft and ordinary theft is readily ex-

back the object from the hands of the one who withholds it,¹ and this shall close the proceedings.

§ 241. **The Same.** — If the object is only found after the expiration of the legal period of three nights, **the theft is no longer flagrant** and the proceeding is not so simple. To the extrajudicial phase there is added² a judicial phase. The seizure of the object, the "Anefang" of the "Sachsenspiegel,"³ which closes the extrajudicial phase, becomes the point of departure. These forms recall those of the "legis actio per sacramentum" (sham combat), with this difference, that they take place outside of the tribunal. The petitioner takes hold of the object with his left hand, and, holding a weapon in his right, swears that he is placing his hand upon a thing which is his (that is to say, on a thing which has been taken away from him);⁴ his adversary, in the same position, swears on his side that the thing belongs to him, or that he vouches a warrantor, "quod ad eam manum trahat qui ei ipsam rem dedit."⁵ It is only in this way that the man detaining the

plained by the idea of vengeance: the anger of the victim is more intense when he takes the guilty man in the very act (cf. Roman law: "furtum manifestum" and "nec manifestum"). The same observation applies to the extrajudicial character of the procedure: *Jobbé-Duval*, p. 76; "Sachsensp.," II, 35. — "Ligratio" of the thief taken in the act: "Rib.," 41, 73, 77; "Sal.," 32; "Burg.," 32. More severe penalties: "Withr.," 25; "Æthelst.," 4, 3, 6. — Is the man who withholds property treated like a thief for this reason alone? Controversy: Yes, according to *Jobbé-Duval*. To the contrary, see *Brunner*; — *Glaser*, 3, 6; "Cout. de Jutland," 2, 106 (he is not allowed to defend himself); "Rib.," 41, 2; "Pactus Childeb.," c. 10.

¹ "Sal.," 37: "Res suas per tercia manu agramire debet." Various interpretations: He takes back his thing, but in order to do this he should swear with three fellow oath-takers that it belongs to him, — cf. "Et. de St. Louis," II, 26; "N. R. H.," 1878, 220 (*Jobbé-Duval*, *Heusler*); he must promise together with a surety that he will take upon himself the action for the third party who has acquired (*Brunner*). "Adramire" means ordinarily to promise by "fides facta": "Rib.," 33, 4; *Rozière*, no. 479; *Thévenin*, "N. R. H.," 1880, 91; 1879, 333; "Bord.," 147; see *Du Cange*, *Geffcken*, p. 154 (bibl.); *Schroeder*, p. 373 (texts); *Hermann*, p. 113.

² Cf. *London*, p. 92. The connection between the "vestigii minatio" and the "Anefang" is disputed.

³ "Anfangen" equals to distrain: *Hermann*, p. 86. — Other applications of this procedure: *Behrend*, "Anefang u. Erbenegewere," 1885. — For *Sohm* the "Anefang" is a formal act. Criticism of this idea in *London*, p. 34. — It takes place in court in the thirteenth century (*ib.*, p. 52) in Germany.

⁴ The depositary, etc., could not swear "quod in propriam rem" ("Rib.," 33, 1) if this was an affirmation of the right of ownership: *Stobbe*, II, 616; "Aist.," 5; *Forel*, "Chartes Communales du Pays de Vaud," 1872, p. 98, § 15.

⁵ Necessity for immediate reply under penalty of seeing the plaintiff take possession of the thing. Argument to the contrary: "Sal.," 37; "Roth.," 232; "Burg.," 83, 1. — It is possible that the withholder may reply, "quod fordonem suum nesciat" ("Rib.," 33, 4; "Sal.," 47, 2; "Bal.," 9, 7; "Lib. Pap. Roth.," 232) and swear it before the tribunal; he is not punished as a thief, but is limited to restoring the thing: *Ina*, 25; *London*, p. 316; *Beau-manoir*, 34, 3.

object can clear himself of the accusation of implied theft, — by means of this formality ("exuere se de latrocinio," says the Salic Law). In the first case the action is decided pursuant to the usual rules; in the second, it becomes complicated by reason of the recourse to warranty. It is always necessary that the parties¹ should appear in court with the object in litigation.² The defendant can plead that he came into possession by some lawful title;³ by this means he overthrows the accusation. Assuming a case where the thing has been transferred to him, he finds himself under the necessity of naming his transferor, and of promising that the latter will appear in court ("intertiatio").⁴ The recourse to warranty is thus followed from one warrantor to another until the first warrantor is found.⁵ In the meanwhile the thing stays temporarily in the hands of the man who actually withholds it; it has been thought that the thing was confided to the sequestrator, which seems to us more reasonable, and which was done later on; but during the Frankish period the very heavy responsibility which weighed upon the holder appeared sufficient to assure the bringing into court of the object in litigation.⁶ Before the tribunal this object passed from the hands of the holder into those of the warrantor, and the latter took the defense upon himself; the holder disappeared from

¹ Engagement entered into by them: "Lib., Pap., Roth.," 231; "Burg.," 83. Delays varying according as the warrantor is more or less distant: "Sal.," 47; 40 or 80 days: "Rib.," 33; "Æthelr.," 2, 8; *Hloth.*, 7, 16; "Roth.," 231. — Results of default: being put "extra sermonem regis," distraint upon the goods of the defaulter. Cf. *Beaumanoir*, 34, 3.

² As to the object in court, cf. "Alam.," 87 (clod of earth under seal): "Bai.," 12, 3 and 16, 17; *Howard*, "Cout. Anglo-Norm.," III, 645. Death of a stolen slave: who is buried at the crossroads, his feet tied with a twisted branch "retorta," which comes up out of the ground and which should "de manu in manu ambulare" until the thief is found: "Rib.," 72. — A slave who has run away: unless he is represented within the legal delay the guilt of the accused is looked upon as proved; but the Capitulary of 803, 13, allows him to justify himself by oath. — Cf. "Alam.," 87; "Bai.," 12, 3 and 16, 17; "Roth.," 313. — On the "quadrivium" cf. *Hermann*, p. 139.

³ For example, if it is a case of an animal born in his stable: "Sal.," 99; *Hessels*; "Bai.," 16, 11; "L. Pap. Roth.," 232; "L. de Guill. le Conq.," 1, 21; "Æthelst.," 2, 9; "Schwabensp.," II, 93; "Cap. Childeb.," c. 1. Cf. *Hermann*, p. 53; *London*, pp. 162, 342.

⁴ "Sal.," 47; *ib.*, 74. — "Cap.," ed. *Bor.*, II, 440; *Du Cange*, see "Intertiatio"; *Hermann*, p. 99 and VII; bibl. in *Geffcken*, "L. Sal.," "Orléans, A. C.," 379, 380; "N. C.," 444, 454; "Amiens," thirteenth century, 76; "Jostice," p. 309; *Jobbé-Duval*, p. 42.

⁵ "Rib.," 72, 1; "Bai.," 16, 11. No limit to these successive recourses, at least in the beginning: *Brunner*, "D. R. G.," II, 502; Law of Otto I, in 967.

⁶ Cf. "Rib.," 74.

the proceedings.¹ If the warrantor refused to accept the object, this gave rise to an action between himself and the holder, which was settled by means of the duel; the holder, convicted of having had recourse to warranty without reason, was punished like a thief.²

§ 242. **The Same.** — The action the procedure of which we have just outlined, the only one which springs out of theft, is a **penal action**, whether it be brought against the thief himself ("actio furti," properly so called) or against a third party who withholds the object (a reclaiming of the movable).³ The only one authorized to bring this action is the man robbed, whether he be owner or not; the lender, the pledgor, etc., have the action, for it is sufficient that the thing which they have lawfully in their possession should be taken away from them to allow them to take vengeance for the injury received, or to permit of their bringing action, which is a milder form of vengeance; ⁴ in such a case, the action of theft is not maintainable by the owner of the property.⁵ The man who has been robbed is not able to sue the thief and the third party who withholds the object, at one and the same time. If he fail in his action, he will suffer the penalty of theft.⁶ Retaliation is the compensation for the risk which the defendant runs in the dangerous procedure which is directed against him. In places where the law became milder the penalties were less.⁷ The defendant who is found guilty

¹ *Post*: "Doctrine of Warranty," "Sale." See *Hermann*, p. 64; "Lib. Pap. Roth.," 231.

² "Rib.," 33, 3; "Cap.," 803, "ad. l. Rib.," 7; *Loersch and Schr.*, no. 93; "Ass. de Jérus.," "C. des B.," 256; *Loysel*, 699.

³ Very diverse opinions as to the nature of the "Anefangsklage"; cf. analysis in *London*, *op. cit.*, introduction. — The penal character of the action results from its being given to a person who is not the owner, from the fact that if the plaintiff fails in his action he incurs the penalty, and also from the fact that the person who has been robbed cannot proceed against the thief and against the third party who withholds the object at the same time. — The commentaries upon the Lombard laws bear witness that this action was given up in order to proceed according to the Roman law.

⁴ A short delay (perhaps a year and a day), because he who allows the customary time to go by is looked upon as having given up all idea of vengeance himself: "L. de Guill. le Conq.," 1, 3 and 6; 1, 21; *Hermann*, VI, 105, 109; "Dec. Childeb.," 3 (10 years).

⁵ Which proves that the action is not accorded to the depository, etc., simply because he is better informed and in a better position to act than the owner is; but this is not always true. *Pertile*, IV, 257, maintains, it is true, that the owner would have the action, for example, if the depository were insolvent. — "Rib.," 72; "Cap.," 803, c. 12; "Liut.," 131; "Wis.," 5, 5, 3; "Bai.," 15; "Schwabensp.," 230; *Schreuer*, "Verbrechenskonkurr.," p. 60; *Schroder*, p. 348.

⁶ "Bai.," 9, 18; "Roth.," 242; "Æthelbr.," 2, 9.

⁷ "Burg.," 19, 2; 83, 2; "Rib.," 47, 3; "Sal." (*Hessels*); "Dec. Childeb.,"

pays his adversary the composition for theft, restores to him the object stolen, or if this be no longer in existence, its value and, furthermore, gives him a sum of money to indemnify him for the time he has delayed in making the restitution.¹ These three items are designated in the law of the Ripuarians by the words: "texaga," "capitale" and "dilatura."²

§ 243. **Feudal Period** (tenth to fourteenth century). — (I) *Voluntary Relinquishment of Possession*. — The Customary law seems to be divided between two opposite tendencies, — one, which is Roman, allowing the owner to reclaim;³ the other, which is Germanic, refusing to allow him to do so. In these same Books of Customs, solutions which contradict one another are met with. Moreover, it is probable that the old law still predominates; one can see that, as a general thing, the owner is reduced to a personal action against the depositary, the pledgee, etc., to whom he has entrusted his movable;⁴ so much the worse for him if he has mis-

c. 3; "Sachsensp.," I, 53; II, 35; "Schwabensp.," 317. As to the Hindu and Scandinavian law, cf. *Jobbé-Duval*, p. 69.

¹ "Rib.," 17; 33. "Sal.," 2, 1 *et seq.* — Is the fine of the "Anefang" of the Customs of the Middle Ages already added to those penalties of the barbarian period? Cf. "Alam.," 2, 88, 90; "Dec. Tassil.," 4, 13; "Wis.," 5, 4, 8. — As an exception, there is a right for the withholder to obtain the price or a portion of the price: "Bai.," 9, 7; "Wis.," 7, 2, 8; *Hlothar*, 16; "Burg.," 107, 8.

² Cf. "L. Fr. Cham.," 25, 27; *Jobbé-Duval*, p. 68. — As to the "dilatura" or "wirdira" controversy, cf. *Tamassia*, "Arch. Giur.," 1897, p. 345; *Vanderkindere*, "Acad. Belg.," 41; *Grimm*, "R. A.," 655; *Brunner*, II, 624; bibl. in *Geffcken*, "L. Sal.," p. 109; *Hermann*, p. 28.

³ Case of the reclaiming of a thing entrusted to another, with or without indemnifying the third party who has acquired it: "Jost.," 8, 5, 2; 19, 23, 3; "Ass. de Jérus.," "C. des B.," 91, 99; "Amiens, 2 Cout.," 99 *et seq.*; *Roye*, 37; "Roisin," no. 111; "Bourges, T. A. C.," 54; *Varin*, "Arch. Lég. de Reims," I, 38; "F. de Béarn," p. 53, 170; *Jobbé-Duval*, p. 176; *Pertile*, IV, 256. Cf. as to the German law: *Stobbe*, II, 621; *Beaumanoir* (31, 16; 54, 3; 32, 15; 6, 3) allows the owner the right of reclaiming (Roman influence), excepting as against the person who has acquired the thing in good faith and who "bought it in the open market to the knowledge of all good people." If it is a question of a movable which has been stolen, the person buying it under these same conditions shall have a right to be paid back the purchase price (25, 22). Cf. 34, 47; *Boutaric*, I, 43. *Beaumanoir*, 32, 15, also admits of the complaint of novel disseisin for the benefit of the man who, having had a movable for less than a year and a day, loses possession of it. Cf. *Bourcart*, "Thèse," p. 191. See also theory of seisin: *Beaumanoir*, 37, 3 (good faith); *Glanville*, 12, 12. — "Petrus," 2, 15; 3, 9.

⁴ (A) **Texts which Formulate the Customary Rule**, according to which reclaiming is not admitted: *P. de Fontaines*, 12, 3; "T. A. C., Bourges" (*B. de Richeb.*, III, 880), Art. 55. Neither the Roman reclaiming nor the mortgage action can take place in the lay court: *A. Favre*, "Cod. Fabr.," VI, 27, 11; *Terrien*, on "Norm.," p. 258; *Voet*, "Ad Pand.," 6, 1, 12; *Boerius*, "Consuet. Bituric.," fo. 35. Cf. *Bessian de Pressac*, on "Auvergne," 17, 1: the usucapion of movables is abolished; acquirers are protected by the general Custom of the kingdom: Movables cannot be followed. — Although these last authors are of recent date, they give the rule as being an old one: *Denyssen*, "Diss.

placed his confidence, or if the "accipiens" abuses this confidence in order to transmit the property to a third person;¹ against the latter the owner has no remedy, even if his own debtor is insolvent; the energetic measures to which he can have recourse (physical compulsion, private seizure) cause this insolvency to be a rather rare occurrence.²

§ 244. **The Same.** — (II) *Loss or Theft.* — (a) **Loss.** The feudal laws modified the old rules in this respect. Movable objects which were lost belonged to the lord, excepting for the duty he had of restoring them to their owner if the latter claimed them within the year and a day; such a reclaiming could have no penal character if the lost property was in the hands of the lord; nor did it have any more of a penal character when, the right of the lord having been obliterated, it was made against a third party (the Latin East, Normandy).³ Between this personal action, which may be

Inaug., 1796, *Raynaud*, "Thèse," 1873, p. 113, think that this maxim is only a short form of the rule of the sixteenth century, "Movable cannot be followed by a mortgage." *Desmares*, 165; "Cout. Notoires du Chât.," 23; "Cout. d'Anjou de 1411," no. 288. To which we must reply by the preceding and following texts, which are general and do not merely contemplate mortgages. — (B) **Texts which Apply the Rule:** "Jostice," 19, 53, 3 (pledging some one else's property, whereas, if one pledges a thing stolen and it be known, the pledge is worthless): "Ass. de Jérus.," "C. des Bourg.," 40, 84 (distrain upon the thing lent to the debtor by a third party); "Roisin," p. 90, n. 111 (reclaiming allowed as an exception). The Customs of the South allow the purchaser of a thing which has been *stolen* a right to compensation if the purchase has taken place in a market; "a fortiori," should this be so in the case of a thing which has not been stolen, yet at the same time this case is not provided for, because the true owner has no right to take the thing back: "Toulouse," 95, etc.; "N. R. H.," 1880, 342 ("estault" at Metz). The lack of usucaption as applying to movables in the Customary law is thus to be accounted for quite naturally: "Orléans," 260, 271; however, it is not certain that the possession of a year and a day did not in the old times take place ("Compil. d. us. Andegav.," 35); when it ceased to be general the old Customary principle was opposed to the admission of the Roman usucaption of three years. — Cf. as to German law: "Sachsensp.," II, 60, 1 (refusal to give any action against third parties who withhold property in the case of a lending, etc.). Current maxims: "Hand muss hand wahren" towards 1400 (the hand should guarantee the hand, allusion to the recourse to warranty in the case where one finds the stolen object in the hands of some one other than the thief; cf. as to the double meaning of "wahren," to warrant, to keep, *Heusler*, II, 213). *Schroeder*, p. 373; *Chaisemartin*, nos. 55 and 56. — English law: in the thirteenth century the owner has only a contractual action of detinue (upon a bailment) against a lender, etc. (*Bracton*, fo. 102 b), and the latter is the only one allowed to bring the action "furti."

¹ Little matters the good or bad faith of the acquirer.

² *Prost*, "Ord. des Maiours," p. 228; "Bayonne," 53, 1; 104, 1 *et seq.*

³ The action for a thing "adircée" (lost) is a personal action which is purely civil, and by means of which one asks for the restitution of the object which has been lost from the third party who holds it (and not a reclaiming, as is thought by *Thévenin*, "Mobilienvindie. nach. d. Altfr. Rechtsq. d. M.-A.," p. 3, and *Franken*, "Franz. Pfandr.," p. 298). It is based upon the fact of the loss rather than upon the right of ownership. It ought to belong to the

called *action for a lost thing*, and the reclaiming of movables, there is only a slight shade of difference.¹

(b) In cases of **theft** (and this word was always understood in its narrow sense without including fraud and abuse of confidence), the man robbed, whether the owner or not,² had two actions at his disposal;³ we will call one of them the *action of theft*, the other a *demand for a stolen thing*, although these names are not found in the texts.⁴ These are both criminal actions. The

pledgor, to the borrower, etc.; but the texts assume that it is brought by the owner. As to the procedure of this action, cf. *Jobbé-Duval*, p. 159. It is only mentioned in the "Ass. de Jérus.," "C. des Bourg.," 226 (220); *J. d'Idelin*, 80, 131; *Jacq. d'Idelin*, 54; "Ass. d'Antioche," "C. des Bourg.," 9; "Gr. Cout. de Norm.," 87; "Fleta," I, 36; *Britton*, 118; "Reg. Crim. de la Just. de Saint-Martin-des-Champs," p. 11; cf. "Summa Norm.," 16, 3.

¹ Cf. in English law, the action of "detinue sur trover" (*Pollock and Maitland*, II, 174), and in German law, the "Schlichte Klage" (*Laband*, "Vermög. Klag.," p. 90), which is the opposite of the "Anfangsklage," which is only given in cases of theft: *Behrend*, "Obs. de Actione Simplicis (Schlichte Klage) Juris Germ.," 1861.

² The borrower, the pledgee, etc., are responsible for unforeseen circumstances and, consequently, for theft; thenceforth the actions arising out of theft belong to them (to the exclusion of the owner): *P. de Fontaines*, 20, 10; "A. C., Bourg.," 18; "Ass. de Jérus.," "C. des Bourg.," 56 (58); *J. d'Idelin*, 119; *Fleta*, I, 37.) — Reaction against this rule: *Beaumanoir*, 31, 15 and 16; "Justice," 19, 35, 1; "Bordeaux," 161. — The action should be begun within a year and a day of the theft or the loss: "Justice," 19, 29, 1 and 161; "Gr. Cout. de Norm.," 17 and 19; "Ass. de Jérus.," "C. des Bourg.," 253 (252). — In the thirteenth century there was no such thing as a prosecution by the government; the man who was robbed and his relatives had to bring the accusation; the criminal action was private, and not public: "Justice," 19, 45, 2. — *Contra*: certain Customs of the South: "Bayonne," 103, 16; "Lourdes," 19; cf. *Beaumanoir*, 6, 12.

³ Was the preliminary examination still entrusted to the man who had been robbed (investigation and search of the house)? Cf. *Jobbé-Duval*, p. 102. — As to flagrant offense, *ibid.*, p. 105; simply because there is a prosecution: *Bracton*, 3, 27, 1; "T. A. C., Bret.," 101; "Gr. Cout. de Norm.," 81 (cf. "Bayonne," 67; "Ass. de Jérus.," "C. des Bourg.," 238); he who is taken in the act cannot exonerate himself; "Ass. de Jérus.," "C. des Bourg.," 241; "Gr. Cout. de Norm.," 18; *Beaumanoir*, 31, 4, 16.

⁴ **English Law**, *Glanville*, 10, 17; *Bracton*, fo. 151; "Fleta," 55. The English common law gave *self-help* a prominent place in carrying out the customary proceedings for the recovery of stolen movables, but in the thirteenth century it was decided that the man who took justice into his own hands should by way of penalty lose the object which he took back (*Britton*, I, 115); thenceforth the old procedure was abandoned. The man robbed had two actions: (a) the appeal of larceny, a true "actio furti"; (b) the action of trespass "de bonis asportatis." The appeal of larceny caused the one who started it to run great risks, and finally it did not even assure him the restoration of the stolen objects. After the time of Henry III, the writ of trespass was the only practical means whereby the victim of a theft could recover the value of his goods; but, as it assumed that the thief had acted "vi et armis" against the king's peace, the third party who had acquired the property from the thief escaped it; this was a deplorable result, not only in itself, but because the juriconsults drew from it the idea that the thief or the trespasser had become the owner of the object which he had seized.

first is more formal and more dangerous than the second,¹ so much so that recourse is scarcely ever had to it unless the thing cannot be found. This action does not differ very much from the old Frankish procedure against the thief. The other action, which is of later creation, applies to the case where one prosecutes, not the thief, but a third party who has acquired the property. This second action does not contain any formal accusation of theft; the accuser who fails is not liable to be punished like a thief, as happens when he brings the action of theft (retaliation); the defendant who is found guilty will ordinarily be compelled only to restore the thing stolen; he will almost always escape the penalties of theft or will incur only a lesser punishment. The demand for a stolen thing² is like a more modern and less barbarous form of the action of theft, — in transition to the stage when

¹ The procedure in the action of theft is very archaic, as one can judge from this outline, which I borrow from *Jobbé-Duval*, p. 107: 1st. Formal accusation ("Ass. de Jérus.," "C. des Bourg.," 246 (252), 244 (249), 88 (90); *J. d'Idelin*, 62, 250; "Jostice," 19, 4, 2; "Et. de St. Louis," 2 17, 19; "Gr. Cout. de Norm.," 71) and offer of proof (*Beaumanoir*, 61, 4; *J. d'Idelin*, 63), surety ("L. de Beaumont," 24), the placing of 4 "deniers" upon the thing ("Et. de St. Louis," 2, 16, cf. *Jobbé-Duval*, pp. 108, 118). — 2d. Immediate denial on the part of the defendant with offer of proof, in default of which the penalty for theft is incurred; no day of counsel: *P. de Fontaines*, 13, 2; "For de Béarn," p. 64 (*contra*: "Et. de St. Louis," 2, 20; "A. C., Bourg.," 14). — 3d. Judgment of proof: "Ass. de Jérus.," "C. des B.,"; imprisonment of both parties: "Et. de St. Louis," 104 ("Livre des Droiz," 257; "Us. de Guynes," 333). — 4th. Proof by ordeals: "L. de Beaumont," 28; by the duel: "Jostice," 19, 1, 2; "Gr. Cout. de Norm.," 71; "For de Morlaas," 81, 282; by witnesses: "Et. de St. Louis," 2, 12; "A. C., Bourg.," 24. — *Beaumanoir*, 34, 45, does not admit of a man's defending himself by bringing in his warrantor; *contra*: "Ass. de Jér.," "C. des B.," 246 (252). — 5th. Pecuniary penalties ("Riom," 24; "Ass. d'Antioche," "C. des B.," 7, 60, tariff of compositions), but generally corporeal penalties ("Et. de St. Louis," 1, 29, loss of an ear, a foot, death; "Reg. Crim. de Saint-Martin-des-Champs," p. 220); with confiscation of movables ("Abbeville" 2; "Ass. de Jérus.," "C. des B.," 227 (232); "Olim," I, p. 240 (328). — 6th. Retaliation against the complainant who is defeated: "Et. de St. Louis," 1, 82; *Beaumanoir*, 6, 16; *L. Delisle*, "Jug. de l'Echiq.," 28, 206; "Ass. d'Antioche, Hte. C.," 11; "Us. de Guynes," 334. Cf. *Jacobi*, 94, 10.

² It is difficult to determine the exact nature of the demand for a stolen thing (a name created by *Jobbé-Duval*, whose terminology we follow). We see in this a criminal action, such as an action of theft was, without attempting to conceal the fact that its penal character is perceptibly lessened. The third party in possession against whom this action is brought is "placed under the necessity of accounting for the obtaining of possession" of the thing; if he is not successful in having the action shifted upon his warrantor he runs the risk of being punished as a thief, or, at least, of incurring some minor penalty ("Et. de St. Louis," 1, 91; "A. C. Bourg.," 76). As to the procedure in this action and the characteristics which reveal its penal character, cf. *Jobbé-Duval*, p. 112-159. Formula of the demand: "This thing has been stolen from me" ("Et. de St. Louis," 2, 17; "Ass. de Jérus.," "C. des B.," 88 (90); "T. A. C., Bourges," 53; "Bordeaux," 18; "Bergerac," 105); certain texts add, "It is mine" (*P. de Fontaines*, 12, 1; "A. C., Bourg.," 14); but this variation is not essential, as the action may be brought by a lender ("A. C., Bourg.," 18; *P. de Fontaines*, 20, 10).

(after the office of public prosecutor had arisen) the civil and the criminal actions were separated and thieves were exposed to both an official prosecution and a civil action.

§ 245. **Market Overt.** — As a general rule, the owner who recovered a stolen or lost object was not compelled to indemnify the person who had possessed it, even although the latter did so in good faith (for questions of intent, of good or bad faith, are immaterial in the old law). But in the interest of the lords and communities for whom fairs and markets were a source of revenue, some of the Customs, many of which are Southern, once allowed a man who had bought a movable in a fair or market the right of demanding the restitution of the price paid. Often less had been paid for the object than it was really worth, for the very reason that it was something belonging to somebody else, and the owner had the advantage of being able to retake it on condition of restoring the price, that is to say, of indemnifying the man who had acquired it.¹ This equitable practice (the existence of which is attested from the eleventh century in Germany as between merchants) did not succeed in passing into the common law of Customs in the form of a general rule, but it shows the direction in which future legislation was to be engaged; these are considerations of an economical order which were to give the latter its final shape. This practice, moreover, did not disappear; some juriconsults of the eighteenth century even extended it by likening a purchase made from a merchant selling the same sort of goods to the purchase made at a fair. It was perpetuated by the Laws of October 6, 1791, 2, 11, and by Art. 2280 of the Civil Code.

§ 246. **Reform in the Roman Direction during the Fourteenth and Fifteenth Centuries.** — The reclaiming of movables was little by little introduced into practice under the influence of the Roman law;² it was allowed to the owner whose property had

¹ Privilege of the Jews in Germany: *Schroeder*, p. 698; *Pertile*, p. 258; *Beaumanoir*, 25, 22 *et seq.*; "Et. de St. Louis," 2, 17; "Bourg.," 14, 12; "Bordeaux," 18; "Perpignan," 25; "Toulouse," "de emt.," 3; "Avignon," "Stat.," 108. Numerous charters in Germany and Switzerland: *cf.* *Stobbe*, II, 618. — Public buying (even outside of a fair or market): "Montpellier" (1204), 21; "Cahors," 22; "Luzech," 82; "Quatre-Vallées," 32. — In this sense "Arrêt Parl. Paris," 1636. — In the eighteenth century *cf.* *Pothier*, "Cheptels," 1, 4, 3, 40; *Denisart*, see "Vol., 17"; *Soulatges*, on "Toulouse," p. 245; *Dunod*, p. 232.

² *Boutaric*, I, 43, p. 319; "Gr. Cout.," II, 16; III, 53; *A. Favre*, "Codex Fabr." (1640), 6, 27, 11 (order of the Senate of Savoy, 1593); *Pithou* on "Troyes," Art. 72, p. 157 (1609); *Charondas*, "Pand.," 4, 31, p. 565. *Cf.* *Deg-*

been stolen or lost,¹ as well as to the man who had voluntarily relinquished it; one no longer finds in the sixteenth century the maxim: "Movables cannot be followed." However, there still remain important vestiges of it, either because of inconsistencies or for practical reasons: 1st. In the South as well as the North it is said: "Movables cannot be followed by way of mortgage."² This was a necessity with the system of general mortgages then in force, if they wished to allow a debtor to dispose of his movables; this rule means: (a) sometimes that there can be no mortgage upon movables ("Paris," "Orléans");³ (b) sometimes that a mortgage on movables is valid,⁴ but carries with it no right of reclaiming.⁵ 2d. *The Roman usucaption* of three years being useless under a system which excluded all reclaiming, our practitioners held it as being abolished, and applied to movables the thirty years' prescription which was in use for immovables;

hewiet, p. 389. Reclaiming, a purely civil action, did not carry with it any fine against the complainant in case he were defeated. It was based upon ownership and was given without there being any question as to how possession had been lost, in case of alienation by a depositary, etc., or whether the thing had been lost or stolen and acquired by a third party in good faith. *Cf. Boulatric*, I, 27, p. 158 and I, 35, p. 244. The procedure began by a distraint of the object in litigation, — a thing which was indispensable because of the rude customs of former times ("Entiercement" at Orléans, *Pothier*, ed. *Bug.*, I, 684); at the request of the complainant and without the authority of the court, the object was sequestered by a sergeant; the court could after this confide it to the defendant (with or without surety). "Adveu" and "Contre-Adveu" ("advocare," to reclaim) in the Customs of Anjou, Poitou, La Rochelle, with "Applégement" (giving of surety) by both parties, as is done in matters relating to immovables: *Bucherellus*, on "Les Instit. de Just.," p. 604; *Loysel*, 754 (note); *Ragueau*, see "Gloss."

¹ The thief (or the acquirer in bad faith) was subject to a criminal action (a public action from the day when the public prosecutor could act officially; the ordinary individual no longer brings accusation, but is limited to a denunciation which allows him to escape retaliation) and to a personal action ("ex delicto") for restitution. Against the acquirer in good faith one had the action of reclaiming. — Abuse of confidence was likened to theft and punished in the same manner (*cf.* Roman "furtum").

² "Cout. Notoires," Art. 23 (by mortgage). *Post*, "Origins of the Mortgage." Movables could not be distrained upon when in the hands of third parties by the creditors of the owner: *Boulatric*, I, 25; *Masuer*, 30, 13; *Viollet*, p. 740; *Valette*, "R. Foelix," II, 365.

³ "Paris," 170; "Orléans," 477; *Loysel*, 487; Civil Code, 2119.

⁴ Anjou, Maine, Normandy. — As to the South *cf.* *Augeard*, "Arrêts," I, 900; *Julien*, "Elém.," p. 352.

⁵ (A) Whether the acquirer were in good or bad faith, for that mattered little in the old law. However, certain Customs only protect the acquirer in good faith (following the Roman law: *Paulienne*); *Desmares*, 165; "Cout. Not.," 23; "Melun," 313; "Champagne," 65; "Sens," 131; *L'Hommeau*, "Maximes," III, 14. — (B) Whether the mortgage be general or special, although there may have been some difficulty in the case of the latter (*cf.* Civil Code, 2102, lessor). *Terrien*, on "Norm.," 8, I, p. 258; *Boerius*, on "Bourges," "Hyp.," § 2; *Bessan de Pressac*, on "Auvergne," 24, 52, p. 215; *Rebuffe*, on *Masuer*, 30, 13. — *Chassaneus*, on "Bourg.," 5, 3, 4.

the reclaiming of movables was thus possible during thirty years,¹ at least, in cases of voluntary dispossession. As to movables which were stolen or lost, our old authors were very much divided as to the case in which they had passed to the possessor in good faith. Some of them looked upon the stolen or lost property as being incapable of having a prescription run against it; the others here admitted either the thirty years' prescription or the three years' *usucaption*.² 3d. *Possessory actions*, which were inconsistent with the old system of the ownership of movables, did not succeed in being introduced into practice, even after the reform, for they were not so useful as they were in the case of immovables.³

§ 247. **Judicial Law of the Eighteenth Century.** — Movables, says Dumoulin, can, "una hora transire per centum manus"; if the owner is permitted to reclaim them during thirty years, the fear of being sued would drive away purchasers; and the owner, if he wishes to make use of his right, runs the risk of becoming involved in fruitless litigation because of the difficulty which exists of establishing the identity of the movables reclaimed. The Neo-Roman doctrine of the reclaiming of movables during thirty years was all the more defective because at the time when it was established commerce was making progress and transactions in movables were on the increase. Practice had to restrict the rights of the owner, who was almost always guilty of imprudence,⁴ in order to give an advantage to the purchaser in good faith, who

¹ *Imbert*, "Enchir.," see "Usuc.," p. 305; "Inst., for.," I, 35, 7; *Fontanon*, on *Masuer*, XXII, "de Prescr.," "Berry," 12, 10; *Buchereau*, p. 155. — Dissenting Customs: (a) no more reclaiming after the seisin of a year and a day: "Compil. de us. Andeg.," no. 35; "L. d. Droiz," no. 51. Cf. *Boutaric*, I, 27. (b) Usucaption of 3 years: "Gr. Cout.," 28; *Chassaneus*, on "Bourg.," 13, 8; *Charondas*, "Pand.," 2, 22, p. 270; "Anjou," 419; "Maine," 434 (legal title and good faith); "Melun," 169; "Sedan," 324; "Clermont en Arg.," 14, 8; "Amiens," 163 (good faith only). (c) Usucaption of from five to ten years: "Bretagne, A. C.," 274; "N. C.," 284.

² *Augeard*, I, 3. — *Auroun des Pommiers*, on "Bourb.," 3, 33. — *Pothier*, "Prescr.," no. 204; *Denisart*, see "Vol.," no. 19, cf. Civil Code, 2279, 2280.

³ "Gr. Cout.," 2, 19, 21; *Masuer*, 11, 66; "Bourges," 56. — However, *Boutaric*, I, 31, p. 189, admits the complaint. Cf. *post*, "Possession"; *Beaumanoir*, 32, 15; "Gr. Cout.," p. 250; *Loysel*, 754, 755, 756 (and citations); *Bucherellus* on the "Inst. of Justinian," p. 604: "utrubi interdictum" admission "gallice nuncupamus" follows the description of the procedure of the admission; but the question of ownership and that of possession are passed upon at the same time; the latter is found to be as though absorbed in the action for real property: *Ragueau*, see "Gloss.," and "applègement." — Let us notice that possessory actions were possible in the case of every kind of movables: "Paris," 97; "Orléans," 489; "Ord.," 1667, 18, 2.

⁴ Order of the Parliament of 1636: reclaiming, but charged with the indemnifying of the purchaser in good faith: *Jobbé-Duval*, p. 228.

was in no way in fault.¹ 1st. Some, like Ferrière, accord to the latter the advantages of the prescription of thirty years, by showing themselves not very exacting in the matter of the proof of lawful title (witness, simple affirmation).² 2d. Others, with Pothier, in his Commentary on the Customs of Orléans,³ declare that the possessor of the movable is presumed to be the owner until the contrary is proved; he needs neither prescription, his ownership being looked upon as established, nor title, possession standing him in lieu of title, for it is not customary to consummate the purchase of movables by writing. 3d. From this point to the establishment of a presumption of ownership "juris et de jure" for the benefit of the possessors of movables there was but a step, and this step was taken towards the second third of the eighteenth century by the practice of the Châtelet of Paris, which is summed up by Bourjon in his celebrated formula: "As far as movables are concerned, possession equals title."⁴ This was a

¹ However, a reclaiming which could be made during thirty years still continued to exist in countries of written law (*Serres*, "Inst.," "Usucaption"; *Boutaric*, "Inst.," p. 182; *Julien*, "Elém.," 2, 5, 4; "Comm. s. les Statuts de Provence," II, p. 415). According to *Merlin*, *Guyot*, see "Prescr.," 2, 5 (1785); *Flaust*, on 522 "Normandie" (1781); *Mall. de la Mothe*, "Quest.," p. 291 (1787), this would have been the common law of France applicable in localities where the Customs were silent.

² "Maine," 434. Above 100 "livres" the proof of lawful title had to be in writing; this would have been the same thing as doing away with usucaption. *Pothier* authorized proof by means of witnesses; *Ferrière*, "Dict.," see "Imm.," is contented with a mere affirmation on the part of the possessor. To the same effect, *R. de La Combe*, "Arrêts," p. 255; *Boucheul*, s. 372; "Poitou": *Chabrol*, s. 17, 1; "Auvergne," etc.

³ "Cout. d'Orléans," title "Prél.," s. 2; "Propriété," no. 282 (elsewhere *Pothier* requires the usucaption of three years, but still allowing the proof of title by means of witnesses: "Prescr.," IX, 386, ed. *Bug.*, or by means of a mere allegation, "Don entre Mari et Femme," no. 67). Cf. *Denisart*, see "Meubles," no. 32; *Dupineau*, s. 421; *Anjou*, "Encycl. Méth.," see "Meubles"; *Cottureau*, "Dr. Gén. de la France et Dr. Partic. de la Touraine," no. 7279; *Jobbé-Duval*, p. 230. — Consequences: (a) no revocation of gifts given by hand; no reclaiming on the part of the seller against the buyer (but if the price has not been paid, the seller for cash may reclaim, for in this case delivery does not transfer ownership: cf. Art. 176, "Paris, N. C.," and 177; *Pasquier*, "Inst.," p. 256, and the commentaries on the Customs; privilege of the seller of movable effects); (b) the purchaser in good faith is not protected from reclaiming when he has received a movable which was deposited or pledged, etc., from the unfaithful depositary, etc. By proving the breach of confidence the depositary, etc., overthrows the presumption of ownership in the possessor.

⁴ Current formula, of which Bourjon is consequently not the originator: *Bourjon*, "Dr. Commun de la France" (1747), 3, 21, 1 and 2; 6, 8, 3, 1, 3 and 18; 6, 8, 3, 4, 26. Good faith upon the part of the purchaser is demanded by *Bourjon* and by *Valin*, on "La Rochelle," Art. 60. Were it not for Art. 2279 of the Civil Code, one might doubt if this jurisprudence had continued after this. — Consequences: (a) the purchaser in good faith who is put in actual possession following a breach of confidence is not open to reclaiming on the part of the owner; the latter finds himself limited to a personal action against

radical and simple solution, which Art. 2279 of the Civil Code has perpetuated, and which gave the needs of business full satisfaction: the purchaser *in good faith*¹ of a movable became the absolute owner from the moment when he took possession (excepting if the movable were lost or stolen).

Thus was brought to a close, by means of a reaction the reason of which we must not seek elsewhere than in the needs of business, the evolution of our old law as far as movable property is concerned. It broke with the Roman tradition, after having almost completely accepted it, and to a certain extent returned to the past, but in a very different spirit from that which had inspired primitive legislation: witness the difference, which was unknown formerly, between the possessor in good faith and the possessor in bad faith.

the person to whom he mistakenly entrusted his movable; (b) movables cannot be followed by a mortgage; (c) between two purchasers of the same movable the one who first received delivery in good faith is preferred: Civil Code, 2279, 2102, 1813, 1141, 2119.

¹ Cf. *Deghewiet*, p. 149, etc.

TOPIC 3. OWNERSHIP OF LAND

§ 248. Real and Personal Rights.	§§ 253, 254. Freedom to Enclose.
249. Real and Personal Actions.	255. Limited Ownership.
250. "Jus ad Rem."	256. Joint Ownership with Joint Possession.
251. Ownership of Land.	257. The Community.
252. Restrictions on the Right of Ownership.	258. Incorporeal Property.

§ 248. **Real and Personal Rights.** — It has been asked if the distinction between real and personal rights¹ did not remain unknown to the Germanic law. It is true that this distinction scarcely appears if one goes back to the primitive period where every attack upon the rights of another was settled by private vengeance or an action "ex delicto."² But when this phase had been passed through, the classical contrast between real and personal rights was disclosed in the Germanic law itself. It did not entirely coincide with the Roman classification, for the class of real rights encroached upon that of personal rights;³ at the same time, it is permissible to bring the two legal systems on this point together, and they tended more and more to resemble each other;

¹ The expression **Real Rights** as contrasted with the term **Personal Rights**, rights of claim or obligation, is derived from the Roman terminology relative to procedure; actions of which the "intentio" of the formula did not designate the defendant were called actions "in rem"; those in which this designation occurred were called actions "in personam." This peculiarity, as often happens, was fundamental; that is why it could serve as a basis for the separation of private rights into two classes: real rights and personal rights. Already the juriconsults made use of the expression "personalis actio" (for example, Dig., 50, 16, 178, 2); in the Middle Ages, as the antithesis of this, the term "realis actio" was used; from applying to actions these expressions came to be applied to the rights themselves. The expression "realis actio" is found in *Tancred*, "Ord. Jud.," 2, 13, and not in *Pillius*. Neither the "Petrus" nor the "Brachylogus" uses it. "Jura realia, personalia"; "Glose," "Utendi," on § 2, "Inst. de Act.," 4, 6. As to the conception of the "jus in re," cf. details in *Landsberg*, "Gl. d. Accursius," p. 81 *et seq.*

² The complainant complains of an "invasio" or "usurpatio" of the land which has taken place, "injuste," "malo ordine" ("Landraub" among the people of the North): *Brunner*, II, 684, 512; "Summa Norm.," "C. de Querelis."

³ The Roman juriconsults had adhered to the simple idea of the "dominium" completed by a small number of servitudes, and restricted as an exception by the usufruct. In the Middle Ages, on the other hand, ownership is divided, real rights become multiplied; one can be an owner as lord, as vassal, as copyholder; one can be owner during one's life or by right of inheritance; one can be owner in the quality of a pledge creditor, or by right of guardianship. Ownership under these various forms is similar to the usufruct and the real rights. — *Delbruck* has even maintained, "Ueberr. fremd. Schuld.," that rights of claim were considered as things and constituted objects of ownership. See the refutation of this opinion in *Heusler*, § 75.

in France, especially, the Roman doctrine easily passed into the books and into practice.

§ 249. **Real¹ and Personal Actions.²** — The distinction of rights is manifested in procedure by the contrast between real actions and personal actions, and this latter is already manifested in the Barbarian laws, especially in the Lombard laws, in spite of the penal character which the actions which were admissible at this period had still preserved in many respects. Some use the typical formula: "malo ordine possides";³ in others the taking of an oath is demanded, "dare debes," being based upon a contract or an offense, "vadia dedisti de solvendo mihi decem solidos," "occidisti servum meum," etc. In the first case the defendant must establish his right over the thing which he detains ("terra propria mea est per successionem patris mei"); in the second case it is sufficient for him to deny the debt and to swear that it has no existence.⁴ It is difficult not to see in these two classes of actions

¹ Cf. especially as to the Frankish period; *Brunner*, § 119 (bibl.); *Hübner*, "Immobiliariprocess," 1895 ("Unters." by *Gierke*), *Laband*, *Planck*, *Heusler*, *op. cit.*; *Pertile*, IV, p. 259.

² Our old authors, from the thirteenth century on, admit of a third class of actions, *mixed* actions, on the subject of which their ideas are often in confusion: "Gr. Cout.," p. 546 (both a personal action and an action on the mortgage for the payment of a rent).

³ **Procedure on the reclaiming of Immovables** during the barbarian period. See details in *Hübner*, *op. cit.*, and *Brunner*, § 119. — The actions arising: 1st, by "mannitio" or "bannitio"; 2d, or by an undertaking to appear in court ("adramire") (cf. "vadimonium" at Rome); 3d, or by the "Anefang," a formal seizure of the thing, just as in the case of movables: "Dec. Child.," 3. If necessary, "visio terræ," in order to settle upon the object of the litigation (cf. Anglo-Norman Custom); *Brunner*, "Entst. d. Schwurg.," p. 173. — The defendant may oppose his adversary: 1st, by relying on some kind of an original acquirement, such as the "aprisio"; 2d, by referring to his grantor; the recourse to the warrantor and the part played by the latter are to be accounted for by the penal character which this action at first had; 3d, by saying that the land came to him from his relatives by way of an inheritance; in which case proof by witnesses on the part of the plaintiff is excluded: "Sal. Extrav.," c. 7 and 8; "Rib.," 67, 5. — The defendant who is found guilty should restore the land and pay a composition ("legis beneficium"); if the latter is not paid, for example, for reasons of an equitable nature, the restitution takes place "sana manu." — Cf. the curious procedure described in the Law of the Alamans, 12, 8, apropos of a lawsuit between two families. Cf. "L. Bai.," 16 and 11.

⁴ (A) Action "malo ordine possides." This formula, which betrays the delictual character that the action originally had, is interpreted in "Expos.," § 2 *et seq.*, "Liut.," 90. The school of Pavia introduced alongside of it a more modern Roman form: instead of "Petre, te appellat Martinus, quod malo ordine possides terram," they say: "P. te appellat M. quod terram, quam tenes, sua propria est" ("s. Roth.," 227). — Cf. the canonists, such as, *Tancred*, etc.; *Heusler*, § 78; *Hübner*, p. 48; "Roth." ("Lib. Pap."), 216, 222, 227, 228, 231, 234; *Rozière*, "Form.," no. 427 ("Cart. sen.," 27), 480, 481; "Liut.," 18, 77. Is this action given against the depositary or the borrower of a movable? Cf. *post*, "System of Movable Property": "Liut.," 130, 86; *Rozière*, 463 (restitution of the price, the object having disappeared). — (B) Action

the precedent for the "Klagen auf Gut" and "um Schuld" of the German Customs of the thirteenth century.¹ In France the distinction was reclothed at a very early period with Roman forms and lost all its originality.² The real action, the "*causa proprietatis*" or *suit for real property*, has its own particular procedure;³ it can be begun at any time; ownership is not lost by non-use, thus differing from real rights.⁴ It assumes that the owner gives proof of his right; for this he will ordinarily invoke prescription; if he does not do this he will produce a title, and the latter, at least, if it is previous to the possession, will permit him to prevail over the possessor, for although he does not establish an absolute proof, this is a very strong presumption in his favor.⁵

§ 250. "**Jus ad Rem.**"⁶ — There was, moreover, an attempt in the doctrine, which was almost without any result, to get away from these ideas by admitting the third species of rights, the

"dare debes." — "Roth.," 362, 382; "Liut.," 8, etc. — Controversy as to the action by the buyer against the seller for delivery of the object sold: *Rozière*, nos. 477, 472. *Heusler*, § 78, points out that the school of Pavia Romanizes these distinctions: cf. "Form. s. Roth.," 227. See also the canonists, for example, *Tancred*, etc.

¹ "Richtsteig Landrechts" (ed. *Homeyer*, 1857), c. 5, adds to it the "Klage um Anevang"; "Sachsensp.," I, 70; II, 3 and III, 79. Various theories as to the exact nature of these actions: *Delbrück*, "Dingl., Klag.," 1857; *Planck*, "Gerichtsverfahren," 1878; *Laband*, "Vermög. Klagen," 1869 (every action by which one claims something other than money is a "Klage auf Gut"): *Planck*, "Deutsch. Gerichtsverfahr.," 1879, I, 339 ("Klage um Schuld": every action which has for its object a prestation on the part of the defendant, for example, the action for delivery of the thing sold, which *Laband* looks upon as a "Klage auf Gut"). *Heusler*, § 78, likens the "Klage auf Gut" to the real action and the "Klage um Schuld" to the personal action.

² Cf. especially *Beaumanoir*, c. 6 ("Des Demandes"), 32: "personal claims . . . concern the person (contracts, torts); real claims when one claims an inheritance; mixed claims . . . begin by being personal and then become real (action for delivery of the thing sold)." In the first case the tribunal of the domicile of the defendant has jurisdiction; in the second and third cases the lord from whom the inheritance is held has jurisdiction. Day of taking counsel and day of view in the case of claims for inheritances: *P. de Fontaines*, 13; "Jostice," p. 97; "Gr. Cout. de Fr.," pp. 202, 351, 404, 459, 515; "Stil. Parlam.," *passim*, "Const. du Chât.," 20, 21; *Boutaric*, I, 27. The "Summa Norm.," c. 66, "de querelis" still takes the early point of view. Cf. *Tardif*, p. clvi; cf. *Bracton*, III, 3; "Fleta," I, 2, 4, 5, 9; "Brachylogus," 4, 19; "*nasceitur omnis actio ex obligatione vel rei detentione.*"

³ *Pillius*, I, 12; *Tancred*, II, 13; *G. Durand*, "Specul.," II, 1 and 4, 2; "Stilus Parl.," c. 17; "Gr. Cout. de Fr.," pp. 350, 493, 532; *Boutaric*, I, 22; *Masuer*, 10; *Tardif*, "Procéd. au XIII^e siècle," p. 36; *Ferrière*, see "Action Réelle"; *Pothier*, IX, 199, ed. *Bug*.

⁴ *Peleus*, "Quest. Illustres," 8; *Pothier*, no. 276. — Cf. as to the Commentators: *Landsberg*, § 9, 19. — As to the early law, cf. *post*, "Tenure of a Year and a Day."

⁵ *Pothier*, 323. As to the literature previous to this, cf. *Landsberg*, *op. cit.*; *E. Lévy*, "Thèse," 1896.

⁶ *Brünneck*, "Ueb. d. Urspr. d. sog." "Jus ad Rem," 1869; *Heusler*, § 77; *Landsberg*, p. 88.

"jus ad rem," being halfway between the "jus in re" and the "jus in personam." No traces of these are found in the Commentary of Accursius, but Jacques de Revigny (1296) gives a "jus ad rem" to the vassal who has been given the investiture of a fief by symbolical methods, and who has not been put into physical possession of it.¹ It is easy to recognize here the influence of Roman ideas; they tended to make of the investiture simply a binding act, and not an act of the transfer of a real right; it is the Roman idea which alone could have had this effect. Against the lord the "jus ad rem" gave the right to demand being put into possession; against third parties it had only a limited efficaciousness. In the French Customs of the fourteenth and fifteenth centuries by "jus ad rem" is understood the usufruct, which is contrasted with the "jus in re" or ownership;² in the eighteenth century it is claims which are designated in this way.³

§ 251. **Ownership of Land.**⁴ — It is not for us here to go over the history of the ownership of land and the various phases through which it passed under the old system:⁵ agrarian joint ownership, family ownership, feudal ownership, before coming to the modern form of individual ownership.⁶ Let us simply recall the fact that,

¹ Cited by *Balde*. According to the "L. Feud.," investiture resulted in the acquiring of a real right, *cf.* II, 26, 15; 7, 1; 81; *Baraterius*, "L. Feud.," App. 4, n. 3, considers investiture as a contract and only causes a real right to be acquired by virtue of delivery. — *Cf.* in the common law the man chosen for some service cannot exercise it until after he has been confirmed and sanctioned: "in VI," 3, 7, 8. — With regard to the commentary "Agitur," on the "l. 1 pr., D.," 19, 1, *cf.* *Landsberg*, p. 90.

² "Gr. Cout. de Fr.," p. 195; *Boutaric*, I, 1.

³ *Pothier*, "Introd. aux Cout.," no. 108.

⁴ Terminology: "proprietas," "dominium." "Dominium" and "dominus" apply as well to the power of the lord as to ownership: "Gr. Cout. de Fr.," p. 232: "seigneur foncier." "Señorio" in the "Siete Part." The owner of a movable is called "seigneur de la chose" by *Britton* I, 60. Thirteenth century, Germany: "Eigenschaft," "Eigenthum" (1230); previously "eigen" or "erbe" to designate the land as contrasted with the fief, "Lehn," *Heusler*, § 86. *Cf.* as to the primitive conception of Germanic ownership: *Champeaux*, "Gr. Encycl.," see "Propriété"; *R. Caillemer*, "Exéc. Testam.," pp. 275, 338.

⁵ As to the contrast between the absolute character of the Roman "dominium" and the relative character of ownership in the Middle Ages nowhere is this relativeness so strongly marked as in England, with its curious theory of estates ("status"), rights or interests which one may have over a piece of land which are more or less extensive and of longer or shorter duration, among which figure alongside of the right of the freeholder that of the mere tenant whose lease ceases "ad nutum." Estates already existed in the time of *Bracton*; *Littleton* speaks of tenures in fee simple, in fee tail, for life, for a term of years, at will, by copyhold, and by the rod. The employment of clauses limiting the rights of the grantee (Statute "De Donis Conditionalibus," 1285) contributed no little to this splitting up of ownership. A classification of rights over the land came into existence which was connected with status or the estate of persons: *Pollock and Maitland*, II, 10 and 76.

⁶ As to the idea of ownership in the writings of the Glossators, *cf.*

if the Revolution has changed the tenant into the sole proprietor of the ground, it only sanctioned an evolution begun a long time since and already almost accomplished.¹ Collective ownership survived of its own accord in the town lands, the partition of which the Convention ordered; from the early Middle Ages the larger portion of the land in France belonged to individuals and to families, and not to communities. The rights of the family had been on the decrease. Finally, the **domain ownership** of the lord tended more and more to become nothing but a servitude; the tenant invested with the **beneficial ownership** was considered as the real owner.² It is thus that Pothier looked upon it in his Treatise on the Law of Ownership of Property, no. 3: "that kind of ownership (immediate ownership) is not the ownership of property which is to be the subject of the present treatise, and is the beneficial ownership; the man who has this ownership is called the proprietor, the one who has the immediate ownership is simply called the lord; it is the beneficial lord who is really the owner of the inheritance."³

§ 252. **Restrictions on the Right of Ownership.** — In spite of the changes which had taken place, the owner was far from having the free enjoyment of his land in 1789. He cultivated it and gathered the produce of it,⁴ but there still existed hampering

Landsberg, p. 92; *Piccinelli*, "Stud. int. all. Defin. Dominium est Jus Utendi," etc., 1886.

¹ "L'Œuvre Sociale de le Révol.," 190. — *Chénon*, *R. Beudant*, *Sagnac*, *op. cit.*; *H. Sée*, "Les Classes Rurales," 1901.

² The Romans granted a "vindicatio utilis," for example, to the holder of a long-term lease; the Glossators made a "dominium utile" correspond with this action and contrasted it with the "dominium directum," which belonged to the man who had the immediate action: *Landsberg*, p. 92 *et seq.* (bibl., p. 97); *Stobbe*, § 80; *Kraut*, "Grundr.," 5th ed., § 74; *Heusler*, § 87; *Pertile*, § 137; *Vangerow*, I, 302. The Gloss. on "L." 3, Dig., 41, 3, puts the expression "dominium utile" in the mouth of *Bulgarus*, "Cout. de Milan" (1216), 24, 30.

³ Cf. already *Bracton*, fo. 46b, fo. 58: "Capitalis dominus" and "verus dominus." *Chaisemartin*, p. 151. — If one wishes to get an idea of the evolution which took place one has only to compare these citations with the "L. Feud.," 2, 23: "proprietas penes dantem, usufructus ad accipientem"; 1, 8, 2: "proprietas" and "possessio." — To which of these two did the issues belong? "Gl." on "L." 1, c., 10, 15. Alluvium, islands, "L. Feud.," 1, 4, 6; "Aoste," 2, 11, 128.

⁴ **Acquirement of the Issues.** The maxim, "he who sows reaps" was already to be found in the old law. Therefore the man who does not own a piece of land, but who has cultivated it, has a right to the issues which it produces. With the exception of certain special applications ("Sachsensp.," 2, 58, 2; 3, 76, 3) of this principle let us call to mind the acquirement of the issues by the possessor in good faith: cf. *Beaumanoir*, 20; 32, 30, "Reclaiming" generally. The issues were considered as being acquired by the mere fact that work had been done: *Heusler*, II, p. 195; *Heimbach*, "L. d. Frucht,"

seigniorial rights, or, in their stead, police rules which were vestiges of joint ownership rights, without taking into account the rights of the family.¹ The Rural Code of 1791² made an innovation by saying that each owner was free to gather his harvest by any means and at any time he pleased; it thereby did away with the fixing of the day of mowing or harvesting or gathering the vintage, which allowed the lord to collect without difficulty rights such as that to a portion of the produce, but which right gave rise to abuses because the gathering of the harvest might be postponed in an arbitrary manner to the great detriment of the farmer.

§ 253. **Freedom to Enclose** one's land, which was frequently impeded by the rights of commons and common of pasture, was proclaimed in 1791; the owner who made use of this power lost his right to common of pasture in proportion to the amount of land which he enclosed.³ With the other feudal rights was abolished the seigniorial right of hunting, which even allowed the lord to go upon enclosed lands.⁴

§ 254. **The Same.** — Enclosure assumes, ordinarily, a **marking of boundaries**,⁵ which is carried out either by a resort to the courts or by friendly agreement.⁶ Each neighbor can compel the other to contribute; the marking of boundaries is done at the expense of all;⁷ the boundary marks are⁸ sometimes trees, such as quince

1843; *Rossi*, "Dir. d. Poss. s. Frutti," 1883. In this is found the protection of the English holder *at will*. As to the distinction made by the commentators between the "usufructus formalis" and "causalis," cf. *Landsberg*, p. 94. Rights of the owner of a piece of land to the fruit which has fallen upon this land from a tree belonging to his neighbor (*Kraut*, "Grundr.," 5th ed., § 77), with branches overhanging his land: *Chaisemartin*, p. 166; *A.-B. Schmidt*, "Recht d. Ueberhangs u. Überfalls" ("Unters." by *Gierke*); *Fournel*, "Voisinage," see "Arbres" (4th ed.); *Masuer*, X, 6 (keeping by the possessor in good faith before the "Ord. de Moulins," 2).

¹ *Pertile*, § 141 and § 145; *Stobbe*, § 83 *et seq.*

² Dec., Sept. 28 and Oct. 6, 1791. Many of these provisions were found to be in opposition to the Civil Code, and a draft of a Rural Code was prepared in 1808 and laid aside in 1814; it has not yet been entirely finished.

³ The right of common, already abolished in some provinces under the Old Régime, was only done away with by the Law of July 9, 1889: *Viollet*, p. 560. As to the connection between these rights and the system of cultivation by rotation of crops, cf. *Haussen*, "Z. f. ges. Staatsw.," 1865-68, 1876 ("Z. Gesch. d. Feldsyst. in D."); *Heusler*, § 88.

⁴ Prohibition of making enclosures within the territory of the "plaisirs" or lands reserved for the king's hunting.

⁵ "L. Alam.," 87; "Bai.," 12, 8; *Loysel*, 255, 290; *Fournel*, "Voisinage," see "Bornes," "Clôtures"; *Ragueau*, see "Bornes," "Cerquemanage"; *Ferrière*, see "Action en Bornage."

⁶ *Beaumanoir*, 30, 27, 28; "Et. de St. Louis," I, 138; *Boutaric*, p. 211, 268, 366, 775.

⁷ *Pothier*, IV, 328, sees therein a quasi contract like joint possession.

⁸ *Du Cange*, see "Crucis," "Terminales"; "Liber Termin." (fourteenth century); *de Ribbe*, "Soc. Provenç.," p. 185.

trees, sometimes, and more often, unhewn stones near which there are placed fragments of a tile (*guarantors* or *witnesses* attest that the stone is not placed there by chance), or else broken glass and other indestructible objects.¹

§ 255. **Limited Ownership.** — Limitations based on agreement which affected the rights of the owner had in them nothing contrary to the spirit of a legislation which carried with it so many restrictions. Also, it is not a rare thing to find in conveyances, sales, gifts, or wills, clauses which only give a conditional or part ownership to the grantee: the land cannot be alienated by him; it is stipulated that it shall return to the former owner or his heirs under certain conditions, or the grant may be cancelled by the effect of an accidental circumstance or the will of the parties. The establishment of appanages may be cited as an example; the possessions of the prince who has had the appanage granted to him return to the crown if he dies without heirs of his body. The English law, with its theory of the "*forma doni*,"² its Statute "*De Donis Conditionalibus*" in 1285, increased the number of these restrictions (reversion, remainder, etc.).³ Thus it had departed from the normal type of Roman ownership, unlimited "*dominium*." In France, jurisprudence, on the other hand, seems to have tended to approach this type by decreasing the number of these restrictive clauses,⁴ for reasons of public expediency.⁵

§ 256. **Joint Ownership with Joint Possession**⁶ is frequently met with in the old law;⁷ the most common case is that of **party**

¹ As to "*agrimensores*," cf. *Giraud*, "*Hist. du Dr. Fr.*," I, 256; *Tissot*, "*Thèse*," 1879; *Girard*, "*Dr. Rom.*," p. 625; *Brugi*, "*Agrimens*," 1897; *Glasson*, "*Gr. Encycl.*," see "*Bornage*"; *Denisart*, see "*Arpenteurs*."

² *Bracton*, f. 17b. Cf. the sneer, "*agreements overcome the law*," *Beaumanoir*, 34, 2; *P. de Fontaines*, 15, 6; *Loysel*, 3, 1, 1. But as to "*donationes post obitum*" during the Frankish period cf. *Hübner*, "*Unters.*" by *Gierke*, vol. 26.

³ "*Reverti*," "*redire*," "*remanere*": expressions which are found in old deeds. For example, the will of Raymond de Toulouse in 960 (*D. Vaissette*, V, 241), etc. See *Pollock and Maitland*, II, p. 14 *et seq.*; *Blackstone*, II, 10.

⁴ *Masuer*, XI, 57, lays down the principle that ownership may be transferred after a term or upon condition (contrary to the Roman law). Substitution, revocation of gifts.

⁵ The English juriconsult Coke complains of the disadvantages which conditional ownership presents.

⁶ Example of joint ownership without joint possession in the lease for possession at will, the lessee or tenant being owner of edifices and superficies (buildings and growing crops, works of improvement such as ditches and banks, etc.), excepting that the lessor has a right to pay him back their value when dismissing him, and excepting that the tenant has a right to give up the lease ("*exponse*," that is to say, giving up of possession), cf. the Law of Feb. 8, 1897. — Houses: joint ownership by floors: *Huber*, IV, 695.

⁷ *Planiol*, "*Traité de Dr. Civ.*," I, 439, cites the Law of Aug. 28, 1792,

ownership of walls and fences.¹ The Roman law knew nothing of the party wall; it was customary to isolate houses from one another; they constituted islands, as is still said in the South. In countries of Customary law, on the contrary, the opposite custom became established, at least, from the early part of the feudal period, and the social and economic conditions brought about a consideration of the party wall as collective property.²

§ 257. **The Community**³ was frequent in the Middle Ages. Does it correspond to joint possession ("communio") as understood by the Romans, or must it be classified among Associations? (cf. Roman "universitas," "Genossenschaft" of the German law). The latter will be discussed when we come to deal with legal persons. As we look at it, this joint possession constitutes a sort of transition between these two legal types. The "Genossenschaft," modeled, as it seems, after the family, is, like the latter, a legal person; it loses its cohesion and lessens by degrees under the form of the community or "Gemeinschaft zu gesammter Hand"; finally, in the last phase, it is reduced to the "communio," or joint possession, in order to allow more scope to the independence of its members; joint possession itself only appears as a provisional state, from which society as well as the individual has every interest in emerging.⁴

The bond which unites the members of a community is closer than that which exists between the ordinary joint owners. Also,

Art. 10, which changes into joint ownership the right of pasturage of the inhabitants of the different departments in Brittany; useless and unoccupied lands have become jointly possessed by all those who were then in possession of the right of common.

¹ "Mitoyen," "moitoyen," same source as "moitié"; cf. "metairié," "métayer," Godefroy, see "Diet.," Loysel, 283 et seq.; Huber, IV, 697. As to the relations of neighbors in general, cf. *ibid.*, p. 728 et seq.; Chaisemartin, p. 163; Loysel, *loc. cit.*; Fournel, "Tr. du Voisinage," 4th ed., 1834; Beaumanoir, 24, 22.

² "Paris," 195, 214; Pothier, "Comm.," nos. 199-229.

³ "Gesamteigenthum," "condominium in solidum," as contrasted with "Miteigenthum," joint possession. First mention of it in Justus Veracius, "Libellus Consuet. Bamberg," 1681 (cited by Kraut, "Grundr.," p. 101). Controversy as to this form of ownership: Duncker, "Gesammt.," 1843; Stobbe, § 81; "Z. R. G.," IV, 218; Heusler, § 50; Gierke, "Deutsches Privatr.," § 80; Huber, 698; Pertile, § 137. Cf. in English law joint tenancy, tenancy in common, Blackstone, II, 12; Pollock and Maitland, II, p. 20. — The expression "communis manus" is to be accounted for by the necessity under which the members of the community found themselves of co-operating in acts which affected the thing owned in common; for example, in order to render homage to the lord for a fief held from him, they all put their hands together into that of the lord. — As to cases of community, cf. Heusler, § 52; Wippermann, "Kl. Schr. Ueb. Ganerbschaften," 1873.

⁴ Chaisemartin, p. 566; Brillou, see "Commune"; Fréminville, "Communauté d'Habitants," I, 3 (consorts); Sée, "Classes Rur.," p. 490.

no member of the community can dispose of his share in the community without the other members being willing. All the more should they all co-operate in acts of disposal bearing on the joint possession. The administration is confided by force of circumstances to one of them, to the one whom custom designates, for example, the elder brother, in communities whose members are brothers. Each one of the members of the community participates according to his needs, and according to the number of the members of his family, in the products of the common land; life in a community carries with it this consequence, which still exists, even when this life has been abandoned: in case one of the members of a community dies without children, the others get his share by way of increase. If the community is dissolved, the partition which breaks up the community takes place according to the usage of the local custom.¹

¹ Curious local variations. At Salies-de-Béarn, rights of the members of the "Vesiau" to the salt spring; regulations (1525, 1536), in order to do away with abuses of power (widows and orphans and the feeble were deprived of their share of the salt water); final regulations in 1587 (still in force): the enjoyment of the participants is fixed by this regulation; the fountain is an inalienable possession and the participants are compelled to live in joint possession; how could they divide it, indeed? It is never possible to know exactly who are the participants; those who cease to reside at Salies lose the exercise of their rights, but they keep the right to enjoy them; at whatever time they may return they may exercise this right again. If one of them dies without an heir his right reverts back to the community. There is not equality between descendants: the right regarding the salt water forms a special kind of inheritance which has its own rules; preference for the eldest or head of the house (the heads of the house were the first to have their share of the salt water); lessees and younger sons ("sterles") come after them; preference for males, for the younger daughter only has a semi-right as well as the widow; privilege of married sons over those who are not married (from this there arise fictitious marriages, young people, 18 years old, marry nonogenarians, to whom they promise, for example, 20 francs as a marriage portion and a rent of 2 sous' worth of tobacco a day); condition of residence (he who has not a fire lighted at Salies and does not keep his family there has no right to the salt water). It was thought that in this there was an ownership by the commune of Salies, but this is not so at all; the inhabitants of Salies have not all a right to the fountain; the corporation of those having this right is distinguished from the commune ("Arr. du Cons." of the king of Dec. 12, 1739); the latter represents the multitude of near neighbors and strangers who have come to join themselves to the former, but who have not succeeded in acquiring a part in this jointly owned property: Lombard, "La Coutume de Salies-de-Béarn," "Thèse," 1900. — Cf. the Swiss "Allmends" and the distinctions between citizens and inhabitants. — In the Valley of Viedessos (Ariège) the ownership of the iron mines of Rancié belonged to all the inhabitants of the valley, or, at least, they had the right to extract a certain quantity of mineral every day, "Recueil des Titres, etc., Concern. les Mines de Rancié," by R. Barbe, Toulouse, 1865. In the North of France under the name of "portions ménagères" and "communales," the heads of families are given shares in the use of the marshes; at the death of one of them his share returns to the community, which confers it upon the oldest head of the family who has not had a share given him. ("L. Pat." of

§ 258. **Incorporeal Property.** — Titles of nobility and patronymic names are connected with the formation of the family and of the feudal system.¹ — Literary, artistic and industrial property is brought under the form of a monopoly resulting from a royal grant: it is the discovery of printing, that is to say, the ability to reproduce a manuscript, which raised the question of the rights of an author; the publisher received a privilege from the king (*letters from the Chancery* reproduced at the head or the end of the old editions) authorizing him, to the exclusion of all others, to have the book printed during a certain time. The Constituent Assembly made a right of that which up to that time had been only a privilege; the Law of the 3d of January, 1791, gave dramatic authors the exclusive right of reproducing their works during their life, and to their heirs this same right during five years after their death; the Law of July 19, 1793, extended this right of the heirs to ten years and generalized the provisions of the preceding law (literary works, musical compositions, pictures, drawings).²

1777); *Passez*, "Les Portions Ménagères et Communales en France et à l'Etranger," 1882. As to Spain, *cf. Wentworth Webster*, article cited in "La Couvade," "R. des Pyrénées," 1900.

¹ "R. h. Dr.," IX, 381; *Stobbe*, § 157-163.

² D., Feb. 5, 1810 (right of the widow); Law of July 14, 1866; *Delalande*, "Et. s. la Propr. Litt. et Art.," 1880.

TOPIC 4 POSSESSION

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§ 270. Assize of "Mort D'Ancestor" and Writs of Entry.	

§ 259. **General Remarks.**¹—The terms which serve to distinguish possession in the old French and German law are "vestitura," "saisine," "gewere."² They originally signified putting

¹ There are most contradictory theories on this matter, a fact which is to be accounted for by the lack of precision in the texts and the mingling of Roman, Germanic, etc., elements. For some the idea of ownership is unknown to the old Germanic law, where possession must have been everything; for others it is just the reverse. For lack of space we must give up the idea of setting forth a critical exposition of the principal ideas that have come to light. Two especially have been very popular, — that of *Albrecht* (revived by *Klimrath*) and the more recent one whose principal supporters are *Laband* and *Heusler*: *Pertile*, § 134 *ad finem* (sketch). Cf. writings of *Huber* and *Champeaux*. — *Albrecht* defines the "Gewere" as the right to a real action, a right which on principle belongs to the man in possession. Without possession, no real action. The "Gewere" depends at one and the same time upon possession and upon ownership, and then becomes the common note of the law on this matter. *Gerber* ("Deutsch. Privatr.," § 72) and *Schulte* adhere more or less closely to this notion, which prevailed for a long time in science, and which in our opinion caused a great deal of confusion therein. — *Laband* and *Heusler* are, on the other hand, partisans of the more correct idea that the German "Gewere" and French seisin are nothing else but possession, although there are important differences between them and Roman possession. As far as we are concerned, it seems to us that these differences, which are of secondary importance, have often been exaggerated; to look upon it as a whole, the evolution of the possessory action in our old law seems to us like a re-beginning of the history of possession at Rome. — Cf. the synonymy of the words "possession" and "saisine," for example, "T. A. C., Norm.," 74; 83, 7, etc. — Current expression: "être en possession et saisine."

² "Vestitura," "investitura," "vestire." Cf. "manus vestitia" (glove and its symbolic use): "Bai.," 17, 2; "Capitul.," see Table; "Cap.," 873, c. 8; things belonging to the Church, to the Treasurer, "in vestitura ecclesiæ," "fisci." Vesting and divesting, *post*, "Transfer of Ownership." During the feudal period investiture only means transfer of the fief to the vassal. — "Saisina," "sacire," "sasjan" (Goth.). Cf. "setzen," "Besitz," possession: *Diez*, see "Sagire"; *Brunner*, "Rom. u. G. Urk.," p. 242; *Warnkoen.*, II, 295; *La Ferrière*, VI, 386. Italian sources, *Pertile*, IV, 171. "Saisimentum," "saisie." *Beaumanoir* uses seisin in the sense of distraint. *Post*, "Disseisin

into possession, physical delivery (and later symbolical delivery, investiture).¹ They have been extended to mean the situation of the man who has received a thing, the fact of having a thing at one's disposal, a possession in general.² The owner, the possessor on his own account, but without the right of ownership (like the vendee "a non domino"), the simple withholder "alieno nomine" (like a tenant, or a depositary), these are persons whose rights are very diverse, and who can all have the thing at their disposal. These persons always have some advantages of position; one is that they are not liable to be deprived without a judgment, or, at least, due form of law.³ But sometimes they enjoy other advantages: (a) a better position in a suit regarding the ownership,⁴ presumption of ownership;⁵ (b) special actions or possessory actions, as compared with the action for real property;⁶ (c) a progression towards the acquisition of the ownership. How does it happen that such effects are attributed to seisin, that is to say, to a mere fact? What is the basis of the protection afforded by possession, according to the expression of Ihering? This question has been answered by various theories, each of which contains a part of the truth. 1st. To disturb the possessor is an attack on public order, an offense which public authority was compelled to restrain as soon as it was strong enough to prevent individuals from taking

Seisin." The copyholder is given seisin and pays for it a toll to the lord, also called "saisine": *Beaumanoir*, 27, 6; see *Ragueau*. — "Gewere," from "vairan" (Goth.), to guarantee ("warantus"), or from "varjan," "vestire," "prohibere." — The terms "possidere," "possessio," "tenere" did not cease to be made use of. They ended by prevailing in Italy and Spain, where they say "tenute," "tenencia": "Siete Part.", 3, 2, 30, in opposition to "señorio dominium." Example in *Pertile*, *loc. cit.* — "Possessio" in the sense of land in the Capitularies: 807, c. 2; "L. Longob. Car. M.," 27. Formulae: "quicquid tenere et possidere videor"; *J. d'Ibelin*, c. 152: seisin or tenure.

¹ This is the normal meaning; *Du Cange*, see *Sesire*; *Dronke*, "Tradit. Fuldenses," I, 91, 92; cf. "Cap.," 819, 6; *Sickel*, "Reg. Karol.," no. 335; *Magna Charta*, 1215, c. 9.

² *Beaumanoir*, II, p. 423, ed. *Beugnot*; *Thévenin*, "Textes," no. 125 (cf. Index): "vestiti legaliter" ("quieto ordine," without being disturbed); "L. Feud.," 2, 2.

³ "Liut.," 148; "Bai.," 16, 1; "Burg.," 19, 2; "Rib.," 59, 8; "Cap.," 819, 9; "Cap. Pip.," 789, 14 (fine); *Wido*, 5 (loss of the right); *Bertaldo*, "Splendor Consuet. Venet.," 88. Cf. Commentary on "Roth.," 348.

⁴ *J. d'Ibelin*, c. 64 ("Ass. de Jérus.," I, p. 106). As to the joys of possession ("beati possidentes") and the enumerations of the old authors, cf. *Savigny*, *op. cit.*

⁵ "Bai.," 16, 1; "Burg.," 19, 2; "Liut.," 148; "L. Feud.," 1, 4, 1; "Stat. Milan," 1396, 10; *Vogherà* (twelfth century), 91; *J. d'Ibelin*, c. 67.

⁶ In Italy the distinction between the possessory action and the action for real property appeared at a very early time: "Form. Roth.," 228; "Aripbrand and Albert," II, 52. Customs of the twelfth and thirteenth centuries.

justice into their own hands.¹ 2d. Possession is an advanced stage of ownership; if it were not protected, it would be difficult to maintain ownership. The first of these theories seems to correspond with the origin of the protection of possession; the second one assumes it to have arrived at a more advanced stage of its development. At least, this rough outline is suggested by the study of the history of possessory actions in the old French law. Created with the object of repression, they were not long in taking on a new character, and in becoming transformed into real actions, substitutes for the petitory actions. It is at this time especially that the possessory action had a vital importance, not only in private law, but even in public law:² "possession is worth a great deal in France," says Loysel, "at least, as long as there is a right of ownership mingled with it" (740).

§ 260. **Canon Law.**³ — As far as possession is concerned, the canon legislation departed from the Roman law on two principal points: in that which concerns quasi-possession, and in that which concerns prevention of spoliation. In the hands of the canonists quasi-possession, which was allowed with fear at Rome for a few rights, is extended almost indefinitely; every spiritual and temporal right relative to persons or property is susceptible of possession;⁴ by this means the jurisdiction of the classical tribunals is increased and the absolute moral authority of the Church is declared. From the time of the Lower Empire special measures have to be taken for the repression of violence; the owner who by force takes possession of his property which is withheld by a third party, and thus takes justice into his own hands, is compelled to restore it; he loses his right of ownership by way of penalty.⁵ Some of the celebrated interpreters of

¹ *Beaumanoir* takes up the subject of novel disseisin after having dealt with misdemeanors and larcenies, after which he passes on to cheating (c. 32). *Blackstone* also places dispossession among torts. *Loysel*, 753. *Davot* tells us that in his time (1677–1743) the fine was not made use of; they were satisfied with condemning a man to pay damages.

² For example, competence of the Courts of the Church.

³ Manuals of the canon law. On the doctrines of the Romanists, cf. *Duquesne*, "Thèse," 1898, p. 40; *Bruns*, "R. d. Bes.," p. 103 *et seq.* Notes on the "Siete Part.," Table, see "Possessio" (bibl.).

⁴ Cf. *post*, "Plurality of Seisins." Offices, ecclesiastical dignities, tithes, etc.: "Gr. Cout.," p. 237 (justice); 255 (incorporeal things); 495 (franchises) *et seq.* — Possession of status: "Possessio, Conjugis ex Causa Matrimonii," Dig. X, 13, 8 and 10; *Bruns*, "Besitz," p. 240; *Duncker*, "Quasi-Besitz," "Zfd. R.," 2, 2, 28; *Ruffini*, "Actio Spolii," p. 253, 408. — Vain protestations of the Romanists; "Glose" on "L.," 9, Dig., 5, 3. Cf. Civil Code, 1240.

⁵ Law of Valentinian III; "Cod. Théod.," 9, 10, 3; 4, 20, 3; "Cod. Just.," "de vi," 8, 4, 7; "L. Rom. Wisig.," p. 131, ed. *Haenel*; *Ruffini*, "Actio Spolii,"

the Roman law have even thought that there must have been created an action "momentariæ possessionis"¹ in order better to assure the protection of possession. The disorders for which a remedy had to be found from the time of the Lower Empire only increased in the Middle Ages, and the Church sought to fight against them by the "remedium spolii," a prototype of the possessory action designed by the secular law (*recovery of possession*).

§ 261. **Origin of the "Remedium Spolii."** — The effects of this institution could be summed up in the maxim "spoliatus ante omnia restituendus."² Originally it appeared as a simple incident to criminal procedure, a plea in bar: the bishop who was deprived of his see, and who found himself under the weight of a criminal accusation, could escape from any judgment before being reinstated; it was the duty of the judge to carry out the reinstatement even officially.³ Thus the "exceptio spolii" was found to be created; at least, it was based upon this and rapidly generalized and applied to the laity as well as the clergy, to civil proceedings as well as criminal proceedings.⁴ From a simple form of procedure relating to ecclesiastical discipline it passed to the rank of a remedy at common law. The practice of the tribunals of the Church took a step in advance⁵ at a very early period; the man who had

p. 33 to 53 (and on the Byzantine law, p. 75–112). That this rule was not forgotten may be inferred from the mention of it contained in the Epitomes of the "Breviary" of *Alaric*, in the "Brachylogus," 2, 11, in the "Petrus," 3, 11. — The Barbarian law was limited to imposing a fine upon the "invador," which does not seem to have been sufficient: "Liut.," 148; "Bai.," 16; "Burg.," 19; "Cap.," 819, 9; 789, 14; Gloss, on "Roth.," 348. Cf. "Const. Sic.," I, 29 (Frederick II). Curious question in the "Liber Consuetud.," of Milan, I, 6.

¹ *Ruffini*, p. 53.

² "False Decretals," "Epist. Eusebii," 2^a, § 12 (*Hinschius*, p. 237). Cf. *Hinschius*, pp. 165, 214, 694, 731. — Reproduced by *Gratian*, c. 1 to 4, c, III, qu. 1. — Sources: (a) "Epit. Aegid., Paul.," I, 7 (restitution in "integrum" for fraud or mistake); "Concile de Lampsaque," 364; "de Rome," 501. — Later texts: Dig. X, 2, 13; "in VI.," 2, 5. — Commentators: *Tancrede*, "P.," 2, vol. 9; *Hostiensis*, 1, 2, r. "De Causa Possessionis et Proprietatis, de Restitutione Spoliatorum"; *G. Durand*, "Specul.," 4, 2. — *Lancelot*, "Inst.," 3, 10; *Pontanus*, "Tract. Ill. Jet.," XIV, 271; *Maassen*, "Jahrb. d. Gem. R.," 1859; *Rosshirt*, "Gesch. d. R. in M. A.," 512; *Goecke*, "De Exc. Spolii," 1858; *P. Fournier*, "Officialités," p. 164; *Ruffini*, "Actio Spolii," p. 141 to 252 (details as to the ecclesiastical discipline previous to the ninth century. The "Pseudo-Isidore," *Gratian*). See also *Savigny*, § 48 *et seq.*

³ *Ruffini* was credited with bringing out this peculiarity. Cf. "Concile de Paris," of 615, c. 10, according to *Bruns*, "Canones," II, 257.

⁴ Regulation by the Decretal "Frequens," 1245, Dig. X, 2, 5, 1: in criminal matters the defense may be offered in opposition to everybody; in civil matters only to the despoiler.

⁵ *Ruffini* shows that the legislation of the Church did not entirely agree with the practice. *Gratian* did not admit of the extension which was given by practice to the c. "Redintegranda" (for example, its application to the laity and to all sorts of possessions). The popes were inclined rather to follow his

been dispossessed was authorized to claim restitution by means of an action ("condictio ex canone redintegranda");¹ the existence of the action was justified by the same motives as was that of the plea; the official intervention of the tribunals led to its admission and the Roman procedure of possessory prohibitions did not seem to differ therefrom to an appreciable extent.²

§ 262. **The Same.** — The "remedium" which was finally established consisted of two methods: **the action and the plea "spolii."** Both, as their essential effect, lead to the re-establishment of the "statu quo ante";³ this is the object which is striven for and the only means which seems natural for the prevention of disseisin, for pecuniary penalties which were decreed by the barbarian laws did not suffice; as long as the despoiler kept the property which he had taken he was satisfied and had no regret at having infringed the laws; by dispossessing him in his turn, every pretext for violence was removed. Thenceforth the requisite conditions for the exercise of the "remedium" were very extensive: (a) the disseisin is not only understood to apply to dispossession by force, but to any other illegal dispossession;⁴ (b)

example and to restrict the new institution which a more profound knowledge of the Roman law caused them to look upon as being abusive. See, for example, the Decretal "Sæpe Contingit." Nor could the Romanists favor it any more. It is only brought up once in the writings of the commentators ("Quæstiones" by Azon, XI, ed. *Landsberg*). *Bartole* and *Balde* only mention the Roman prohibitions. We find it dealt with, on the other hand, in *P. de Castro*, "Consil.," III, 29; *Decius*, etc. See especially *Menochius*, "De Recuper. Poss. Remed.," XV (restrictive tendency); *Pontanus*, "Tract. Univ. Jur.," XIV, f. 270 ("despolio," opposite tendency); *P. de Ferariis*, "Aurea Practica," 1579; *Gui Pape*, "In Stat. Delph., si quis per Litteras."

¹ "Glose," on the Decree, c. 3, c. III, q. 2. — They saw in the "actio spolii" or "condictio ex can. Redintegranda" only the prohibition "de vi," and it was all the more willingly admitted as they could obtain support from the "Const. de Théod. et Valent.," which pronounced the forfeiture of the property against the "invasor," upon a rescript of Hadrian according to which the question of violence should be decided before everything else: "Cod. Théod.," 9, 7, 2; *Guill. Durand*, 4, 2, only establishes a verbal distinction between restitution to the despoiled and the prohibition "de vi." Cf. "Glose ad Recup.," s. I, 1, D., "de vi," 43, 15.

² Cf. the "περίβλας" of the Orientals: *Ruffini*, p. 332, and part 2, c. 1.

³ Dig. X, 13, 11. A mere judgment is not sufficient; the man disseised may demand that he be put back in physical possession of the thing which has been taken away from him.

⁴ Case in which the prohibition "de vi" was refused, but with regard to which *Cujas* thought ("Obs.," I, 1, c. 20 and I, 19, c. 16) that under the Lower Empire a general prohibition called "momentariæ possessionis" had been provided: "Cod. Théod.," 4, 20, 6; 2, 1, 8; "Cod. Just.," 3, 16, 1; 3, 6, 3; 8, 4, 8. To the same effect *Ihering*, "Fondement de la Prot. Poss.," p. 112. *Bourcart*, "Thèse," p. 138, criticises this doctrine. *Ruffini*, p. 53. — The prohibition "de vi" differed from the "remedium" not only in that it assumed a dispossession by force, but also in that it was not granted in the case of movables (cf. D., "de vi," 43, 16, 14, a text which deceived the canonists), that it was only given

the "remedium" belongs to every possessor, whether his possession be lawful or unlawful, yearly or not, even to the "prædo," even to the one who merely withholds; (c) it is granted for every species of thing, corporeal or incorporeal, movable or immovable; (d) no prescription can be pleaded against the man disseised;¹ (e) nor can the right of ownership be pleaded against him, nor can he be reproached with having himself committed a disseisin; (f) the "remedium" is given not only against the perpetrator of the disseisin, but even against his assigns and against the purchaser in good faith.²

These rules are undoubtedly justified by the condition of affairs in the Middle Ages; but as soon as the public peace was better assured they were quickly restrained, and even abandoned. Thus the man disseised was not given restitution when he had been guilty of a serious crime;³ the plea of "spolii" was forbidden to be interposed in civil matters when the disseisin was due to some other than the man making the claim; as far as advantages were concerned, the "possessio colorata" (by title) was demanded; in criminal matters the plea had to be proved within fifteen days under penalty of forfeiture;⁴ secular legislation only permitted it to be taken advantage of within a short period;⁵ and, finally, by virtue of a celebrated Decretal of Innocent III, the Decretal "Sæpe contingit," 1215, the "spolii" action could no longer be granted against third parties who had acted in good faith.⁶ It is true that practice did not accommodate itself to all these changes, and that it clung by preference to the old rules.⁷ But, while the doctrine underwent these modifications, the ecclesiastical judges were deprived of the cognizance of questions

against the one who carried out the despoiling, that it was not accorded to the possessor properly so called, and, finally, that proceedings could only be begun for obtaining it within a short delay.

¹ Or, at least, no prescription of less than thirty years.

² "Glose," on the Decree: "Quilibet possidens possit conveniri," "Const. Sic.," I, 26: "Sive sciens, sive ignorans per quascumque manus possessio ambulaverit."

³ *Guill. Durand* points out twenty-three cases in which, as an exception, the person despoiled does not obtain restitution (*Durand de Maillane*). Cf. *P. de Fontaines*, 21, 50.

⁴ "Sexte," 2, 5, 1.

⁵ Novel disseisin: 40 days in Palestine; *J. d'Ibelin*, I, 34; a delay which varied in England, *Glanville*, 13, 32; one year and one day in France and in Sicily; two months in the latter country since the time of Alphonso I.

⁶ Dig. X, "de rest. spol.," 18. As to the interpretations of this text, cf. *Ruffini*, p. 335; *Ihering*, "Besitzville," p. 459. — See "Siete Part.," 3, 2, 30.

⁷ *Ruffini*, *loc. cit.*

relating to possession. Cognizance was taken by the tribunals of the king,¹ or even the municipal justices.²

§ 263. **Frankish Period.**³ — Did the old Germanic law recognize the distinction between possession and ownership? If it sprung, as it seems to have done, from a system of collective ownership of the ground, the temporary right which was given the family rather than the individual over the share which had been granted him, resembled possession more than ownership; but, while abandoning this primitive system, they passed to a true ownership, beside which the fact of possession had no very great importance in the law. So long as possessory actions were not known, — and they do not appear in the Frankish law,⁴ — the possessor had no other advantage excepting that he played the part of defendant in the contest over the ownership; he then prevailed over his adversary, not exactly because of his possession, but because of the special principles of the theory of proofs; it was sufficient in order to enable him to win his suit that he should swear that he justly detained.⁵ In order to ascertain who was the possessor, recourse was undoubtedly had first of all to the simple fact of the detention without disputing it.⁶ But it seems certain that procedure became complicated upon this point; as in the old Roman law, there took place, as an incident in litigation concerning ownership, a preliminary discussion on the question of possession to determine the status of the parties.⁷ The documents are not sufficiently precise to admit of our knowing how the question was settled as to detail.⁸ It seems that possession, in order to give a man the status of defendant, could not be violent⁹ or uncertain;¹⁰

¹ Bull of Martin V, 1428; *Loysel*, 752.

² "Cout. de Toulouse," I, 25; the complainant may overthrow the "exceptio spoli," which is pleaded against him by a mere denial, by saying that he has not despoiled the defendant.

³ See especially *Heusler*, "Gewere," pp. 1 to 106.

⁴ *Hübner*, "Immobiliarprocess," p. 51. If one admits that the early law only recognized actions "ex delicto," the distinction between the action for real property and the action for possession could not be conceived of. It only became possible to make this distinction when procedure lost its penal character.

⁵ "Inst. Just.," 4, 15, 4; "Bai.," 16; *Rozière*, no. 487, 488; *Huber*, IV, 232, n. 44; "L. Feud.," 4, 1. Cf. *Champeaux*, p. 334.

⁶ The imputation "malo ordine possides" implies a possession based upon a tort: "Form. Sen.," 7, etc.

⁷ "Capit.," 819, c. 4; *Muratori*, "Ant. Ital.," I, 973; *D. Vaissette*, I, no. 5, a. 783; *Pollock and Mailland*, II, 47; cf. *Champeaux*, p. 339.

⁸ The year's delay seems to have been required: "Cap. Langob.," 825, c. 11; *Pertz*, I, 252. Cf., however, *Glasson*, *op. cit.*

⁹ "Cap.," 820, 1.

¹⁰ That is to say, "alieno nomine."

it could be held by various titles, for example, as owner, or simply as usufructuary;¹ it resulted from occupation, from delivery, or from inheritance.² The Barbarian law here presents, as it were, the outline of the regulation admitted by later legislation.

§ 264. **Feudal Period.**³—From the tenth to the twelfth centuries no important changes seem to have taken place. The French seisin, the German "Gewere," give, as they did in the past, to the man who is invested with them, the power of repelling disseisors⁴ by means of force, which is an advantage in the suit for real property;⁵ and they also give him the right to have his possession recognized on the occasion of this action.⁶ This is simply an incident, from which possessory actions have not yet been evolved. The Customary German law remains in this stage of evolution.⁷ This was not so with regard to the Anglo-Norman

¹ Numerous texts speak of "vestire in beneficio, sub censu." The tenant at will is not an uncertain withholder in the modern sense of the word; thus he has the seisin, which does not prevent the owner from also having a seisin on his part over the same piece of land by right of ownership; all the more did he have it when his lands were cultivated by slaves or farmers (although the texts speak of slaves invested with a farm and the necessary implements for cultivating it; cf. "mansu vestiti," "absi"): *D. Bouquet*, VIII, 621; *D. Vaissette*, no. 127; "Cart. de Savigny," no. 434; "de St. Victor," I, 77, etc.; *Haeberlin*, "Syst. Bearb. d. in Meichelbeck ent. Urk.," p. 189.

² *D. Vaissette*, no. 16. Cf. *Champeaux*, p. 255. As to hereditary seisin, see documents cited *infra*.

³ *P. de Fontaines*, p. 86, 230 *et seq.*, 264 *et seq.*; "Artois," t. 19 *et seq.*; "Et. de St. Louis," I, 69, 159; II, 7; "Jostice," pp. 110, 270, 316; *Beaumanoir*, c. 32; "Cout. Norm.," *post*; "Stil. Parl.," I, 18; "Gr. Cout.," II, 19, p. 231; *Boutaric*, I, 31; *Masuer*, t. 10 and 11 (matters in suit relating to real property and in possessory action); *J. d'Idelin*, c. 64, 151; *Loysel*, 740; *Buche*, *op. cit.* — Cf. *J. Faure*, "Inst. s. les Interdits"; "Fors de Béarn," p. 165 (ed. *Mazure*). — Choice of texts in *Henri de Pansey*, "Comp. des Juges de Paix," p. 104 (in his "Œuvres Judiciaires"). — And *Guilhiermoz*, "Enquêtes et Procès," pp. 232, 285, 419, 438, 455, 618.

⁴ *Beaumanoir*, 32, 24, 27; "T. A. C., Norm.," 19, 77; *Loysel*, 741. The man despoiled had not only a right to repel force by force, but also the right of taking back his property within a year and a day, according to the German books of Customs ("Sachsensp.," II, 44, 1; "Schwabensp.," 50, 209; *Heusler*, II, 37; *Bruns*, 360), provided that it had not passed into the hands of a third person.

⁵ "Gr. Cout. de Fr.," II, 19, p. 232; Statute of Milan, 1396, 10: "ex possessione præsumatur quis abere dominium."

⁶ *P. de Fontaines*, 21, 9 *et seq.*; 22, 9; "Jostice," 19, 42, 2; *Glanville*, I, 7. — A sort of "missio in possessionem" of the complainant in the procedure when there is a default. — In the procedure when there is a defense there is no distinction made between the action for real property and the action for possession in France any more than in Germany; there is only one proceeding in which the first thing is to ascertain who has the possession in order to give the possessor the advantage of being allowed to prove it: *D. Martène*, "Ampl. Coll.," II, 362 (in 1149); *D. Calmet*, IV, 471 (in 1071). On the German law: *Heusler*, *op. cit.*; *Schroeder*, 704, n. 44.

⁷ The State did not have sufficient strength to create these institutions, as had been done in France and Normandy. However, after the thirteenth

and French law; the former towards the end of the twelfth century, the latter during the course of the thirteenth, break away from the old condition of affairs. The possessory action becomes detached from the petitory action for title;¹ particular forms of action are created, — possessory actions, which are more expeditious and less dangerous than suits for the title;² they serve, as did the Roman interdicts, to recover or to preserve possession.³ The action for the title remains for the man who has neglected to make use of the possessory action;⁴ the pleas drawn from the actions for title cannot be set up against the man who brings suit for possession.⁵ The minor cannot act “de jure” or “de proprietate,” but he is capable of bringing the possessory action.⁶ The distinction is marked, even in matters of jurisdiction; the possessory action is reserved for the tribunals of the duke in Normandy, for the tribunals of the king in France, whereas the action for title can appertain to the seigniorial or ecclesiastical tribunals.⁷

century we find here and there a suggestion of this sort of action. Recourse to a jury of neighbors to discover who has the possession: “Vetus Auctor,” I, 98.

¹ *P. de Fontaines*, p. 232: “saisine,” “fonz de querele,” “principal querele”; “T. A. C., Norm.,” 75, 78, etc.; “Sum. Norm.,” 2, 55, 2; *Bracton*, 1, 4, 3; 3, 4, 7, etc.; *Beaumanoir*, 6, 4; 32, 30; “Jostice,” 12, 26, 3; “Gr. Cout. de Fr.,” pp. 350, 529, etc.

² *J. d’Ibelin*, 64, mentions the action of novel disseisin, which corresponds to the “actio spoli” of the canon law and the compulsory action, which is purely penal. It does not seem that the complaint had yet found a place in the law of the Assizes: *Glasson*, “N. R. H.,” 1890, 606. Cf. “Et. de St. Louis,” II, 7; I, 69.

³ Effects: a full restoration to seisin, and restitution of the issues. Cf. especially *Beaumanoir*. — Let us observe that the possessor in good faith obtains the issues for himself: *P. de Fontaines*, 21, 9; *Beaumanoir*, 32, 13; *Loysel*, 743.

⁴ “Salva questione proprietatis”: “T. A. C., Norm.,” 75, 2 and 3; 77, 3; 81, 2; “Stat. Norm.,” *Warnk.*, II, 38; “Etabl.,” p. 66; “Olim,” I, pp. 4, 76, 288, 355, 452, 476, 515, 542; II, pp. 58, 67, 72, 112, 162, etc. *P. de Fontaines*, p. 267: loss of seisin for failure to prove one’s case, but, conversely, when one begins by the action for real property one is not allowed then to proceed with the action for possession. *Bracton*, 5, 11; “Anc. Us. d’Artois,” 20, 29 *et seq.*; *Desmares*, 300; “Gr. Cout.,” p. 267; *Masuer*, 10, 2: one cannot begin the action for real property and the action for possession at the same time. *Boutaric*, I, 31 (p. 198): the judgment in the case of the possessory action should be carried out entirely before one passes to the action for real property: cf. “Siete Part.,” 3, 2, 28.

⁵ “Arrest. Scac.,” *Warnk.*, II, 76; “Etabl.,” p. 123; “Olim,” I, 452, no. 16; 494, no. 13, etc. The nearest heir against whom his adversary pleads his quality of donee obtains the seisin “et de proprietate fiat jus coram domino feodali.”

⁶ “T. A. C., Norm.,” 78, 1, 3.

⁷ “T. A. C., Norm.,” 22, 2; 53; *P. de Fontaines*, 32, 17; “Olim,” I, 452, 16; 667, 8; II, 56, 10; 408, 20, etc. Cf. I, 814, 2, 881, 38; II, 79, 5; 156, 7; “Stil. Parl.,” 1, 18, 25. “Gr. Cout.,” p. 240, 253: charge only by the royal judge:

§ 265. **The Seisin** belongs to the man who enjoys the use of a piece of property or exercises some right over it on his own account.¹ Thus we find the characteristic double element of Roman possession, the "corpus" and the "animus," the fact and the intention. It is true that seisin, not corresponding to ownership alone, as did possession in Rome, the "animus" and the "corpus" must be understood in a broader manner; but it cannot be said that they have changed their nature.² The one who detains for another has not the seisin, — at least, as a general rule; it still remains with the owner, as it does when he has his land cultivated by workmen or servants.³ Moreover, distinctions here become necessary; the same person can withhold at the same time on his own account and for somebody else; he can have the seisin as far as his own right is concerned and not as far as somebody else's right is concerned. In such a case as this two seisins will exist at the same time with regard to the same piece of property. Sometimes, instead of two, there will be three or more. The fief gives us an example of this series of simultaneous seisins: the lord who has granted it, the vassal who has received it, and who in his turn has the land cultivated by a copyholder, the copyholder who leases it out to the tenant, have each one a seisin; for each one of them the seisin is the exercise of his own particular rights.⁴

Masuer, XI, 60, 75 (privilege for the action of simple seisin). "Lib. præ. Remensis," p. 187; "Ord.," 1539, Art. 49; *G. Pape*, q. 1; *Loysel*, 752.

¹ Cf. the German formula: "Gut im Nut und Gelde hat": "Sachsensp. Lehnrecht," 14, 1; *Pollock and Maitland*, II, 32; *Beaumanoir*, 34, 13; "Gr. Cout. de Fr.," 252; "L. d. Droiz," 630; *Loysel*, 749, 765. Numerous examples in the "Olim," seisin of the right of hunting: I, 425; II, 175; of a tithe: I, 743; of a right to administer justice: I, 984, etc.

² According to *Heusler*, the main difference between Roman possession and the Germanic "Gewere" would consist in the fact that the former assumed the "animus domini," whereas the second belonged to whoever had the use of a piece of property or of a right ("animus possidendi"). This is an extension of the idea of possession, an extension which is so natural that it had already half taken place at Rome (quasi possession) and it became complete in the Middle Ages in the common Roman law and in the canon law. Cf. in the formulæ ("Roz.," 142, 152, etc.): "possidere jure proprietario, sub usu beneficio, usufructuario ordine."

³ He who disseises the serf disseises his lord, which does not prevent two serfs from disputing with each other the seisin of their holdings.

⁴ "Gr. Cout. de Fr.," p. 235: seisin of the usufructuary; p. 239: the vassal can bring complaint against his lord; p. 248: seisin of the farm tenant who had still four years left to hold the land and whom a new purchaser wished to expel; p. 756: between lord and subject there can be no trespass. *Beaumanoir*, 32, 8: "for many reasons may the lord take that which is held from him." If the possessory action is refused him the subject may proceed in another manner before the seigniorial court. Cf. *Masuer*, XI, 15, 22, 49. *Beaumanoir*, 32, 13, gives the farm tenant the action of novel disseisin against the lessor; thus he recognizes that the farm tenant has a true seisin for the

§ 266. **The Seisin is Acquired**, on principle, by the taking of physical possession: occupation with regard to "res nullius," delivery with regard to things which have already been appropriated, taking into possession regularly carried out by some one who merely exercises a right (for example, by virtue of a judgment).¹ Having sprung "a non domino," delivery, however, confers seisin;² but upon one condition in the old law, that is, that there has been an investiture or giving of seisin by the lord, — in other words, that it has been regular. In time this requirement disappeared, as we shall see, with regard to the transfer of ownership.³ Taking into possession "vi aut clam" only gives rise to a defective seisin, which is not efficacious or has limited conse-

purpose of protecting his right over the land, and it is to be noticed that here he is dealing with a lease for a term and not a lease for life, — a case in which the doubt could not have arisen. According to *Bracton*, the tenant for a term has a special kind of action, whereas the assize of novel disseisin is reserved for the lessor. *Pollock and Mailland*, II, 36. As to these simultaneous seisions and the difficulties to which their existence gives rise, *Heusler*, II, 25; *Stobbe*, I, 200. — The doctrine of the Romanists is confused: *Azo*, "Sum. in Cod.," 7, 32; *Accursius*, "Gl. s. l.," 3, 5, D., 41, 2; *Bartol.*, "ad" I, 1, "D., de acq. v. am. poss.," 8. Cf. the position of the tenant at will, the pledgor, and the sequestrator at Rome.

¹ "Gr. Cout. de Fr.," II, 19 (p. 231).

² *Beaumanoir*, 51, 18. The seisin is justified by the regularity of the deed, at least in appearance. The purchaser in good faith had, moreover, advantages of prescription. As to the purchaser in bad faith his seisin might have been considered as defective, but bad faith cannot be presumed; if there is no aggravating circumstance, no offense or complicity in offense, he has the same advantage as the purchaser in good faith. The texts of the thirteenth century do not formally provide for this case, because good faith is assumed.

³ One can say there is no seisin (that is to say, no possessory actions, etc.) without a giving of seisin by the lord or by the law (or without possession for a year, which was the equivalent of this giving of seisin: "L. d. Droiz," § 712; later on possession for ten years: *Loysel*, 748). The taking of possession is only regular on condition of the intervention of the lord or the judge; if this is lacking the protection offered by the possessory action is denied (cf., however, "Recovery of Possession"). But from the fact that there can be no seisin without a lawful giving of seisin, it does not follow that seisin is acquired through the mere fact of the conferring of seisin; this is an unsettled question and one which cannot be answered by the similarity of the words, "saisine," "ensaisinement": As to this, "Jostice," 2, 1, 1; 12, 6, 26; "Cout. Not.," 53, 72; *Desmares*, 62, 185, 189; *Boutaric*, I, 43; *Varin*, "Arch. lég. de Reims," I, 675, 961; *Beaumanoir*, 30, 38; 6, 4; *De Parieu*, p. 76. — Moreover, in this matter the distinction was drawn, at least in the fourteenth century, between fiefs and copyholds ("censives"). The conferring of seisin by the lord was given up in the case of copyholds: "He does not take seisin who does not wish to." *Loysel*, 745, 746: "Taking possession in fact is equivalent to seisin," that is to say, that taking possession in fact is worth just as much as the old giving of seisin by the lord which was formerly in use; the ownership is acquired in either case. With regard to fiefs, on the contrary, the necessity for conferring of seisin by the lord continued longer; in its absence, says the "Gr. Cout.," p. 233, seisin is neither acquired in law nor in fact; the purchaser is not the owner and cannot bring the action for possession (even if there has been a feigned delivery).

quences;¹ but this original defect is capable of disappearing;² as soon as the possession ceases to be disturbed, as soon as it takes place publicly to everybody's knowledge, the demands of the texts which are constantly speaking of peaceful seisin are satisfied;³ the defect of uncertainty, on the contrary, does not disappear with time; a change of title would be necessary.⁴

§ 267. **Seisin under Law**,⁵ which is independent of any physical taking into possession of an object, of any exercise of a right, only exists in a very exceptional manner: (a) for the benefit of the possessor unlawfully deprived, and who is considered as still being legally seised;⁶ (b) for the benefit of the heir from the time of the death of the "de cuius";⁷ (c) for the benefit of the vendee, who has received the seigniorial or judicial investiture in a symbolical manner (delivery by the rod);⁸ (d) for the benefit

¹ *Beaumanoir*, 32, 23: the thief has the seisin and may demand to be resealed "before anything else is done," although he may have to incur the penalty of death. Cf. 31, 3: he is seised and possessed of the thing stolen: *P. de Fontaines*, p. 264 (we make use of this right): seisin of theft (seisin based upon a tort); *Guilhiermoz*, p. 286: possession based on distraint.

² "Jostice," p. 271: to hold a year and a day without dispute; *Beaumanoir*, 32, 2; to have the seisin for a year and a day in peace.

³ The texts do not pronounce themselves categorically either upon the absolute or relative character of defects of possession or upon the question of knowing if they are cleared off by lapse of time. They seem to look upon these defects as absolute, and as being of such a nature that they could be offered in opposition by everybody, and not only by the person injured, etc. In fact, the restriction "ab adversario" plays no part here. Cf., moreover, hereafter the distinction between the complaint and the recovery of possession: *Pothier*, no. 17; *Dunod*, "Prescr.," p. 18 (ed. 1753). *Guilhiermoz*, "Enquêtes," p. 288, no. 56: 1st, one complains "de novitate," that is to say, of a recent disturbance; the complainant will only be heard if he has been disturbed within less than a year; if he allows his adversary to remain in possession for a year and a day he will be defeated, although he may set up that this possession was defective; 2d, one acts "simpliciter de possessione"; the man succeeds who proves that he has possessed the property for the longest time "nec vi, nec clam, nec precario." No. 59: "Alii dicunt quod qui cadit a novitate . . . cadit etiam a possessione simplici" (an Order to the contrary in 1340). *Post*, "Action of Simple Seisin."—See as to the existing law: *Garsonnet*, I, p. 588.

⁴ *Beaumanoir*, 32, 13, 14. On the expression, "withholders at will," cf. "Cod. Just.," 7, 39, 2.—*Garsonnet*, I, p. 585, n. 18.

⁵ The expression, "Seisin at law," is found in the "Gr. Cout.," as contrasted with seisin in fact or physical detention. Cf., "Possessio realis civilis" of the old Romanists, and "Ideelle Gewere" of the modern Germans.

⁶ This seisin can be opposed to everybody without distinction, in the same way as ordinary seisin, and not only to certain persons (for example, to the "deiciens").

⁷ Before he shall have taken possession himself of the property of the inheritance: *J. Faber*, "Inst. de Interd." Cf. *post*, the formulæ, "Le mort saisit le vif"; "Le roi est mort, vive le roi!" *Gui Pape*, q. 355.

⁸ From this there results the transfer of the ownership, but also that of the possession; investiture is after all only a delivery. Cf. *Ferrière*, see "Poss. Feinte."

of the man to whom the judgment gives the possession of a piece of land before he has actually entered into possession of it.¹ That the possession should have belonged to the two former, that is to say, to the heir² and the possessor who has been deprived, is something which cannot be doubted; the books are as specific as possible upon this point, and urgent motives of practical utility justify this explanation. As to those who could only invoke a feoffment or a judgment without physical taking into possession, they had the right of acquiring the seisin and of taking possession; but one asks oneself if they were allowed to make use of the possessory actions before any taking into possession, and if they could plead that they were seised. This would seem logical, because a transfer of ownership for their benefit takes place, and the pretended delivery of which this is the effect ought to transfer the possession at the same time as it reduced the grantor to the condition of a withholder "*alieno nomine*." Such is indeed the solution which seems to have prevailed,³ but our sources are far from being as explicit with regard to these cases as they are with regard to the preceding ones.⁴

¹ This last case is the most doubtful one, and it is perhaps the one which is contemplated by the "*L. d. Droiz*," § 280: *Gui Pape*, "*In Stat. Delph.*," *loc. cit.*

² The rule, "*Le mort saisit le vif*" (the dead gives seisin to the living) was more efficacious with regard to copyholds than it was with regard to fiefs. The seigniorial giving of seisin was entirely done away with as far as copyholds were concerned; on the other hand, the lord is seised of the fief before the heir, but the latter has a right to demand the investiture upon condition of swearing fealty and homage; he cannot take possession before investiture under penalty of a fine: "*Gr. Cout. de Fr.*," p. 234. Cf. "*Ass. de Jéru.*," I, 227, ed. B.; "*Regiam. Maj.*," 3, 28, 1. — In the English law seisin in law as contrasted with seisin in deed, taking of possession in fact. *Post*, "*Writs of Entry*."

³ *Laurière*, on "*Paris*," 96: in order to bring the complaint one must have the seisin, and in order to have the seisin one must have been in possession for a year and a day, unless one has been given seisin by the lord from whom the thing in dispute is held, for the seisin given by the lord is equivalent to that acquired by the year and a day, cf. *Guilhiermoz*, "*Enquêtes*," p. 233; *Gui Pape*, q. 22 (*Hostiensis, post*), 101, 415.

⁴ In support of this very much contested theory one can invoke the maxim, "*Le mort saisit le vif*." By this means it is desired to place the heir in the position where he would find himself if he had been invested or given the seisin by the lord. As it is certain that the heir acquires the ownership and the possession at one and the same time, it should be the same for any assignee who had received the investiture from the lord. The more he joins the possession of his grantor to his own, the more the seisin in law completes this advantage without difficulty, owing to the idea of the agreement for possession in lieu of delivery; the important part played by this in matters of transfer of ownership we are well aware of: "*N. R. H.*," 1891, 176. — The question, nevertheless, encounters many difficulties. *Heusler* cites to the contrary a passage from the "*L. d. Droiz*," § 280. He argues from various passages of the "*Gr. Cout.*," p. 231: occupation, delivery in fact; p. 233, denies seisin through

§ 268. **Yearly Possession.**¹ — Towards the end of the thirteenth century there took place a remarkable modification in the possessory theory: a year's possession alone was taken into consideration, or pretty nearly so;² under the name of *seisin*, or *true seisin*, it was contrasted with mere possession or detention.³ Possession led to seisin by a sort of prescription, to ownership by a longer prescription. In both cases the "accessio possessionum" of the Roman law was admitted; the assign was authorized to join to his possession that of his assignor, so as to complete the period of one year.⁴ Thus seisin appeared like a real right which could be set up against everybody, a sort of inferior ownership. The result

possession "et non e contrario." Cf. *Beaumanoir*, 2, 8 and 17; 20, 2; 32, 24; the first of these passages seems to him to support the opinion pointed out in the text, and thus perhaps explains the "L. d. Droiz." According to *Heusler*, the giving of seisin by the lord or the giving of seisin at law had no effect excepting from the point of view of ownership: "Sachsensp.," 34, 3; "Anc. Us. d'Artois," 24, 5 to 12; "Cout. Not.," 124; "L. d. Droiz," 712. The Romanists commonly admitted that possession was not acquired by investiture "in absentia rei": "Siete Part.," IV, 26, 4 (notes); *Hostiensis*.

¹ As to the delay of a year and a day, cf. *post*, "Complaint," "Prescription," "Repurchase," etc. — According to *Glasson*, "N. R. H.," 1890, 594, the seisin for a year and a day already existed with a certain general character during the Frankish period; from there it must have been transmitted to the feudal period and have been admitted in various countries from Italy even to the Scandinavians. — In support of this opinion one can cite remarkable cases of the application of the delay of a year: *Tacitus*, "Germ.," 26: "arva per annos mutant"; "L. Sal.," 45 (47), "de migrantibus" (he who has established himself in a village cannot be expelled therefrom upon the request of one of the inhabitants at the end of a year's sojourn). "Cap.," 825, c. 11 (I, 331): preference for the man who has had possession for a year and a day in the case of two successive sales. — But the mention of the year's delay can be reduced to about this. It is difficult to maintain thenceforth that it was generally made use of. More likely a custom came to be established which became fixed and generalized later on. Cf. "Charte de Lorris," ed. *Prou*, note on Art. 27; *Guilhiermoz*, "Enquêtes," p. 287.

² In the "L. Feud.," there is a question sometimes of yearly possession and sometimes of "longa possessio," and sometimes the possession "aliquo tempore" (1, 26, 1; 2, 33, 5, 2, 33 pr.). The vassal who has been in possession one year, "sciente domino et non contradicente," may swear that he has been invested by the lord; possession for a year was thus equal to investiture by the lord. *Pertile*, § 135, cites various Italian statutes where yearly possession is mentioned: "Stat. of Modena," 1327, IV, 180. In 1163 at Trent, "in mallo publico per laudum curie," a possession of a year and a day is required. The "Fueros de Catalayud," by *Daroca*, assumed a possession of half a year (1151, 1142); the "F. de Miranda" (1099) a possession of a year and a day; he who has been in physical possession during these periods can overthrow every action. As to triennial possession in Italy, cf. *Salvioli*, p. 443.

³ To have the peaceful enjoyment of the seisin for a year and a day, an expression which is already current in the time of *Beaumanoir*: "Jostice," 3, 5, 4 (true seisin). *Post*, "Complaint in Case of Seisin." "Gr. Cout. de Fr.," 232; *Loysel*, 749; *Masuer*, 11, 3: in matters dealing with income the most that is required is a title. Cf. the German "rechte Gewere," which rather deals with ownership.

⁴ *Guilhiermoz*, "Enquêtes," p. 286.

of these changes was not long in making itself felt in the procedure in actions for possession, which became complicated, and developed.¹ It is likely, as we shall see with regard to possessory actions, that the importance given to a year's possession is less a radical innovation than a regulating of the previous state of affairs.² In order to know who has been in possession of a piece of land, it is sought to discover who has cultivated it, who has gathered the harvest; and this assumes a cultivation of one year. It is no doubt owing to this fact, that the tenure of a year and a day, the German "rechte Gewere," was instituted. Now possession for a year is only a reduction of these older institutions. In countries such as Italy, where the Roman law prevailed, it is a question of possession for a year in the local statutes; but the common law set it aside, until the day when it reappeared with the French codes.³

§ 269. **Possessory Actions. Anglo-Norman Law.**⁴ — Although the Romano-canonic law recognized the creation of possessory actions, it is probable that they would have appeared spontaneously, even if the influence of this law had not made itself felt, so much did they conform to the social conditions of the Middle Ages. It is in Normandy that the land was found to be best prepared to receive and to foster the germ of reform; the authority of the duke worked energetically for the maintenance of the public peace, perhaps because after the invasions and the wars disorder was greater than it had been before;⁵ acts of violence were

¹ The suppression of offences and acts of violence being assured, a greater degree of protection may be demanded for possession.

² *Guilhiermoz*, "Enquêtes," p. 287, no. 52 *ad finem*.

³ The theory of *Klimrath*, according to which the seisin is closely related to the real right and is bound up in it, is opposed to the most categorical texts: *Beaumanoir*, 6, 4; 32, 30; "Jostice," 12, 26, 3; "Gr. Cout.," pp. 350, 529). According to *Klimrath*, seisin in fact would be the same thing as occupancy (lender, farm tenant, etc.); seisin at law is rather the right to take possession in fact; simple seisin is contrasted with true seisin, — that is to say, with the seisin which has lasted a year and a day. Thenceforth there would be four kinds of seisins: 1st. The *simple seisin in fact*. 2d. The *simple seisin at law*, resulting from a judgment, from investiture at law, or from inheritance. 3d. The *true seisin in fact*, or possession for a year and a day, serving as a basis for the complaint. 4th. The *true seisin in fact and at law*, or possession for a year and a day based upon a judgment, etc. The terminology of the sources is not firmly established: "Gr. Cout.," pp. 233, 234, 367; "saisine de fait, saisine de droit"; "Jostice," 13, 5, 4; 17, 3, 2; "vraie saisine"; cf. 12, 6, 26; 4, 4, 1; "Gr. Cout.," p. 239: natural possession and civil possession; "L. des Droiz," 86; *Boutaric*, fo. 90.

⁴ *Heusler*, "Gewere," § 28; *Brunner*, "Entst. d. Schwurger," 327; *Pollock and Maitland*, II, 29.

⁵ "T. A. C., Norm.," 22, 31: "nullus, guerram faciat"; *Pollock and Maitland*, II, 44.

repressed by every possible means; one of those by which the police power of the dukes was most effectively exercised was the establishment of possessory procedure.¹ It had its point of connection in a privilege which was reserved to the duke during the feudal period, and to the king in the Frankish period, the practice of "recognitio";² instead of taking the chances of the duel, as in ordinary procedure,³ the duke caused his rights to be ascertained by means of the inquest; this prerogative was extended to ordinary individuals; by means of a writ of the duke,⁴ each man could have his possession established ("recognoscere") by a jury of twelve honorable men of the neighborhood; the inquest is more favorable to the weak and the poor man than would be the combat with the formidable champions of the rich.⁵

The most important of the possessory actions⁶ is the "*querela novæ dissaisinæ*" or complaint ensuing upon a recent dispossession.⁷ The person deprived has the resource of taking back his

¹ "Ne potens male agat super impotentem": "T. A. C.," 7, 1; 16, 4 and 5; 19, 1; 31, 35. The "T. A. C.," 53, classed them among the "*placita ensis ad duces pertinentibus*," alongside of such offenses as "*infractioes qui minorum*," and the "*insultus pacis*." The assize of novel disseisin probably dates from the year 1166 (Henry II); it is at this time that it constituted a normal kind of proceeding. As to precedents, cf. *Bigelow*, "Placita," 128.

² The Church orphans and other persons under the special protection of the State were the first to enjoy this advantage.

³ "Fleta," 5, 7, 1. The procedure of the "recognitio" was also, it is true, applied to ownership; but then the writs were granted in a different manner. The denial by a single juror makes the duel inevitable: "T. A. C.," 85; *Pollock and Maitland*, II, 45.

⁴ The Roman procedure of prohibitions is also begun by an order of the prætor: "T. A. C.," 25: "*nulla fiet recognitio nisi per breve ducis*." Cf. *ib.*, 73. The writ is presented to the duke's bailiff "*in patria conquerentis*"; by means of this writ the duke notifies him to send to the "*dejiciens*" the order to make restitution ("*præceptum de ressaisiendo*"); if this order produces any result the property is then sequestered according to the "*Summa*," 93, 2 (cf. "T. A. C.," 19, 3), which is the best means of assuring peace; a jury is appointed; it proceeds with the "*visio terræ*" and renders its verdict at the next assizes held before the ducal "*justitiarius*." C. 19, 3 of the "T. A. C.," seems to require unanimity on the part of the jurors, as it does in actions dealing with ownership; c. 76 declares that a majority is sufficient (cf. c. 22, 1: nine); only one excuse ("*essoine*") is allowed, whereas there are three in the proceeding of the duel ("T. A. C.," 42, 1 and 3; 73, 3 and 4; 77, 6; 82), so that the proceeding is short. If the accused is in default a second time, the "recognitio" by the jury takes place as though he were present; this may turn out to his advantage, but he is "*in misericordia ducis pro defectu*."

⁵ "T. A. C.," 17; *Beaumanoir*, 32, 24.

⁶ Other actions: "*querela de antecessoris saisina*" for the benefit of the heir with whom the seisin of the property possessed by the deceased is being contested; "*querela de presentatione ecclesiæ*" for the benefit of the man with whom the patronage of a church is being contested; perhaps "*querela maritaggi impediti*" (writ of encumbered marriage) for the recovery of the marriage portion: "T. A. C.," 5; 79, 9.

⁷ "T. A. C.," 73. Cf. "*Summa*," 93; "T. A. C.," 74, and "*Summa*," 98, 1.

property by force on condition of acting at once; the English law even allows him a delay of four days; but, as a general thing, if he does not act immediately, the method of the "Selbsthülfe" is forbidden him;¹ he is reduced to the "querela." In order that he may be able to exercise this right, the dispossession must bear on a free tenement, and not on a villein tenement, or a tenement held by a serf.² It matters little whether the dispossession has taken place with or without violence. The simple disturbance of possession is likened to absolute disseisin or spoliation,³ which accounts for the fact that the "querela" took the place of the "retinendæ" and "recuperandæ possessionis causa"⁴ interdicts. The dispossession must be recent ("nouvelle"); if a year and a day has passed since it has taken place, the action will be refused; the spoliation is an offense, the victim of which should make complaint within a short time, under penalty of being considered as having pardoned it; moreover, order is re-established; the jury of neighbors would have more difficulty than if it were consulted the day after the offense took place.⁵ The question asked the jury is to be a simple one;⁶ they are asked if such and such a man was in possession at the time of disseisin; now, this is a fact which it is easy to establish; possession is known by *cultivation*, by enjoyment.⁷ The "Très Ancienne Coutume de Normandie" seems to

¹ *Bracton*, 4, 1, 5 and 27. — The action of *trespass*, which in English law could apply to a case of disturbance, only made its appearance under Henry III: *Pollock and Mailland*, II, 53. — The raising of the hue and cry which was used in cases of mere disturbances in fact: "N. H. R.," 1882, 411. Cf. "T. A. C.," 16, 3 and 5. *Post*, § 14.

² "Magna Charta," 1215, c. 39; 1217, c. 35.

³ Distinctions in English law, disseisin, intrusion, abatement, etc.: *Glasson*, IV, 261. Fictitious preservation of the seisin by means of a protest made every year upon the land or within its immediate neighborhood: *ibid.*, IV, 266. Cf. *Littleton*, 435.

⁴ Contesting of the right to collect a tithe; there is disturbance rather than dispossession: "Arresta Scacar," after *Warnk.*, II, 76. Should the man in possession of a piece of land who was simply disturbed have the "querela"? The English sources are very liberal on this point: *Bracton*, 4, 1, 38, 4; "Fleta," 4, 1, 8 and 9; *Britton*, 42; "Myrror of Justice," II, 25 (ousting, disturbance, ejectment). No doubt the ducal writ was only granted at first in cases of dispossession, the attack upon public order being of a more serious nature; afterwards its limit was extended to include even cases of disturbance, without its being necessary to create a new form of procedure.

⁵ "T. A. C.," 21, 2; 73, 4; 74; 75, 2 and 3; 78, 5; *Warnkoenig*, II, 31; "Etabl.," p. 54; "Summa," 2, 29, 6, and 30, 1, 2; 2, 32, 2 and 34, 3 and 5. — Cf. as to the English law from the last voyage of the king in Normandy and from the "prima coronatio regis": *Bracton*, fo. 179; *Pollock and Mailland*, II, 50.

⁶ *Pollock and Mailland*, II, 48.

⁷ "Explicare," "explicitare," to carry out to the very end, "explectare," "espleitier," "espleit": "Et. de St. Louis," I, 92 ("exploitables au baron"); *Godefroy*, see "exploit" ("frui et espleiz"). Cf. *Beaumanoir*, 29. ("Rentés,

exact nothing more than this in order to allow a man to prevail in the "querela" (excepting, no doubt, possession "animo domini").¹ It is the same thing, according to the "Summa," if the jury is not agreed on the "modus" or the "qualitas saisinæ";² but, if the inquest reveals by what title the possession is held ("qualitas saisini"), in what manner the possession was acquired ("modus"), the "Summa" demands that the utmost importance be attached to these two points. It refused the possessory action: 1st, to the man who holds for another;³ 2d, to the man whose possession is tainted with the defects of violence or surreptitiousness, that is to say, which is acquired by force or from an unfaithful custodian in the absence of the owner. The former has no personal right and must give way to the man for whose benefit he detains. The latter does not deserve to be protected: "omnis violenta vel furtiva possessio detestanda."⁴ Against him whom he has de-

loyers et esplois.") Cf. "exploiter" in speaking of the bailiff. If the matter is one concerning a piece of land, the jury takes into consideration who it was that gathered the harvest in the month of August preceding the disseisin (in the month of August of the year previous to that if the harvest is gathered every two years). — With respect to other property they regard in the same way the period when the income is collected: "Summa," 93, 7. — On the "querela de antecessoris saisina," cf. "T. A. C.," 21, 1 and 2; 74; "Summa," 98, 1; 2, 34, 1; *Warnk.*, II, 73. They find out whether the deceased was seised upon the day of his death, — that is to say, if he gathered the harvest in the preceding August.

¹ Writ of novel disseisin (73, 1): "dissaisivit injuste et sine ordine iudiciario." "Injuste" means irregularly, without the intervention of the law. Cf. *Pollock and Maitland*, II, 47, n. 4; 51. But it is possible that afterwards the following reasoning was made use of: only he who is seised "juste" can be disseised "injuste"; therefore, we must find out whether the seisin of the man despoiled was "justa"; if it were not, then the "verus dominus" has a right to take possession of the thing. This interpretation is contrary to the "T. A. C.," 22, 1: "nullus ausus sit aliquem de aliqua re devestire sine ordine iudiciario." Cf. Canon law. — *Guilhiermoz*, "Enquêtes," p. 286 ("indebite").

² "Summa," 95, 10; *Delisle*, no. 390, in 1226.

³ "T. A. C.," 78, 3. "Possessio fidalis" alone is protected, and the word "feodum" in the old Norman documents applies both to the copyhold and the fief. The "querela" belongs to the lord, to the vassal, to the copyholder, but not to the farm tenant, to the officers, to withholders by virtue of a lease, a loan, or even a pledge: "Summa," 95, 10 and 11; 98, 7; *Glanville*, 13, 28; "Fleta," 4, 3, 1 and 4. Conversely, nobody can begin the "querela" against a person who is in possession for another; the owner will have another means of action against possessors at will, that of the "districcio" or distraint upon a pledge. — English law: the "querela" is only accorded because of a frank tenement and to a man who has possession "in dominico," and not as a farm tenant or pledgee; but *Bracton*, 7, 1, 36, gives the farm tenant in place of the "querela" a "breve ad recuperandam firmam" against the owner who puts him out of possession before the termination of a lease, and against third parties. The "vilanus" cannot bring the "querela": "Fleta," 4, 3, 1 and 4; *Britton*, 43.

⁴ "Summa," 95, 11; "Arr. Scacc.," after *Warnk.*, II, 50; "Etabl.," 91. They do not go so far, however, as to require a title on the part of the possessor. He can hold the land without force and without any concealment, — for ex-

spoiled, the possessor by force or by surreptitiousness is not given the "querela," on principle; the despoiled can thus take back his property without running any risk.¹ At the same time, it seems that at the expiration of a year and a day the defects of violence and surreptitiousness are wiped out; the "Summa" does not say so, but the general rules which it gives with regard to the year and a day allow of assuming this.² Thus the "querela" ceases for the despoiled and passes to the despoiler, who can even exercise it against the "verus dominus." Even before the expiration of a year and a day, the English law, at least, grants it to the possessor by force or surreptitiousness as against third parties; the "statu quo," although due to violence, is maintained in the public interest as against him who has no superior right.³ Thus seisin appears in this conception as a relative right, which can be set up against certain people and cannot be set up against others; this same relative character is met with in English ownership and in the theory of *estates*.

§ 270. **Assize of "Mort D'Ancestor" and Writs of Entry.** — The English law is complicated by a particular class of possessory actions, "writs of entry."⁴ The assize of novel disseisin assumes that the dispossessor and the dispossessed are both alive; as soon as one of them dies it can no longer be brought. In order to remedy this inconvenience, and not to oblige a recourse to be had at once to the "brevia de recto," there were invented for the heirs of the dispossessed the assize of "mort d'ancestor" (which also belongs to Norman law, and which is little subsequent in date to the assize of novel disseisin),⁵ and against the assigns of the dis-

ample, when he has received it from a third party to whom the "custos terræ" had transferred it. Tenure at will is an absolute and ineffaceable defect; is it the same with force and concealment? Are not these relative defects? Cf. *Bracton*, 4, 1, 18 and 28. — In the "querela de antecessoris saisina" the "recognitio" affects the title of the heir, his right to the inheritance: "Summa," 99, 3; *Delisle*, "Jug. de l'Echiq.," nos. 189, 204, 724.

¹ "Summa," 95, 12, 13 ("vi et violentia"). — Cf. *Bracton*, fo. 210 b; "Inst. Just.," 4, 15, 6; *Pollock and Maitland*, II, 52.

² Ed. *Tardif*, Table, see "Annus."

³ *Pollock and Maitland*, II, 49; *Bracton*, 4, 1, 27; cf. 2, 5, 2; 2, 18, 2; 2, 25, 1; see also: 4, 1, 1, and 3, 2, 13; *Azon*, "Sum. in Cod. de acq. poss.," 7 and 8.

⁴ *Pollock and Maitland*, II, 62: as to the possessory character of these writs (which is disputed); cf. *Littleton*, 385 *et seq.* — In time the assize of novel disseisin fell into disuse and a variant of the writ of entry, the writ in the quibus, took its place: *Pollock and Maitland*, II, 79: 2.

⁵ The Assize of "Mort d'Ancestor" (*Pollock and Maitland*, I, 126) is accorded to the nearest heir for the reclaiming of the seisin of the deceased at the moment of his death against whoever may be opposed to his having it: *Glanville*, 13, 3; *Bracton*, fo. 253b. The heir who has not taken possession of the property of the deceased cannot be disseised, properly speaking; he cannot

possessor, the writs of entry "sur disseisin" (1205). The writs of entry rest upon the command to restore, by which the procedure of the petitory action for title starts ("Præcipe quod reddat"). The preliminary point to this action is that the defendant must not have acquired excepting by such a method (a method which does not constitute a regular title; for example, he holds the land of a dispossessor). The number of writs of entry increased until the time of Bracton, so as fully to assure the active and passive transmission of the protection of possession, with this restriction, however, that the third transfer could not be exceeded; after this the complainant was obliged to have recourse to the "brevia de recto" (writ of right).

§ 271. **The raising of the Hue and Cry ("Haro")**¹ offers a striking example of the transformation of a form of criminal procedure into a possessory action.² This was originally merely an old Germanic custom consisting in a call for assistance to the neighbors raised by the victim of a wrong at the very time when this latter was being committed.³ Whoever heard it must run to his

have the assize of novel disseisin; for him has been created the assize of "mort d'ancestor": *Bracton*, fo. 273. This action at first is only given to the nearest relatives, — sons, brothers, nephews; such was the strictness of the law that it was necessary to create special writs for more distant relatives ("de avo, de consanguinitate"). It is only after 1259 that it carries with it a condemnation to pay damages. The "abator" ("ablator") could not take possession of the property in the inheritance before the funeral took place, and *Bracton* allows the heir a delay of one year within which to take it away from him: *Bracton*, fo. 160 b; *Britton*, I, 288; II, 2. Thus self-help was often sufficient for the heir. The taking of possession was facilitated for him ("sola pedis posicio seisinam contulit"), as well as the acquiring of a personal seisin. The assize is given against every withholder of the inherited property, the "abator" of early times or his assigns; but it cannot be made use of between two claimants to the inheritance: *Glanville*, 13, 11; *Bracton*, fo. 266; *Britton*, II, 115. Cf. *Pollock and Mailland*, II, 58; *Houard*, "Anc. Lois des Franç.," I, 539.

¹ Bibl. in *Glasson*, "N. R. H.," 1882, 396. Let us only cite: *Tannequy-Sorin*, "De Cuiritatione Normannorum quam Haro appellant," 1567; see *Ragueau*, *Merlin*, *Houard*, *Gouillard*, "Soc. Antiq. de Norm.," XXVIII, 1872; *Tiphaigne*, "Et. s. la Cl. de Haro" 1880; *Del Vecchio*, "Sul. Signif. d. grido: Hare. n. fiere de Siampagna," 1899 ("Arch. Stol. Ital.," V, t. 24).

² Etymology: "hara" equals here ("ici," old high German): see *Diez*. Forms, "haro," "harou," "hare," "hareu." As to the imaginary etymology, "ha," "rou," ("help! Rollo"), cf. *Glasson*, 517. There is no connection between "haro" and "harahus" (a sacred object) of the law of the Ripuarians, "hraopant" ("corpus," "vinculum") of the law of the Bavarians, and "hréam" (a cry, cf. "ruhm") of the Anglo-Saxon laws. Cf. the Latin "huc," from whence "huccus" ("Form. Turon.," 30), "hucher." The etymology of "huz," "hue," is uncertain ("huz" equals "foras"? interjection?): *Du Cange*, see "Huesium." — As to the other cries which are made use of, cf. *Brunner*, "D. R. G.," II, 482.

³ This cry may be uttered also under other circumstances. On the occasion of the entry of Philip-Augustus into Normandy, the women cried "harou"; the heralds did the same in order to quiet the tumult. The fairs in Champagne were opened by the cry, "Hâre!"

help and assist him by force;¹ the malefactor taken in a flagrant offense was judged or, rather lynched, by an improvised tribunal composed of the neighbors. In time, customs became milder and putting to death was only authorized as an exception. Thus the Frankish laws show us this malefactor bound and carried at once before the magistrate in order to be sentenced. He was only killed in case he offered resistance.²

In the same way in the Norman law, the procedure in a case of flagrant offense is opened by raising the hue and cry.³ "He who has raised the cry is placed 'ipso facto' under the protection of the duke of Normandy or the lord justice,⁴ and whoever took the liberty of ill-treating him would be guilty of having infringed this protection. As to the delinquent, the fact of the hue and cry having been raised against him makes him a prisoner of the duke by right."⁵ If he flees, he can be hotly pursued and brought back to the place where the hue and cry was raised. The hue and cry was only allowed, according to the "Grand Coutumier de Normandie," for a *criminal cause* (fire, larceny, homicide, etc.); "he who cries 'haro' without apparent injury must pay a fine to the prince for so doing."⁶ This is the "haro de playe et de sang"

¹ "L. Franc. Cham.," 37; "Convent. Silvac," 853, c. 5 ("Capit.," II, 272); "Cnut," II, 29; *Brunner, op. cit.*, 227. The same obligation in India and among the Slavs. Cf. "Summa Norm.," 54. Persons who respond to the cry of "haro" must serve as witnesses if need be.

² Other systems, to-day abandoned, as to the origin of the hue and cry. To-day they are only interesting as being curious. One may find them in *Glasson*, p. 429 (for example, the acclamation of Rollo, whom they hailed with the words, "Ha Rou!"). Cf. *Gouillard, op. cit.*, and "France Judic.," VI (creation of the capitularies), and especially *Brunner, loc. cit.* — The "haro" is not peculiar to the Norman law: *Beaumanoir*, 57, 12; 67, 22; 69, 16; 52, 16; 31, 5 and 14; "Jostice," 19, 44, 14; 47, 7; "T. A. C., Bret.," 144, *et seq.*; *Isambert*, I, 650; "Ord.," I, 312. Examples in "Reg. Crim. de St. Martin-des-Champs," p. 115, 141, 187, etc. As to the procedure in the case of a flagrant offense, cf. *Glasson*, pp. 529; *Esmein*, "Hist. de la Procéd. Crim.," 1880; "Sachsenspiegel," I, 51, 2; 3, 54, 4; "Schwabenspiegel," 298. — England, cf. *Blackstone*, IV, 21.

³ In Jersey the complainant kneels down and says in the presence of two witnesses, "Haro, haro, haro, a l'aide, mon prince; on me fait tort" ("Help, my lord; I am being injured"). The owner of a piece of land who wished to cry "haro" against the Jersey Railway Company had great difficulty, because of his "embonpoint," in kneeling down in order to fulfill the legal formalities.

⁴ "Summa," 54; *Glasson*, p. 407: since the reuniting of Normandy and France under Philip Augustus the high lords justices have the same jurisdiction as the duke.

⁵ The "haro" allowed one to bring clericals before the secular tribunals (flagrant offense), which were the only ones authorized to inflict the punishment of death or mutilation.

⁶ Not only was the victim of the tort, but also his relatives, and even anybody, authorized to cry "haro": thus the raising of the hue and cry in this way came to be a sort of popular action.

(wounding). It became rather rare as soon as police protection was better assured. "The right given to each individual to appoint himself a public officer to compel his neighbor to follow him and to help him by force, which was very useful in a society in process of formation, where the person and the possessions of individuals were each day in real danger, is no longer as necessary as soon as there exists a strong enough power to make the public peace respected, and it can become a source of abuse by placing the property of the individual at the mercy of the first comer." The officers charged with police duty "perhaps maintain that they alone should have the right of proceeding with arrests in the case of a crime; and, in fact, it seldom happens otherwise."

The practice of the *hue and cry* persisted, on the other hand, in civil matters, where it had been introduced at a very early time.¹ When a man wishes "suddenly to dispossess and dispossess another, the latter cannot at that very minute have recourse to justice; he has no officer at hand to put an end to the enterprise which will perhaps cause him an irremediable injury; he cries 'haro,' and by this fact alone immediately puts an end to the undertaking of his adversary." In fact, should the latter have good right on his side, still for the simple reason that he did not obey the "haro," he would be subjected to a fine and have to re-establish the "*statu quo*"; only after that could his pretensions be submitted to the tribunals. In the case where he submitted to the summons resulting from the "haro,"² the matter was carried without delay³ before the court; the two parties gave surety, or, if they did not do this, had to stay in prison,⁴ after which the prop-

¹ To put it better, civil and penal matters were not very well distinguished formerly. It was an offense to disturb somebody in his possession as well as to attack his person. — In the "N. C., Norm.," they had recourse as much as possible to the services of a sergeant; it was he who cried "haro." They could proceed with it within a very short delay, ordinarily 24 hours. Women, minors and other persons under a disability could have recourse to it.

² Obligation to cease from every undertaking and summons at law at the same time.

³ Delay of a year in the sixteenth century within which to prosecute one's adversary at law, and the proceedings could not be discontinued for more than a year.

⁴ Both parties had to stay in prison in the Middle Ages in criminal matters when there was a formal accusation; thus they found themselves in the same position, both liable, — one to a penalty for the offense if he were found guilty, the other to a retaliation if the accusation had been unfounded. These old forms of procedure lasted as long as there was not any public prosecutor (see in *Glasson*, p. 424, quite recent examples, in England foreigners imprisoned for having lodged a complaint against a thief, whereas the thief remained out on bail; the absence of a public prosecutor perpetuated the old customs in this country). As soon as people were satisfied with a mere denunciation the ac-

erty was sequestrated.¹ The final sentence condemns the loser to pay damages, and to a discretionary penalty: which meant that the procedure of "haro" was not without its dangers.² But its advantages had made it popular; it assured to everybody prompt and economical justice. Practice endeavored to extend it; the "haro" could be raised every time that there was an *immediate* necessity for protecting the person or the possessions against acts of violence, simply because there was danger in delay.³ It was even abused by an endeavor to make a means of extortion of it,⁴ and the Parliament had to counteract this tendency. It is to be noticed that the raising of the hue and cry only served to *preserve* possession. He who had *lost* possession could only recover it by the assistance of a writ of novel disseisin.⁵ The raising of the hue and cry is still in use in the Anglo-Norman Islands.⁶

§ 272. **Possessory Actions in the French Customary Law** ⁷ are, as in Normandy, created by public authority ⁸ ("Amtsrecht"), which is inspired by the idea of remedying the same evils and

cusation was abandoned and the victim of the offense thus avoided being imprisoned. — Bail or imprisonment are customs of the old procedure which have lasted in relation to the raising of the hue and cry in order to prevent the abuse of this proceeding by individuals: *Esmein*, "Hist. de la Procéd. Crim.," 1880.

¹ However, in matters of ecclesiastical benefices ("Cout. de Norm.," 54, 55), possession and enjoyment were put up for sale by the parties while the proceeding lasted, because it would have been necessary to give the sequestrator the canonic appointment by means of the authority of the Church, — a thing which would often have been impossible, and would always have been rather impractical.

² According to the "Cout. de Norm.," 54, 55, the "haro" is applicable to movables as well as inheritances.

³ Cf. French procedure by means of a reference.

⁴ *Glasson*, *op. cit.*, p. 417 (Order of Jan. 22, 1761). The "haro" was not allowed against those who were collecting dues of the king ("Ord." 1680 on Aids; Order of the Council of May 15, 1725); but it was possible outside of these cases to raise it against public officers as well as against individuals, at least in cases where they abused their powers.

⁵ *Glasson*, *op. cit.*, pp. 411, 419. Thus it became necessary in this last case to begin by notifying his adversary; the extrajudicial proceeding of the "haro" was more simple and more effective.

⁶ Details in *Glasson*, p. 540 (bibl. on the law which applies to it). — This learned man believes that in France the "haro" would be of some use in civil matters because a reference does not prevent undertakings on the part of others and it is not applied in matters dealing with possession; in criminal matters pursuit and arrest brought about by public outcry still exist.

⁷ *P. de Fontaines*, c. 32; "Olim," I, 230; p. 338; *A. Tardif*, "La Procéd. aux XIII^e et XIV^e s.," p. 35; "Ac. Lég. Toulouse," I, 24, 69.

⁸ The origin of the actions for the recovery of possession is neither in the Roman law (*De Parieu*, p. 82, etc.), nor in the Norman law (the French law is like it, but is not identical with it), nor in the Feudal law and the splitting up of ownership (the lord keeping the ownership, the holder only having the seisin; it is certain that vassals and copyholders can bring actions for real property, and lords actions for possession, *Beaumanoir*, 32, 17).

based upon the same police powers and the same power of "inquisitio" of the king.¹ The procedure is not identical. In France the law was developed in a more liberal manner, without being subjected to such an excessive formalism, but the principal fundamental rules in the Norman legislation are found in the French Customs during the thirteenth century. It is by means of an inquest that the proceedings are carried on: the bailiff to whom the complaint is made goes to the locality with aldermen and other "viri idonei," ascertains the fact of the disseisin, and, if there is occasion to do so, causes the one who has suffered the injury to be put back in possession.² Disseisin, which is the preliminary condition of the possessory action, is understood to apply to dispossession and disturbance;³ or, rather, dispossession is looked upon simply as a disturbance, for, in considering himself as being disturbed in his possession, the man who is disseised finds that he is preserving the advantages which possession confers upon him. It is an indispensable condition that action be taken within a year of the disseisin, otherwise the latter would not be recent⁴ ("nouvelle"). After the establishment of the fact of the recent disseisin, the object of the inquest was to determine whether the complainant was in possession at the time of the "novitas"; this came to the same thing as inquiring whether he then was cultivating the land and had the enjoyment of it.⁵ It was not rigorously demanded that the possession should have lasted a year and a day;⁶ but defects of uncertainty,⁷ or violence and clandestine-

¹ Also the actions for possession are at first included within the category of cases under the jurisdiction of the crown.

² "Olim," II, 212, 30. — *Post*, "Procedure."

³ "Olim," I, 930, 19; II, 232, 18 ("perturbatio seu dessaisina"); II, 58, 15 ("dessaisina" equals "impedimentum"); II, 61, 3 ("forcia" equals "dessaisina"), etc. "Ass. de Jérus.," I, p. 585: disseisin and force (in the latter case one is at the mercy of the lord).

⁴ *P. de Fontaines*, 14, 4; "Olim," I, 230, 2 (within a year of the death of the deceased); II, 232, 18; *Beaumanoir*, 32, 9, 25. In the "Ass. de Jérus.," instead of the delay of one year we find the old Frankish delay of 40 days.

⁵ "Olim," I, 709, 74; II, 279, 1. — *Cf.* "Hereditary Seisin": "Olim," I, 23, 4; I, 98, 14; II, 864, 29.

⁶ "Olim," I, 231, in 1266: not one year; I, 398, in 1272: "fere per annum." The "Ord." of Philip Augustus dealing with the Crusades, Art. XI, caused Laurière to believe that the complaint based upon yearly possession had been in existence from the beginning of the thirteenth century. It is probable that this referred to the annual tenure, which we shall deal with later on; as a matter of fact, the action contemplated by Art. XI is brought "coram dominis feodorum et censivarum," and not before the king.

⁷ The lord is given the possessory action when the serfs are disturbed: *Faber*, "Inst. de Int. Ret.," p. 6; *Masuer*, 11, 22. *Beaumanoir* refuses the possessory action to the tenant against the lord, 32, 8, but concedes it to the farm tenant against the lessor, 32, 13 (*id.*, "Gr. Cout. de Fr.," p. 248), because

ness, precluded the possessory action. However, upon this last point a reservation must be made. An action which Beaumanoir describes as of *recent disseisin*, which he could have called an action "spolii," or for recovery of possession, was allowed even to the man who only had a defective seisin which was of short duration; he should be "reseised," says this juriconsult, "before anything else is done," excepting to permit his adversary, if he has a year's possession, to take back the thing from him by means of a complaint.¹

§ 273. **Beaumanoir** speaks repeatedly of a royal ordinance which, as far as disseisin is concerned, would have established a "new means of executing justice." It is hard to tell just what royal decree he is here alluding to.² Whichever one it may be, it does not seem to have modified the theory of possession, for the explanations of this juriconsult agree with the decisions contained in the Register of Parliament; at the same time, whereas the Registers of Parliament are not very precise on this subject, he clearly demands the possession of a year and a day;³ further-

the mere lease does not imply any feudal relation. With regard to the rule that the subject can bring no complaint against his lord, *cf. Masuer*, II, 16, 68. The king never pleads "dispossessed": *Loysel*, 759, 878.

¹ *Beaumanoir*, 32, 23 (*cf.* 15). The recovery of possession serves as a preliminary to the complaint (example: A disseises B, who in his turn dispossesses A; A has himself reseised by B; and then B, who has possession for a year, takes back the thing by means of the complaint); *Bruns*, p. 361. *Cf. Aluzet*, p. 155; *De Parieu*, p. 115; *Heusler*, II, 65. — *Cf. "Olim,"* I, 316, no. 3; "Et. de St. Louis," I, 96. On the "exceptio spolii," *cf. P. de Fontaines*, pp. 271, and 280, n. 3.

² The Ordinance has been lost track of. It is neither the Ordinance which abolishes the duel at law and substitutes therefor the inquest nor the regulating Order of Jan. 7, 1278, giving jurisdiction to the bailiffs rather than to parliament because of the urgent nature of cases for the recovery of possession. (*Viолет*, "Et. de St. Louis," I, 340); "Ord.," II, 542; *Langlois*, "Philippe III," 231. According to the latter, the Ordinance which was lost was concerned: (A) with novel disseisins: (a) procedure, delays of adjournment (15 days for gentlemen, 1 day for commoners; no revocation, but a day for view); (b) upholding the man who has the last peaceable seisin of a year and a day; (c) a fine of 60 sous for the defeated party; (d) he who fails when reclaiming the seisin should within a year and a day bring the action for real property under penalty of losing all rights over the property (on this last point, however, *cf. Champeaux*, p. 426); (B) counter pledging (*Beaumanoir*, 32, 28; *cf. "Olim,"* II, 178, nos. 23, 24), which it prohibited (the gentleman who had something taken away from him did not limit himself to taking back this thing from the man who had despoiled him; he took from the latter everything that he could).

³ *Beaumanoir*, 32, 2, 3, 7 (peaceable possession for a year and a day before the "dejectio"). Is not the delay of a year and a day only the abstract regulating of the concrete period of time adopted by the Norman law? Disseisin ordinarily taking place in the month of August, — that is to say, at the time of the harvest, — inquiry is made as to who gathered the harvest the previous August; this is pretty nearly the same thing as demanding a year of

more, it seems that he admits of three kinds of possessory actions instead of one: "claims" ("clamor") or "complaints" of force, novel disseisin, and recent disturbance; but these "claims" undergo the same procedure, and are accorded under identical conditions; between them there is no difference excepting one of form; the innovation, if there is any, is an entirely superficial one.¹

§ 274. **Fourteenth and Fifteenth Centuries.**² — The possessory actions are classified in the following way, as they gradually approach the petitory action for title: 1st, recovery of possession; 2d, complaint in case of seisin and trespass ("casus novitatis"); 3d, an action of simple seisin.³ This last alone constitutes an innovation. In every other respect it was rather a regulation or development of already existing rules. — **Recovery of possession.**⁴ The man in possession who is disturbed or despoiled is always authorized to repel force by force; but he should act "in continenti"; once he has been definitely dispossessed, he is forbidden to reinstate himself in possession by means of violence.⁵ The least he is accorded, in imitation of the Romano-canon law, is an action of restitution, the action for *recovery of possession*.⁶ As this

possession. "Accessio Possessionum," "Gr. Cout. de Fr.," pp. 231, 505, 748; *Loysel*, 749; Arr. du Parl. of 1373 cited by *H. de Pansey*, "Compét. des Juges de Paix," ch. 41. Cf. *De Parieu*, p. 116; *Heusler*, p. 407; "Cout. d'Anjou" of 1411, Art. 292 (*Beaumonts-Beaupré*, I, 566).

¹ The distinction is made in the regulating Order of 1278. Cf. "Et. de St. Louis," I, 69. *J. d'Ibelin*, 64, contrasts force with disseisin: "Cout. de Touraine et d'Anjou": if there be disseisin or force there is occasion for the procedure of pledging or counter pledging: in case of a mere disturbance the object in litigation is sequestered in order to prevent acts of violence without there being any need of giving a pledge: *Ragueau*, "Gloss.," see "Applégement." But the procedure of the "Applégement" disappeared at an early time from the Customary common law.

² *A. Tardif*, "La Procédure aux XIII^e et XIV^e s.," p. 35; *H. de Pansey*, "Compét. des Juges de Paix," c. 31 et seq., "Confér. des Coutumes de Guénois," Table, see "Complainte," etc.; *Rebuffe*, "Tr. de Mat. Possess."

³ On the respective parts played by these actions, cf. *Viолет*, p. 584.

⁴ Recovery of possession ("réintégrande"), that is to say, an action based upon the Canon "Redintegranda"; a word which does not make its appearance before the fourteenth century. See *Godefroy*. Under the name of "actio spoli" it is admitted in Italy and in Germany, where there is a dispute as to whether it belongs to the withholder ("Cod. Maxim. Bav.," II, 5, 11; "Land. Pruss.," I, 7, 146), and whether it is given against a third-party purchaser: "Et. de St. Louis," I, 65; II, 7; "T. A. C., Bret.," 259; *Ragueau*, see "Gloss."

⁵ *Beaumanoir*, 32, 26; *P. de Fontaines*, p. 264.

⁶ "Charte de Roye," 1183 ("Ord.," XI, 229); "Et. de St. Louis," II, 7. Cf. *P. de Fontaines*; "Artois," 8, 1; "Ord.," 1256, 26; *P. de Fontaines*, 264. It does not occupy a very important place in the Customs (perhaps because the man despoiled prefers not to say that he is disseised): "Gr. Cout.," p. 239; (reinstatement before anything else takes place): *Beaumanoir*, 32, 23. Cf. Use of the safeguard: *Masuer*, 11, 5; *Gui Pape*, q. 56, 418.

action is intended to restrain acts of violence, it is allowed every man who has possession, even to the thief (excepting that he will afterwards be hanged).¹ For the sole reason that one has been disseised, one is given this right. No other condition is required.² But nothing prevents the man who is defeated in the action for recovery of possession from getting back the thing by means of the complaint; this happens often enough for one to be able to look upon the action for recovery of possession as a procedure preliminary to the complaint; it is to the latter what the complaint is to the action for real property.³ The Romanists termed it a prohibition "*recuperandæ possessionis clamor*," whereas the complaint would be the prohibition "*retinendæ possessionis clamor*";⁴ this is not absolutely accurate, because the complaint serves at the same time for the recovery and for the retaining of possession. In reality, it is less a possessory action than a penal action directed against the despoiler,⁵ and having, as

¹ *Beaumanoir, loc. cit.* The farm tenant can have it against the lessor who expels him. But we do not think that one can say the same thing with regard to the possessor "*alieno nomine*" as a general rule. The farm tenant is in a special position, just as the pledgor; it is easy to understand that in a period of violence a necessity to protect him by means of some action should be made manifest: *Masuer*, XI, 49. On the other hand, the mere overseer, the workman for wages, etc., who possesses something has no redress if it is taken back from him. — With this exception, every withholder or possessor has a right to the recovery of possession, whether he be in good or bad faith, whether his possession has lasted for a short or a long time; and he can even oppose it to the true owner. Does it affect third-party purchasers or mere despoilers? The canon law had made of it a real action. *Cujas* (cited by *Ragueau*) does not express himself on this point. The recovery of possession applied to movables as well as immovables. The juriconsults of the thirteenth century interpreted the L. 14, D., "*unde vi*," as though it had spoken of movables in general, and not merely of the things accessory to the piece of land.

² Must one have been disseised by force in order to have a right to the recovery of possession? or is it sufficient if there has merely been a dispossession? And by this must we understand an absolute dispossession or a mere disturbance? Cf. the interdict, "*momentariæ possessionis*." *Cujas* calls it recovery of possession: "*Obs.*," 19, 16. — *Pasquier*, "*Inst.*," 4, 8, distinguishes it, on the other hand, from the complaint in that it assumes force.

³ *Beaumanoir, loc. cit.*; "*Olim*," I, 316, 3. In the action for the recovery of possession a question which is a preliminary of the action for possession, properly so called, is settled: it is determined who shall be the defendant in the action for possession. Also this action has been compared with the Italian "*Summariissimum*." Cf. "*Gloss.*" by *Ragueau*; *H. de Pansey*, "*Compét.*," ch. 50 and 52.

⁴ *Bucherellus* on the "*Inst.*," 4, 15; "*Ord.*" of Charles VIII, 1498, Arts. 49 and 58; of Francis I, 1539, Art. 61 *et seq.*; *Imbert*, "*Pratique*," I, 17; "*Inst. for.*," 17; *Masuer*, XI, 26; *De Parieu*, p. 133.

⁵ The "*Ord.*" of 1667, t. 18, in dealing at the same time with the complaint and the action for recovery of possession, gave the impression that they were not distinguished from each other. This is what *Ferrière* says, see "*Réinté-grande*": "the recovery of possession is not distinguished from the complaint;

penal actions ordinarily do, a short duration, — that of a year and a day.¹

§ 275. **The Complaint in Cases of Seisin and Trespass**² is substituted³ for the “clamor dissaisinæ” (or for the three “claims” of disseisin, of force, and of disturbance, assuming that this distinction had a place in practice).⁴ It is given to the man who has been in possession peacefully and publicly and in his own name for a year and a day⁵ before the disturbance or the dispossession;⁶

but it is included within the latter in the case where there has been despoiling and not a mere disturbance . . . (the complainant) moves that he be restored and reinstated (‘réintégré’) in his possession.” He requires that the complainant be in possession for a year, and in peaceable possession, etc. (*H. de Pansey, contra*). The result of this doctrine taught by *Ferrière* was that in his time there was no more thought of recovery of possession and it was not made use of. Cf. *Bourjon*, II, p. 512; *Merlin*, “Rép.,” see “Complainte.” They said that the recovery of possession — that is to say, reinstatement — could be sued for civilly (complaint) or by an exceptional action (criminal); when one had chosen the civil action it was no longer possible to proceed by means of the criminal action, “Ord.,” 1667, 18, 2. — *Pothier*, no. 84 (cf. 124), is as categorical as *Ferrière*. Cf., however, *Argou*, I, p. 242; *Pasquier*, “Inst.,” 48. — Cf. Civil Code, 2060 (physical compulsion in case of recovery of possession). Law of May 25, 1838, Art. 6.

¹ From this there would also result the consequence that recovery of possession is a personal action, whereas the complaint is a real action. The question of knowing the nature of the recovery of possession is still unsettled, and one asks if it is not subject to the same conditions as the complaint: *Garsonnet*, I, p. 592.

² Our old authors distinguish between the complaint in matters of ecclesiastical benefices, which had its own special rules, and the complaint in profane matters: *Guyot*, see “Rép.”

³ The “Gr. Cout.,” p. 253, seems to attribute this simplification to Simon de Bucy, President of the Parliament of Paris in 1358; he must have thought of the case where there was trespass, — that is to say, omitted all mention of disseisin, as we shall see later on. But the modification took place previous to his time. (As we may infer from the “Stil. Parl.,” which already deals with the “casus novitatis.”) Cf. *Laurière*, “Tén. de 5 Ans,” p. 82; “Cout. de Paris,” I, 257 (ed. 1777); “Paris,” 96.

⁴ “Touraine” (I, 23, “A. C.”); “Poitou,” 385; “Anjou,” 168; “Maine,” 188; “Bretagne,” 27: the complaint is called procedure of pledging or counter-pledging: *Glasson*, “N. R. H.,” 1890, 167; *Mortet*, see “Gr. Encycl.,” *Ragueau*, see “Gloss.” (the complainant gives surety or a pledge to reimburse his adversary if the complaint has been erroneously brought. It is assumed that he admits himself to be disseised, or that it is an heir who has not yet taken possession). This due course of law was applied to movables as well as immovables. Unless there were a pledge-giving the thing was not sequestered, which was a different matter from the case of disseisin. In the common law this difference disappeared.

⁵ “Stil. Parl.,” 18, 11 and 22; “Cout. Not.,” 181; “Const. du Chât.,” 53; *Loyzel*, 768; *Aubert*, p. 193. Joining of Possessions: *Loyzel*, 745. The name of seisin is reserved for the possession of a year and a day; from thence comes the expression, “complaint in case of seisin”: “Gr. Cout.,” p. 232. Cf. “Arrest. Querel. de Nov. Dissais.,” 1496.

⁶ *Masuer*, XI, 5, 26: the man who fears that he will be disturbed may obtain from the judge *protection*, — that is to say, a prohibition for anybody to disturb him or hinder him under a certain penalty (prohibition of simple ban). Protection is accorded to the mere lessee or produce-sharing farmer (XI, 49).

in this last case he is considered as not having ceased to be in possession; also, he must be careful not to say that he is disseised; this would be a contradiction in terms.¹ The action can only be brought within a year and a day after the disturbance.² Moreover, the doctrine of the juriconsults of the fourteenth and fifteenth centuries has mingled with it quite a good deal of Roman law; for them the complaint is the "uti possidetis"³ prohibition (so it is inapplicable to movables),⁴ it is a double action,⁵ it assumes that possession has not been taken by force, clandestinely, or by request; it is refused to the farm tenant because he has no "jus in re," but a "jus ad rem." From these Roman formulæ practice deduced the following rules: the seisin is refused to the possessor "alieno nomine" and the farm tenant himself;⁶ but there is no need of a good title in order to have the seisin;⁷ the complaint is given not only against the despoiler, but against every possessor, in good or bad faith; in other words, the action is

— Mere threats are not sufficient to allow of the complaint: "Gr. Cout.," p. 238.

¹ He who admits that he no longer has the seisin is taken at his word; he finds himself reduced to the action for real property. On the other hand, in still declaring himself to be in possession in spite of a "dejectio," he keeps the right to bring the possessory action: *P. de Fontaines*, 21, 50; "Et. de St. Louis," 2, 7; "Anc. Us. d'Anjou," § 90, 107; "L. d. Droiz," 47, 74, 88, etc.; *Beaumanoir*, 44, 51; *J. Faber*, "Ad Inst.," "de Int.," § "Retin.," no. 13 ("te ipsum excluderes"); "Stil. Parl.," 1, 18, 3; "Gr. Cout.," p. 247 (each party should declare himself seised), 250; *Loysel*, 750. — *P. de Fontaines* points out the conflict which exists between this rule and the current maxim, "One should not plead disseised," — a common translation of the "exceptio spoli" of the canon law. It was found in practice that it was an advantage to do away with the latter. Thus is to be accounted for the fact that thenceforth there is no mention made of any complaint of *disseisin*. *Tardif*, p. 38, thinks that the idea that possession is kept "animo" was borrowed from the Roman law.

² *Desmares*, 84. However, even after this delay the king may grant letters of relief: "Gr. Cout.," p. 238. Forty days, according to the "Ass. de Jérus." Cf. as to cases of absence and minority: "Summa Norm.," 2, 30, 34.

³ "Gr. Cout.," p. 232; "Et. de St. Louis," ed. *Viollet*, III, 369; cf. I, 112, 338. — Prohibition "retinendæ poss. c.": this is an action based upon a mere disturbance, whereas the recovery of possession assumed an absolute putting out of possession. This opinion is as inaccurate as that of *Pasquier*, which is that one has the complaint for dispossession without violence and the recovery of possession for dispossession by force. To the contrary, cf. "Et. de St. Louis," I, 69; *Beaumanoir*, c. 32; *Beautemps-Beaupré*, I, 274.

⁴ "Gr. Cout.," p. 239; *Masuer*, XI, 15. Cf. *Beaumanoir*, 32, 15; 38, 2; "Olim," I, 489; "Paris," 97. — *Loysel*, 754, 755, 756 (residuary inheritance of movables, etc.); "Ord.," 1667, 18, 1. On the admission: *Boutaric*, I, 31; *Imbert*, "Prat.," I, 172. The complaint applies to incorporeal things: *Masuer*, 11, 18; *Garsonnet*, I, 372; *Heusler*, "Gew.," p. 278.

⁵ "Gr. Cout.," p. 247; "Stil. Parl.," 18, 3, 8. Each one says that he has been disturbed.

⁶ "Gr. Cout.," pp. 231, 232, 248, 256; cf. p. 195; "Stil. Parl.," 18, 23, 24; *Loysel*, 749; *Pasquier*, "Inst.," p. 768.

⁷ "Gr. Cout.," p. 232.

real.¹ This transformation of the "clamor dissaisinæ" into a real action, which is contrary to the Roman precedents, is to be accounted for in that it rested upon a year's possession, which was not defective;² it is an ownership on a small scale; it is reputed lawful in itself, says the "Grand Coutumier de France."

§ 276. **The Procedure of the Complaint**³ for a long time was opened by obtaining letters from the king (analogous to the Norman writ);⁴ it was summary (no periods of notice, view, advice, etc.),⁵ at least with respect to the action for petitory title, but, little by little, it became unencumbered with incidents (Or-

¹ "Gr. Cout.," p. 494; all real actions are based upon recent disturbance of seisin or on previously existing impediments (allusion to the action of simple seisin) or they are proprietary actions: *Boutaric*, II, 27; *Pasquier*, "Inst.," p. 768. Cf., however, to the contrary, *Pothier*, "Int. à la Cout. d'Orléans," no. 118 (personal actions springing out of a tort).

² Cf., however, "Stil. Parl.," 18, 23: "reus dicat, non potes dicere te saisitum quia me de possessione per violentiam dejecisti." It seems to result from this that violence was a relative defect. Nor is it a perpetual defect, any more than is clandestineness; peaceful and public possession for a year, whatever its origin may be, gives one a right to the complaint.

³ Formulæ: "Gr. Cout.," pp. 495, 505, 513; "L. d. Droiz," 739, 742; *Boutaric*, I, 40 and 77; "Paris," I, 256, 268; *Warnkoenig*, II, 319; *Varin*, "Arch. lég. de Reims," I, 794. — As to the procedure, cf. "Stil. Parl.," 18; "Ord.," 1347 (II, 266); *Isambert*, IV, 689, 535; *Auber*, "Hist. du Parl. de Paris, 1250-1515," 1894, II, p. 192.

⁴ As to this procedure, cf. *Schwalbach*, p. 134. The procedure in the Parliament of Flanders in 1789 still kept many of the characteristics of the old law: see *Guyot*. Royal letters delivered in Parliament and containing a command for the bailiff to give the property back, or, if he were resisted, to forcibly take possession of it. A sergeant was dispatched by the bailiff to summon the parties to come to the locality; "ad veutam," in order to view the property in litigation (coming of the judge, coming to this place). Opposition by the defendant. The property was then sequestered: "Gr. Cout.," pp. 235, 240. The first defect appearing causes one to lose the action of trespass. — This procedure fell into disuse; instead of recovery by means of the complaint one proceeded by the mere adjournment. "Gr. Cout. de Fr.," p. 235; there were two methods, — complaint and mere adjournment (comparison): *Masuer*, I, 34 (*id.*, 1600); XI, 47. Cf. *Laurière*, on *Loysel*, 739; *Imbert*, "Inst. for.," I. — It was no doubt the making use of the complaint that carried with it the payment of a fine: *Loysel*, 753 (and citations).

⁵ In order to proceed more rapidly and not out of fear that the year and a day granted one within which to act might have expired: "Stil. Parl.," 10, 3 and 4; 18, 18; "Gr. Cout.," p. 235; *Boutaric*, p. 195; "Stil. Parl.," 18, 20; 12, 19 and 30. The defendant "plaide a toutes fins," — that is to say, sets forth all his defences at once: *Masuer*, XI, 37. The "Style des Req. du Palais," ch. 14, outlines this procedure: Only one giving of notice within a week after the order for examination of the facts at issue, one week to hear witnesses and pronounce a decree of provisional possession, one week to pass upon the facts, etc. The rapidity of the progress of this procedure is entirely relative. Its delays account for the importance of the decree of provisional possession. On the other hand, it is not without some formalism; if a man says that he is disseised he gives up all right to the complaint; if he simply says that he is hindered in his seisin, the defendant does not have to reply: "Gr. Cout.," pp. 245, 247; "Stil. Parl.," 18, 3 and 17, 27; *Desmares*, 300.

dinance of 1347: "*lites maxime breves efficiuntur immortales*"). The property in litigation was first placed *in the hand of the king* ("*ad manum regis positum*," in sequestration) so as to prevent the parties getting hold of it, and to avoid the doing of acts by the defendant which would be prejudicial to the demandant who should win his cause.¹ The judges, however, had the power of confiding ("*recredentia*," provisional possession) the property to one of the parties, provided surety were given.² Little by little, a fixed judicial law came to be established, exact rules covering the case in which **provisional possession** ought to be granted or refused;³ thus it was adjudged to the party who invoked the common law and not a privilege, for the party who presented a written title, etc.⁴ From the very beginning of the proceeding it was not a rare thing for the demandant thus to recover by way of provisional title the possession which he had lost. The possessory proceeding became divided:⁵ 1st. Into **provisional possession**, a preliminary stage which was in reality short and summary,⁶ and which thereby acquired a special importance and passed almost to the rank of an

¹ Already in the Norman law: "*Gr. Cout. de Fr.*" p. 240: "*ne partes veniant ad arma*"; *Laurière*, on *Loysel*, 768, 769; *Masuer*, XI, 17; *Fontanon*, on *Masuer*, ed. 1660, p. 204, maintains that the use of sequestration at the beginning of the procedure was done away with; it could no longer take place excepting with full information.

² A request "*ut manus regis amoveatur*" is left to the decision of the judge in the beginning: "*Et. de St. Louis*," II, 5 and 6; "*Cout. Not.*," 123; *Desmares*, 3; "*Olim*," I, 255, 11; *Ragueau*, "*Gloss.*," see "*Récreance*" (and cit.); "*Stil. Parl.*," 18, 7-9 (the provisional possession is granted to the complainant if the defendant does not give some good reason for his defense; if this is not so the thing remains sequestered); "*Parl. au B.*," p. 168. — *Cf.* "*Gr. Cout. de Fr.*," p. 233.

³ Following a hasty examination, — the hearing of a few witnesses and examination of the proofs (*Boutaric*, p. 195; *Masuer*, XI, 30; "*Ord.*," Apr., 1454, 70-75; 1493, 58), — the provisional possession was granted by order of parliament, with an obligation to furnish surety to pay over the income (sometimes a dispensation). *Loysel*, 767, "If the person put in provisional possession does not have his possession confirmed, he has to give up and restore the issues." *Masuer*, XI, 32; "*Ord.*," 1667, 15, 14; *Boutaric*, p. 198; *Papon*, 8, 11. If the good faith of the judges had been abused the provisional possession could be annulled.

⁴ "*Stil. Parl.*," 18, 11; *Boutaric*, p. 193; "*Gr. Cout.*," pp. 250, 251; *Desmares*, 32; *Masuer*, vol. 9. It is refused if it would cause an irreparable injury, if the king is a party (*Loysel*, 768), and if the jurisdiction is at issue: *Loysel*, 766; *Schwalbach*, p. 140.

⁵ Without there being, however, two separate instances: "*Ord.*," 1539, 59; *Boutaric*, p. 109 (ed. 1603).

⁶ A sort of "*Summarissimum*" established as a reaction against the slowness of procedure. *Cf.* recovery of possession where the complainant bases his argument upon the despoiling, whereas in the provisional possession he pretends to be in possession and bases his argument upon his probable possession. On the question of knowing whether the provisional possession and sequestration are mere means of investigation or true possessory actions, see Law of May 25, 1838, Art. 6, 1.

action. 2d, Into fully **confirmed possession**,¹ or final judgment which was not always arrived at.²

§ 277. **The Same.** — The period of a **year and a day**³ often recurs in possessory matters; it is necessary to insist upon it. As many as four applications of this are to be found: 1st. The year's tenure of the municipal statutes of the twelfth century, carrying with it, as it seems, the acquisition of the ownership. 2d. A year's possession *before* the disturbance or the disseisin is a necessary condition before the complaint can be made use of. 3d. Period of a year and a day *after* the disturbance or disseisin, another necessary condition of the complaint.⁴ 4th. The period of a year and a day, dating from the judgment upon the complaint, during which

¹ "Manutenuta," *Loysel*, 767. In the sixteenth century they say that there are three headings in the complaint: 1st, the sequestration, which should be asked for before the case is tried if there is any reason to fear that the opposing party may take away the issues; 2d, the provisional possession, which is required during the proceedings; 3d, the full possessory action, or the fully confirmed possession: *Imbert*, "Inst. for.," c. 17. Possession for three years will prevent sequestration or provisional possession.

² An alteration of this nature took place in the Italian practice: the "Glose" (on "l." 37, D., "de jud.," 5, 1; arg. 1, 8 "pr., de dol. exc.") admitted the "exceptio domini" in matters relating to possession; they were concerned with the title by which the parties held possession; thenceforth the duration of the possessory action was extended and it became necessary to distinguish between: 1st. The "**Summariissimum**," a proceeding resulting very quickly in a provisional decision following a summary investigation of the matter; it is made use of when there is a "periculum" or "timor armorum" with the object of preventing violence; it was accorded to any person in possession, and it was within the discretion of the judge to give even a mere withholder the advantage of it (fifteenth century, *Paul de Castro*). The "**Summariissimum**" was propagated in Germany and in Spain. The provisional possession was found in France. It had the same origin; it issued from the measures to keep order which were forcibly taken by the law at the beginning of the action for possession: "Stat. Romæ," 1580, I, 92; *P. de Castro*, "Consilia," II, 3. — 2d. The "**Summarium**" ("possessorium"): this is the ordinary possessory procedure, the prohibition "uti possidetis"; it is thus called because it has always been understood that the possessory procedure ought to be summary. 3d. The "**Ordinarium**" or "**Plenarium**" ("possessorium"), an intermediate proceeding between the possessory action and the action for real property; it was derived from c. 9, Dig. X, "de prob.," 2, 19 (Innocent III, 1207), where a long possession based upon a title is given precedence over a doubtful possession; it corresponds to the action of simple seisin of the French law. Details in *Bruns*, "Besitz," 232, etc.; "Besitzklagen," 1874; "Jahrb. d. g. R.," IV, 1; *Briegleb*, "Einl. in d. Theorie d. summ. Proc.," 1859; *Pertile*, IV, 177; *Salvioli*, § 243; *Savigny*, § 51, again finds the "**Summariissimum**" in *Guil. Durand*, "Spec.," 4, 1, 9, 22. He shows us that in Germany at the end of the eighteenth century this very summary procedure was very long drawn out; he was judge in an action where the "summar" had lasted twelve years, and nobody could foresee an end to their difficulties; according to this the "ordinarium" might easily last fifty years and the "petitorium" a century.

³ The extra day, which was only demanded so as better to distinguish the end of the delay, has disappeared from the existing law. Cf. "Summa Norm.," ed. *Tardif*, Table, see "Annus," "Dies."

⁴ "Gr. Cout.," pp. 237, 238. According to the "Ass. de Jéru.," *J. d'Ibelin*, c. 64, after more than forty days have expired one is not disseised over again.

delay the petitory action for title must be brought, under penalty of forfeiture.¹ These last two delays are periods of procedure established to insure order, so as not to allow individuals to be affected for too long a time by a litigation concerning which the interested party has no more thought, or which he is only delaying in a spirit of chicanery. Perhaps they owe their origin to the fact that in the Roman prohibition one had to act within a year of the disturbance or of the "dejectio"; perhaps they are only an application of the Customary period of a year and a day.² The year's possession required of the man who brings the complaint is a surer, better established, and more respectable possession, owing to the sole fact of its duration, than is possession for a few days.³ It is no doubt due to the same needs to which the tenure of a year and a day, with its consequence of prescription, answered; it must be connected with the same old Customary ideas, because it is simply an application of them.⁴

¹ *P. de Fontaines*, pp. 232, 289. A rule which disappeared in the fifteenth century. Cf. "Gr. Cout.," p. 256 (still applied). Cf. German "Rechte Gewere."

² Cf. *Champeaux*, p. 436.

³ *D'Espinay*, p. 119; *De Parieu*, p. 116 (cf. pp. 264, 265, 257, n. 8, vol. II). There has been an endeavor to account for this by means of the rule that it was necessary to bring the action for possession within a year and a day; so long, therefore, as a man had not had possession for a year, he was liable to have the complaint brought against him; as soon as he was no longer exposed to this he acquired the right of bringing the possessory action himself. The second and third rules laid down in the text are, therefore, in the last analysis, but a single rule looked upon from either the positive or the negative point of view. — According to this system it is hard to understand why a man who has been in possession less than a year — six months, for example — has no action against a possessor of one or two months. One will say that he runs the risk of being sued himself by a third party who can plead possession for a year. But what difference do his relations with third parties make? Perhaps, moreover, there may not be any third party who can plead the possession for a year. It never occurred to the Romans to say that, if the "dejectus" had not acted "de vi" within the year, the "dejiciens" would, because of this fact alone, have a right to the prohibition. The Assizes of Jerusalem, which allow forty days within which to begin the possessory action, do not require that possession shall have lasted during this time.

⁴ The tenure of a year and a day existed before the possessory proceeding; the former springs from popular custom, the latter is created by public authority. They have existed side by side, but this does not explain why the customary delay had no influence on the regulating of the possessory actions; nor could one invoke as a decisive argument against this influence the fact that the Assizes of Jerusalem do not require a possession of a year in the matter of the complaint, while at the same time admitting of tenure for a year. "Ord." of Philip Augustus applying to the Crusaders, Art. XI; *De Parieu*, p. 118. — In the "Olim" the tenure of a year and a day with acquisition of the ownership is qualified as "specialis consuetudo terræ," II, 339, 10; 748, 22; III, 556, 52; *A. Thierry*, "Doc. Inéd.," IV, 716. Charter of Saint-Valery sur Somme, Art. 21 (in 1376). This tenure was done away with by means of the system of the long Roman prescriptions. *Heusler*, "Gewere," p. 407 *et seq.*, sees in this period of a year and a day in possessory matters an abstract formula corresponding to the one in the Norman law relating to the last harvest.

§ 278. **Action of Simple Seisin** (without there being any trespass).¹ By this was understood a possessory action accorded to the man who had failed or should have failed in his complaint because he had not the last year's possession, but who could avail himself of a long possession previous to this.² The possessor for ten years³ prevailed by means of this action over the one who had possessed the property a year and a day upon condition of acting within ten years from the time of the loss of possession,⁴ and of presenting a title in support of his seisin,⁵ — not a very happy creation, the origin of which is obscure,⁶ and owing to which our practitioners were not long in becoming confused;⁷ the action of simple seisin disappeared in the sixteenth century.⁸

¹ "Gr. Cout.," p. 494 (as contrasted with proprietary actions). *Masuer*, t. 10 and 11; *H. de Pansey*, "Compét. des Juges de Paix," ch. 46. Cf. *Alauzel*, p. 106; *Klimrath*, p. 368. A personal action, the "condictio possessionis" of the Roman law, has been erroneously seen in this. — As to the procedure, *Loysel*, 763. — Cf. *Guilhiermoz*, p. 288; "quando simpliciter agitur de possessione" (as contrasted with the "novitas"). — *Ducoudray*, "Orig. du Parlement," p. 831.

² In this action, "les plus anciens exploits" (that is to say, the enjoyment which has existed the longest) are the most efficacious: "Gr. Cout.," pp. 250, 252; *Loysel*, 765; *Varin*, I, 794, 802.

³ *Loysel*, 748, 764; "Gr. Cout.," pp. 232, 252. The delay of ten years was taken without any special object from the delay of the Roman usucaption: *Beaumanoir*, 8, 9; "Gr. Cout.," p. 199; "Paris," 98.

⁴ "Gr. Cout.," p. 238; *Varin*, *loc. cit.* — The rule cited by *P. de Fontaines*, 22, 3; "Artois," 2, 29; *Beaumanoir*, 32, 6; 64, according to which one could only bring the action for real property within a year and a day of the judgment upon the complaint, was therefore abandoned: cf. "Gr. Cout.," pp. 237, 238.

⁵ "Gr. Cout.," p. 232. From this point of view the action was very similar to the action for real property and became practically useless.

⁶ The "Gr. Cout.," p. 232, calls it "casus recuperandæ possessionis," which might lead one to suppose that it was invented in order to take the place of the prohibition "recup. poss. c.," in imitation (distant?) of the Roman law. *Laurière* (on *Loysel*, 765, 762) says that its creation was due to Simon de Bucy, which is not said in the passage from the "Gr. Cout.," upon which he relies, p. 253. From this it follows that there remained no other resource but the action for real property to the man who was defeated on the complaint; when the case of simple seisin was devised it was asked if it was not necessary to refer to it in the formula of the complaint, in the same way as one reserved the action of reclaiming. Practice did not believe this to be necessary, which was contrary to the opinion of Simon de Bucy. — It may be that the action of simple seisin had this origin in the custom of delivering letters of relief to the man who was despoiled and who allowed the year and a day to pass without taking any action. — Cf., however, *Guilhiermoz*, "Enquêtes," p. 288, no. 57.

⁷ *Beaumanoir*, 24, 4, allowed the complaint to the holder of a servitude. In the fourteenth century this opinion seems to have been contested, under the pretext that every possession of a servitude without a title is one at will. *Boutaric*, I, 31 (p. 188), then applies the action of simple seisin to this case; he also allows it in the case of burdens upon real property. Cf. "Rents," "Paris," 198; *J. Faber*, "Inst. de Int.," § "Retin.," no. 22; *Masuer*, 11, 18, 21: complaint to recover quit-rent, rents, servitudes. The "Ord." of 1667 also allows the complaint in the matter of servitudes.

⁸ Excepting in the Parliament of Flanders, *Guyot*, see "Complainte."

§ 279. **The Declaration of Recent Work,**¹ which the old authors looked upon as a possessory action and likened to the complaint, appeared towards the fourteenth century in countries of Customary law. This was the "operis novi nuntiatio" of the Roman law, preserved and disfigured, undoubtedly, by the Italian practice and that of the South of France, and again disfigured by the confused doctrine which was anxious to give it its Roman physiognomy.² It assumes that one neighbor carries out some work on his land in violation of the rights of another neighbor (for example, he builds his house so high that he blocks the view of a neighboring house). He to whom the declaration is made should defer the work until he has obtained a judgment which gives him permission to go on with it; the judges will only accord him this permission upon condition of his giving surety to have the work demolished if it should be so ordered later on. When the complaint is made, the defendant cannot be allowed to continue work again even by giving surety. The little importance of this procedure explains why it is not mentioned in the Ordinances of 1667.³

¹ "Gr. Cout. de Fr.," p. 249; *Masuer*, 11, 7; *Boutaric*, I, 31 (p. 197); 2-32; "L. d. Droiz," no. 763; "Anc. Cout. d'Anjou," "F.," 1054 (*ed. Beauteemps-Beaupré*, II, 293); see *Ferrière* (bibl.); *Glasson*, VII, 312; cf. "N. R. H.," 1890, 627; "Précis de Procéd. Civile," 1902.

² This is dealt with at a very early time in the Italian statutes: *Lattes*, "Dir. Consuetud.," p. 302. Just as in the "Gr. Cout. de Fr.," p. 88, we see it combined with a usage which existed at Rome, but without becoming confused with the "nuntiatio," the prohibition of continuing work of some kind (and not only a building operation) by the throwing of a stone on the premises and in the presence of witnesses.

³ The Law of May 25, 1838, mentions it again. Cf. *H. de Pansey*, "Just. de Paix," ch. 38; *Garsonnet*, p. 538 (controversy).

TOPIC 5. ACQUISITION OF THE OWNERSHIP OF IMMOVABLES.
OCCUPATION AND PRESCRIPTION

§ 280. The Principal Methods of Acquisition "Inter Vivos."	§ 286. The Tenement of Five Years.
§ 281. Occupation.	§ 287. Good Faith.
§ 282. Prescription. — Short and Long Prescriptions.	§ 288. Immemorial Possession.
§ 283. The Year and a Day.	§ 289. The Roman Prescriptions. Prescriptions of Ten to Twenty Years, and Prescriptions of Thirty Years.
§ 284. "Rechte Gewere."	§ 290. In the Sixteenth Century.
§ 285. The Tenure of a Year and a Day.	

§ 280. The Principal Methods of Acquisition "Inter Vivos"¹ are occupation, usucaption (or acquisitive prescription), and delivery.² Further on we will discuss the methods of acquiring "mortis causa," such as intestate succession, which relates rather to a collection of possessions, and the legacy, which can be applied to special objects. The loss of ownership only results from **abandonment** or **surrender**, the effects of which vary according to the nature of the possessions.³

¹ Our old authors enumerate them and classify them, drawing their inspiration for the most part from the Roman law: *Bracton*, I, 2. Cf. *Blackstone*, I, 2, c. 13 *et seq.*: (A) *Rights to real possessions*: inheritance, succession to the estate of a deceased alien, occupation, prescription, confiscation, alienation by deed, by special custom, and by will; (B) *Rights to personal possessions*: occupation, prerogative, confiscation, custom, inheritance, marriage, judgment, gift, contract, **bankruptcy**, will and administration.

² In its final stages the old doctrine was connected with the Roman ideas, but it did not triumph without having some resistance offered it; the rights claimed by the lords are opposed to it, — for example, with respect to alluvium, *Loysel* still says, no. 236; "The river gives and takes away from the lord justice" (bibl.); *Huber*, IV, 701; *Grimm*, "R. A.," 548. As to dispossession because of public utility, cf. also *Huber*, IV, 716. This is not dealt with in the old texts because the rights of the people collectively are so extensive that no regulation is required; the individual will always yield. — But must we not observe that the conflict will arise between the family and the State, and that the family is not so weak as the individual? In reality cases in which dispossession is necessary are very rare. — "Olim," I, 252, IV; *Viолlet*, "Etabl. de St. Louis," IV, 63; *P. de Fontaines*, p. 292, 483.

³ Surrender as applied to the fief or the copyhold results in causing these possessions to revert to the lord who granted them. But the copyholder can only escape from his future obligations by complying with certain formalities. *Loysel*, 521, — "Every surrender must take place at law." The vassal cannot by this means break the ties that bind him to the lord. With regard to **abandonment** (properly so called, that is to say) of freeholds, the old law had no general regulation. At the same time, according to *Ferrière*, see "Biens Vacants," it was customary for the lord justice only to make use of his right of taking goods which had been abandoned after the lapse of several years. In *Guyot*, see "Occupation," the legislation of Languedoc is cited as a model;

§ 281. **Occupation** (or taking possession "animo domini" of a "res nullius").¹ This method of acquiring holds a place in the speculations of the philosophical jurists² in proportion to its lack of importance in the history of our old law. It is only met with in the barbarian period, under the form of the "aprisio"³ or "Neubruch."⁴ With the consent, expressed or implied, of the community to which he belongs, an individual starts to cultivate a portion of the territory upon which the community has established itself;⁵ he clears it and appropriates it to himself; no one opposes him because he injures no one, and in one way or another it is felt that this conquest by an individual will turn to the profit of all. Where there are no communities, or even, in time, upon the territories of communities, we see the king au-

possessions were considered as abandoned when their holder ceased to cultivate them and ceased to pay the tallage for a period of three years; they were then conferred upon the man who offered to cultivate them and to pay the tallage and who improved the condition of the community. Cf. Law of the 3d Frim., year VII, Art. 76; *Despeisses*, III, 13. — Etymology: "a-bandon"; as to the meaning of "bandon," cf. *Godefroy*, see "Abandon"; *P. de Fontaines*, 15, 29; *Beaumanoir*, 43, 13; "Ord.," I, 293 (abandonment is the taking of a pledge).

¹ See especially the writings dealing with the feudal or domanial rights: *Guyot*, see "Occupation"; *Pothier*, "Propriété," c. 2. On the subject of occupation in international law, cf. *Bonfils Fauchille*, "Manuel de Dr. International Public," 1898; *Jèze*, "Occupation," 1896. Balboa took possession of the Pacific Ocean in the name of the king of Spain by walking into it and striking the waters with his sword; Cortez thrust his sword into a tree in order to take possession of Mexico, etc.: *Lameire*, "Occup. Milit. en Italie sous Louis XIV," 1903.

² Rousseau only echoes their old doctrines in the well-known passage from the "Discours sur l'Origine et les Fond. de l'Inégalité," p. 2. Cf. *Pascal*, "Pensées," VI, 50.

³ *Thévenin*, the "Communia" ("Mélanges Renier"), 1886; "Textes," pp. 64, 69, 78, etc. (Table); *Cauvet*, "Etude Hist. s. l'Etabliss. des Espagnols dans la Septimanie," 1877 (especially p. 109); *Brunner*, "D. R. G.," II, 256. As to the method the barbarians had of establishing themselves cf. *Meitzen*, *op. cit.* (by villages or by single houses) and an analysis of these ideas in *Brandt*, *op. cit.*, and in *G. Blondel*, "Entre Camarades," 1901. As to the Roman period, cf. *Mitteis*, "Z. Gesch. der Erbpacht im Altherthum, Abh. Sächs. Ges. d. Wiss.," 20, 4 (in 1901), p. 28 (bibl.), dealing with the inscriptions of Souk-el-Khmis, and *Henrich Mettich*; *Girard*, "Textes," p. 163.

⁴ Other terms: "captura," "comprehensio," "porprisio," "exartum" ("essart," clearing ground, from "sarrire," "sarcler," to weed): "bifang" (a translation of "aprisio"), "neubruch" or "rodung" (clearing). These various expressions at the same time designate the method of acquiring and the land acquired ("Rottland"): *Grimm*, p. 524; see *Du Cange*. Often, in order to make a field of some value, men begin by burning off the underbrush and the trees which cover it ("novalia exusta"): *Laveleye*, "Economie rurale de la Belgique," 1875, p. 200; *Roscher*, "Traité d'Econ. Polit. Rurale," French translation, p. 82.

⁵ "L. Burg.," t. 13, "de exartis" (bibl. and note): clearing in "silva comuni," — that is to say, common to the Roman and his barbarian host: cf. 41; 54, 2; 67. The custom of clearing is here applied to private property: *Ragueau*, see "Pourpris."

thorizing the taking of possession.¹ But the increase of population and the progress of agriculture resulted in the abandonment of this old practice.² It became more rare from the beginning of the feudal period.³ In countries where the theory of feudal ownership was applied exclusively, for example, in England, there was no longer any room for occupation, for, on principle, unoccupied lands belonged to the lord, and those which the tenants abandoned returned to his domain because of his immediate holding.⁴ It is by drawing their inspiration from these ideas, or, rather, from their practical result, that the framers of the Civil Code had inscribed in their draft this rule, which was too absolute: "The

¹ "Bai.," 16, 2. Cf. *Schlyter*, "Corpus Jur. Sueo-Goth.," III, 245. The right of the first occupier is formally recognized in this text. He must have cultivated a piece of land which was uncultivated and without an owner. There is no question of his being authorized by an agrarian community, nor by the State, nor of any formalities required for the taking of possession. Cf., however, *Beseler*, p. 11, "Certain statutes mention the 'capitatio circum-eundo,' the incision of trees, the fact of lighting a fire, of erecting a structure; this is the popular custom." But not one of these formalities is indispensable in my opinion; they may be useful in order to determine the limits of the land acquired. Owing to the mere fact of having taken possession of a piece of land, even when the "extirpatio" has not been completed, one has a right to drive off third parties who would take possession of it for themselves. Every free man used to have the right to exercise the taking of possession in the "silva communis," and upon the uncultivated lands of the community; what he could take and *really occupy* was such a trifle as compared with the vast expanse which remained (*Tacitus*, 26: "et superest ager"), that there was no need of limiting this right; the community tacitly permitted it to be fully exercised. When population increased and these clearings began to increase, it had to be restricted or even done away with; this is what is done by the laws and regulations of the feudal period. However, we meet with traces of the old principle until the eighteenth century (in 1712, in Holstein; cf. *Beseler*, p. 15). As a general rule, taking possession was only allowed with the expressed consent of the lord or the community, and it was a natural transition to the system of seigniorial grants (for example, to guests).

² This is what happened especially in France. Lands without an owner and unpopulated regions were occupied by immigrants whom the king authorized to establish themselves there by virtue of his police powers. Thus in the time of Charlemagne the Goths established themselves in Septimania, *Cauvet*, *op. cit.* Diplomas from Charlemagne and his successors in: *D. Vaissette*, "Preuves" and "Capitul.," ed. *Boretius*, I, 169 (in 812). Cf. Charter of 811 (*Beseler*, p. 19); *Thévenin*, "Textes," no. 93. The royal confirmation thus appeared to be necessary for the man who had exercised the right of taking possession. It also often happens that the "captura" takes place in a royal domain, "regalis silva," and in this case it goes without saying that the authorization of the king is indispensable. Colonies in the German provinces: *G. Blondel*, "Et. s. les Popul. rurales de l'Allemagne"; *Imbert La Tour*, "Mél. P. Fabre," 1901.

³ The Church encourages clearings by showing less strictness in the collecting of the tithe from the "novalia": Dig. X, 3, 30, 13; 5, 40, 21; see *Du Cange*. But by "novalia" is understood all cleared land, whether in consequence of a taking of possession or not.

⁴ Thus it is that the English law did not recognize occupation as a method of acquiring land: *Pollock and Mailland*, II, 80.

civil law does not recognize the right of occupation alone." They reconsidered this idea; following the example of the old law, they admitted occupation as far as movables were concerned (hunting, fishing, estrays, treasure), sanctioning in this respect the victory of the Roman theories over the Germanic and feudal conceptions.¹

§ 282. **Prescription. — Short and Long Prescriptions.**² — Acquisitive prescription or usucaption does not seem to have been known in the old Germanic law; the only one met with therein is a sort of extinguishing prescription,³ which is applicable to the most diverse rights, and which has its basis in some fact which places the interested party under the necessity of pleading it.⁴ From thence arose in the ancient Customary law a usucaption of short duration, the tenure of a year and a day. This system contrasted with the Roman theory, according to which usucaption was contrasted with prescription of actions, and which only admitted the long prescriptions. From the barbarian period Roman institutions made their way in the legislation;⁵ the Canon law gave them a new force, and towards the thirteenth century they prevailed.⁶ Their success was less a consequence of the authority of the Roman law than an effect of the gradual progress of law; there was in this one of those legislative reforms which took place because of practice, under cover of the superstitious respect for the Roman law, but which may be justified by motives quite different from those which are avowed. Even in Rome, long prescriptions had in the end taken the place of the usucaption of early times. Very short periods, like that of a year, are in accord with the requirements of a barbarian society, where there is need of prompt regulation, where a rough system of proofs is the only one which they have; they also accord with the requirements of a very highly civilized society, where the rights of each individual

¹ *Fenet*, II, 124.

² *Caillemier*, "Antiq. jurid. d'Athènes," "La Prescription," 1869; *Beauchet*, "Hist. du Droit Privé de la Républ. Athén.," III, 142; *Girard*, "Manuel de Dr. Rom.," 3d ed., p. 296.

³ In the same way the English law does not recognize any acquiring prescription, but only an extinguishing prescription: *Pollock and Maitland*, II 81.

⁴ *Heusler*, § 91; *Immerwahr*, "Die Verschweigung," 1895.

⁵ Law of the Franks, Visigoths and Burgundians: "Liut.," 53; *Pardessus*, "Dipl.," II, 185, no. 394; *Brunner*, II, 517.

⁶ "Arr. Parl. Paris," Apr. 3, 1322; *Buche*, "N. R. H.," 1884, 335. — Combination of the Germanic delay and the Roman delay: "App. Marcult.," 33; "Reims," 168: 11 years; *Boutaric*, I, 22; "Hainaut," 7, 5: 21 years; "Ponthieu," 31 years; "Sachsensp.," I, 29: 30 years plus "Jahr und Tag"; *Champeaux*, p. 433; *Soule*, r. 28: 41 years.

are sufficiently well protected for usurpations to be little feared; the old system, not being able to organize the ownership of land on the perfected foundations of modern law, protected it at least by means of the long duration of prescription.

§ 283. **The Year and a Day.**¹ — A year is a natural period which was applied of its own accord to the acquisition or loss of rights.² Cæsar and Tacitus state that a distribution of the land was made annually among the ancient Germans: "anno post alio transire cogunt," says one of them; "arva per annos mutant," says the other.³ In the barbarian laws this period is taken into consideration under various circumstances; thus, according to the Salic Law, t. 45, "de migrantibus,"⁴ the stranger in a village cannot be expelled upon the demand of one of the inhabitants when he has sojourned there for twelve months.⁵ The Capitulary of 803, which was added to the Riparian law, Chap. 6, declares that if the pleader who is in default does not put in an appearance *within a year*, the king shall decide as to the disposal of his possessions. In the same way, according to the "Capitula legi addita" of 816, Chap. 5, the "proprietas" of the defaulting criminal which is placed under the royal ban becomes finally acquired by the treasurer, if the default is not cleared up *within a year and a day*.⁶ With the coming of the feudal period applications and mentions

¹ Val. Smith, "Orig. de la Poss. annale," 1854; Klimrath, II, 357; Alauzet, p. 47; De Parieu, p. 56; Heusler, "Gewere," p. 345; Glasson, VII, 349; Viollet, 570; Champeaux, "Thèse," p. 376; Fockema-Andréæ, "Z. S. S., G. A.," 1893, 75; Mailland, "Law Quart. Rev.," V, 253.

² "Perennis," by the year, "Verjahrung": Viollet, 572; Val. Smith, p. 33, 48; Heusler, I, 56. Cf. the three-year period corresponding to an archaic system of triennial rotation of crops (Denmark, "Jydske Lov.," I, 47, 51). — Other explanations. — (I) Roman origin: "Cod. Théod.," 10, 1, 1; "L. Rom. Wis.," 5, 6; Benech, "R. Crit.," 1854, 377. — (II) The year includes three "placita legitima": "Cap.," 803, c. 6 (*post*); "Jostice," 19, 42, 2: in the three assizes and forty days. Cf. Martène, "De Antiqu. Rit.," 9, 5; Prost, "N. R. H.," 1880; "Giving of Public Notice at Metz," *post*.

³ Cæsar, "De Bell. Gal.," VI, 22; Tacitus, "Germ.," 26.

⁴ "Cap.," of 819, c. 9, which modifies this title.

⁵ This title, according to the general opinion, does not provide for the acquiring of ownership. See as to the controversy to which its interpretation gave rise: Geffcken, "L. Salica," p. 178 (bibl.). Other cases in which the delay of a year is applied in the barbarian laws: "Sal.," 46 (appointment of an heir "affatomie"); 27, 19; "Roth.," 74, 112, 127, 221, 361; "Liut.," 24, 96, 100. Old-time evidences: Thévenin, "Textes," 114, etc.; Muratori, "Ant. Ital.," I, 435; Brunetti, "Cod. Diplom. Tosc.," I, 425; Yves de Chartres, "Ep.," 77 (Migne, "Patr. Lat.," t. CLXII); "Leges fam. S. Petri Worm.," § 1 and 6; D. Martène, "Ampl. Coll.," II, 56, 58; Laws of Hoel le Bon, Laferrière, "Hist. du Dr. Fr.," II, 123; "Acad. Lég. de Toulouse," II, 250.

⁶ "Capitul.," ed. Bor. "Index Rer.," see "Annus"; see especially, I, 118; 268; 283; 362; II, 63; 226; "Cap. L. Rib. Add.," 803, 6 (I, 118); "Cap.," 816, c. 5 (I, 268); "Cap.," 825, c. 11 ("Lib. Pap. Loth.," 31).

of this period become more numerous;¹ it becomes the normal period of prescription in the old Customary law; the expression, *a year and a day*, is, as it were, the style in the Customs.²

§ 284. "**Rechte Gewere.**"—In case of "missio in bannum," and, owing to the very fact of this "missio," the interested party found himself called upon to plead his rights to the property which had been seized; and, if he did not do this, his rights were lost, because there could be no going back upon a confiscation which had become absolute.³ This procedure of the "missio in bannum,"

¹ *Du Cange*, see "Annus et Dies"; *Aripbrand and Albertus*, p. 138; *Heusler*, I, 57, etc. Cf. "Possession," "Repurchase by a Person of the Same Lineage." Citizenship or serfdom results from residing in a place for a year and a day (Customs in which the very air makes one free or a slave). Cf. on this subject "Nov.," 123, c. 17 (*Justinian*). In the eighteenth century the Elector Palatine had a right over foreigners: *Hildebrand*, "De Jure Wildfangiatus," 1717; *Stobbe*, I, § 68. The community was established by "living together in the same household for a year and a day." A number of actions were lost by the expiration of this period: *Loysel*, 713, 714; *Dunod*, p. 133; *Champeaux*, "Thèse," p. 400. Inheritance without an owner, "Fribourg," 24; Customs of the South ("Albi," etc.); things lost, etc.: *Immerwahr*, p. 43.

² The year and a day figures for the first time in the Capitulary of 816. By assuming that the period begins on the 1st of January it will expire, not on December 31, but on January 1 of the following year; the interested party has this entire day within which to allege his rights, — for example, to exercise the right of repurchase, and therefore all the more to avoid confiscation, as in the Capitulary of 816 (where it seems a delay of grace). Then only in the popular thought is the year completed; in the same way eight days are counted as a week, fifteen days as two weeks. Our old authors saw a clever intent in this error in calculation; they must have added a day to the year in order to show that the "dies a quo" was not included within the period ("ut omnes molestæ quæstiones de anni tempore tollantur"). Who can help seeing that this would have been postponing the difficulty instead of solving it? *Tiraq.*, "De Retr.," I, 11, 17; *Grimaudet*, "Retr.," 8, 2; *Laurière*, on "Paris," I, 264; "Poitou," "Troyes," 144; *Pasquier*, "Rech.," IV, 32; *Guyot*, see "Retr. Lign.," s. VI. From this explanation one may at least conclude that there was no difference between the Customs which speak of a year and a day and those which merely dealt with a year. — In Germany in the thirteenth century by "Jahr und Tag" is understood a delay of one year (three "placita legitima," three assizes), six weeks (the delay of the Salic Law for appearing in court, *Geffcken*, p. 187) and three days (duration of one session). After the year has expired the interested party still has the power of pleading his right at the first judicial session, which will be held within six weeks at the latest; if it takes place previously to this the delay is shortened; it may be reduced to one day: "Capit.," 803, c. 6; *Heusler*, I, 57; *Grimm*, "R. A.," 223; *Chaisemartin*, "Prov.," p. 185. Cf. *Schroeder*, p. 706 (Controversy, must we see an innovation in this?). Cf. "Jostice," I, 6, 40, 50; III, 6, 2; XII, 6, 8; 7, 5; 22; XIX, 37, 9, 12; *P. de Fontaines*, 21, 9; *A. Thierry*, "Doc. inéd.," IV, 662; *Fagniez*, "Doc. p. Servir à l'Hist. de l'Ind.," p. 317; *Champeaux*, p. 375; *Immerwahr*, p. 22. On the three assizes, "Jostice," 19, 12, 2; *P. de Fontaines*, 21, 10, 12 and 91; 22, 9; *Glawville*, 1, 7; "Gr. Cout. de Fr.," p. 263; *Durand*, "Specul.," 3, 1, 6; 2, 15, 10. Cf. date of these statutes; one should indicate the year and a day ("Wis.," 2, 5, 1). It has also been conjectured that this was the merely verbal connecting link with the customary formula.

³ The interested party had to appear in court within the year and a day; an extrajudicial protest or the forcible retaking of a piece of property would have had no effect. This rule, which was perfectly natural in the cases pro-

with its powerful effects, was extended to the case of voluntary alienation which took place in court. The German sources of the thirteenth century show us this in their description of the "Auflassung" (or investiture) by law (in the "echte Ding," "placitum legitimum").¹ The judge summons those who take part in it, three times to plead their claims over the piece of land which has been alienated, under penalty of being foreclosed; all the free men of the locality are present at this, with the exception of minors, the sick, and those who are absent from the country. If no one claims the property, the judge places his peace over it, — that is to say, forbids everybody to disturb the man in possession ("sub banno regio proprietati firmam pacem induximus"). Those who do not take part in the judicial assembly, for some lawful reason, preserve the right of making complaint during the year and a day.² Once the year has expired, the position of the acquirer could not be attacked; he had the "rechte Gewere" ("legitima possessio").³ The delay of a year was granted even to those who were present at the judicial assembly, and an oath was demanded of the acquirer in support of his possession.⁴ It is scarcely to be doubted that the institution of the "rechte Gewere" was connected with the "missio in bannum" of the ninth century; the formalities with which the former is surrounded are too analogous to the latter, and are conceived too much in the same spirit, for this to be otherwise. Moreover, one finds already in the Capitulary of 825, Chap. 11, the alienation of immovables connected with a procedure of calling upon all those who have any rights.⁵ The German practice of the Middle Ages thus has precedents from the time of the Frankish period.

§ 285. **The Tenure of a Year and a Day** of the municipal char-

vided for by the Capitularies of 803 and 816, was afterwards kept in the case of the "Auflassung."

¹ *Post*, "Transfer of Ownership."

² "Leges Fam. S. Petri Worm.," about 1024, c. 6. Other texts in *Immerwahr*, p. 15.

³ "Sachsensp. Landr.," II, 44, 1; III, 83, 2, 3. Municipal charters, — for example, "Berner Handfeste," 1218, c. 22; "Augsburg," 1156, c. 4; "Delft," 1246; in *Mieris*, "Charterb.," I, 231, etc. — In the twelfth and thirteenth centuries the "rechte Gewere" exists almost everywhere in Germany. — The notions respecting this institution were scarcely clearly defined until after the writings of *R. Sohm*; cf. "Z. S. S., G. A.," I, 33, 53; *Heusler*, "Gewere," 237; "Inst.," II, 81; *Stobbe*, § 74; *Schroeder*, p. 706 (bibl.); *Siegel*, § 145; *Brunner*, "Forsch.," p. 736; *Huber*, IV, 712; *Immerwahr*, p. 27; "Z. S. S., G. A.," IV, 235.

⁴ *Brême*, 1186, 3; "Lübisch. Recht," 78; *Soest*, 31, etc., "L. Feud.," I, 26, 1: possession for a year confirmed by an oath is equivalent to an investiture of the fief received from the lord: *Ibid.*, II, 24; 40; 52; 55; *Pertile*, IV, 221.

⁵ "Lib. Pap. Loth.," 31; *post*, "Public Investiture," "Investiture."

ters of the North of France has the same origin as has the "rechte Gewere" of the German law.¹ This is the old forfeiture resulting from the expiration of the year and a day, which has become transformed into usucaption, and the primary condition of which is the year's possession of the acquirer.² The preliminary procedure of calling upon those who have rights often fell into disuse; its absence was supplied by the publicity of the delivery, or of the taking of possession.³ But the effects of the forfeiture have lasted; there results therefrom an absolute plea in bar against every adverse claim (by way of ownership, servitude, or obligation),⁴ and, as a consequence, the rights of third parties, whatever they may be, those of the relatives, and even those of a previous acquirer, are cleared away.⁵ This institution lost its importance

¹ "St.-Omer," 1128; "Laon," 1128, 15 and 20; "Lorris," 1155, 18 and 32; "Noyon," 1181, 13; "Chaumont," 1182, 10; "Roye," 1183, 3 and 15, "Abbeville," 1184, 23; "Pontoise," 1188, 11; "Amiens," 1190, 26; "St. Quentin," 1195, 24, etc. ("Ord.," vols. IV and XI, p. 199 *et seq.*); "Anc. Cout. d'Artois," ed. Maillart, p. 357; "Ass. de Jérus." *J. d'Ibelin*, "C. de B.," II, p. 36 (ed. B.). Cf. Bigelow, "Placita," p. 282; Prou, "N. R. H.," 1884, 163; "Jostice," Table, see "Prescription"; "Const. du Châtelet," § 53 (note); "Olim.," I, 748, 22 (in 1268): ten years or even a year and a day, according to the local custom: *Glasson*, VII, 272; "Fuero Real," 2, 11 (year and a day in peace); *Giraud*, II, 259; "Beauvais," 1182, 27.

² Whereas in the early law inaction on the part of the interested party is sufficient to make him lose his right, he will undergo a forfeiture from the mere fact of his "Verschweigung," whether his adversary have or have not been in possession during the year and a day. For the "rechte Gewere," possession is also required: *Pertile*, IV, 222.

³ "L. Sal.," 45; "Lorris," 1155, 18; *Immewahr*, pp. 12 and 15. The "bannum regis," which is the early basis of this procedure, often disappeared: "Noyon," 1181, 13; "Abbeville," 1184, 23; "Ass. de Jérus.," *J. d'Ibelin*, c. 38; "C. des B.," II, 36 (ed. B.); *Pertile*, IV, 180 ("Asti"), etc. In these texts they seem to assume as a necessary condition of prescription a public purchasing, which is brought to the knowledge of everybody; sometimes they speak of those who "juste ac legitime emerint"; but the mere fact that there is no insistence or precision upon this point proves that this condition has lost a good deal of its importance; publicity, or even regularity, of purchasing is equivalent to a formal putting in possession of all the interested parties. Cf., *post*, "Public Investiture by Proclamation."

⁴ "Nulli tenetur respondere," say the Charters in speaking of the man who has possession for a year. Thenceforth he does not have to bring his warrantor into the action and it matters little whether he have acquired "a domino" or "a non domino." Nor are good faith and lawful title necessary for him. Cf., however, "Cap. Olon.," 825, c. 11 (I, 329); "Cap. Adelchis," 866, c. 5; *Murat*, "Ant. Ital.," I, 435; *Laband*, "Vermög. Kl.," p. 315. — Minors and people who are absent are not deprived of their rights; forfeiture only affects those who know or who are in a position to know that a third party is in possession: *Schmid*, "Ges. d. Angels.," "Gloss.," see "Verjährung"; "Roye," 1188, 3; "Summa Norm.," 98, 5; *L. Delisle*, "Jug. de l'Echiquier," 151 (in 1215), etc.; *Immewahr*, p. 19 *et seq.*; *Laurière*, "Tén. de cinq. Ans.," p. 75; cf. "Olim.," III, 556, 52. — *Loyselet*, 721, on the other hand, looks at it from a new point of view: "Every Customary prescription for a year or a less time runs against persons who are absent and minors."

⁵ "Cap.," 825, c. 11: in case there are two successive deliveries, one can say,

as the theory of possession became better established; it became an exception in the Customs of the sixteenth century; at this time the only effect of a year's possession was to accord a right to the possessory action; it did not cause one to acquire the ownership.¹

§ 286. **The Tenement of Five Years**² (Anjou, Maine, Tours, Lodunois)³ or possession for five years, served in the sixteenth century to free immovables of rents, mortgages, or real charges, which encumbered them; the acquirer of the land by color of title and in good faith was the only one authorized to avail himself of this possession, and, again, only upon condition of his not being the heir presumptive of the debtor.⁴ This was only a transformation of annual prescription, as a result of the text or the preparatory work of the Customs, which provided that the too short period of one year be prolonged to three years, and then to five.⁵ There was a controversy as to whether this prescription ran against minors, those who were absent, or the Church.⁶ It is to be noticed that the arrears of a "constituted rent," for a sum of money, were lost by prescription in five years.⁷

§ 287. **Good Faith**⁸ was required by the Canon law⁹ in every prescription, and this not only at the time of the taking of possession, but again during the entire duration of the latter. On this point it was in accord with popular ideas ("one hundred years of injustice do not make a year of law"), and it was in-

"Der jungere Bann. bricht den älterem." *Post*, "Delivery": "Leges et Stat. fam. S. P. Worm." (about 1024), c. 6, sale; c. 1, appointment of dower.

¹ Cf. *Beaumanoir*, 8, 9. Frederick II abolished it: "Const. Sic.," III, 37.

² *Laurière*, "Diss. s. le Ténem. de cinq. Ans.," 1698; *Pothier*, "Propri.," no. 21; *D'Aguesseau*, II, 189; see *Ferrière*. — Cf. *Boutillier*, I, 48 (4 years).

³ It left in existence rents on land (which could be lost by a prescription of ten to twenty years or thirty years), the rights of the lord (which could not be lost by prescription) and rents or charges with which the immovables had been affected for more than thirty years (old debts are not so much suspected of fraud as are new ones): *Pothier*, no. 219.

⁴ The heir presumptive of the debtor can only make use of the prescription of thirty years: "Maine," 438; "Anjou," 423; *Pothier*, 224.

⁵ *Laurière*, p. 83; "Maine," Report on Art. 482, "Mons," 27 (instead of one year to be in possession henceforth three whole years).

⁶ *Loysel*, 721; *Laurière*, p. 85; "Anjou," 447; "Maine," 459; "Journ. des Aud.," I, 6, 13; *Pothier*, nos. 236 *et seq.*

⁷ "Confér. des Ord. de Guénois," IV, 7, 44; "Ord." of June 15, 1510, Art. 71; of Jan., 1629, Art. 142; "Déc." of Aug. 20, 1792, 3, 1; Civil Code, 2277. — *Dunod*, II, "Le Gouix," "Thèse," 1901.

⁸ *Mollentheil*, "Natur des guten Glaubens," 1820; *Hildebrand*, "De Bona Fide," 1843; *Kroutzwald*, "De Canonica Prescriptione," 1873; *Knitschky*, "De Præscr. jur. Canonica," 1873; *Reich*, "Kanon. Verjährungslehre," 1880; *Benzacar*, "Thèse," 1890; *Ruffini*, "La Buona Fede in Mat. di Prescrizione," 1892 (bibl., p. 6); "Encicl. Giur. Ital.," see "Buona Fede"; *Horn*, "Bona fides," 1899.

⁹ Dig. X, 2, 26 ("de præscriptionibus").

spired from the old Mosaic law (for example, the Jubilee).¹ If we are to see in this a consequence of the confusion of morality and law, which consequence is one of the characteristics of canon law, this doctrine is also to a certain extent an expression of the reaction against prescription, an institution which becomes less and less necessary in a well-ordered society.² The Decree of Gratian still clung to the Roman ideas.³ But the new doctrine was not long in appearing in the writings of the canonists, and at the end of the twelfth century two Decretals, one of Alexander III, the other of Innocent III, sanctioned it; they may be summed up in the rule: "Possessor malæ fidei ullo tempore non præscribit."⁴ The canonic rule had a good deal of difficulty in making its way into the secular forum; because of its absolute character, it agreed better with the "jus" or the "lex poli" (that is to say, "cæli") than with the "lex Fori"; and if it had the advantage of preventing some spoliations, it was only at the price of the multiplying and prolonging of actions with relation to ownership. From the time of Baldus the Italian practice, in spite of the formal prescriptions of the "quoniam" Decretal, took no account of this.⁵ In France it seemed at one time as though the

¹ From this reform perhaps comes the rule according to which title should be provided (excepting in cases of immemorial prescription); however, when the man who gains by prescription has the "jus commune" to support him, good faith will be sufficient for him: *Johannes Teutonicus*, on c. 7, c. XVI, q. 3; *Reich*, p. 28 *et seq.*; *Bernard de Parme*, on c. 17; *Dig. X*, "de præscr." Cf. "Sexte," c. 1, II, 13.

² Churches were exempt from the prescriptions of thirty years: *Mohr*, "C. Dipl. Rh.," I, 97.

³ Cf. *Ruffini*, p. 11 (old canonic texts containing the Roman doctrine, especially the Prague collection of canons, first half of the twelfth century, c. 271, 279; *Hincmar*, "Op.," II, 737). Decree of *Gratian*, 2 a, "Pars," "cause," XVI, q. 3 and 4. A commentary which antedates the "Pars" VIII, maintains that the "Partidas" VIII and IX were introduced into the Decree by one of the four Doctors *Jacobus*.

⁴ First mention of the new opinion: *Ruffini*, p. 39 *et seq.* Cf. especially "Sommes," by *Rufin*, p. 319; and *Etienne de Tournai*, p. 220; *Gross*, *op. cit.*, p. 252. — Was not this opinion based upon a passage from St. Augustine cited by *Gratian*, "Caus.," 34, q. 1, c. 5, in which at the same time there was absolutely no thought of any innovation? In reality the Custom, "Mala fides superveniens non nocet," was a remainder of the old law at Rome according to which usucaption occurred even if good faith were lacking; there came a time when good faith was required, but it was only required at the beginning of the possession. The canon law thought to moralize prescription by demanding that good faith should be prolonged during the entire time the possession lasted: Decretal "Vigilanti" of Alexander III (*Dig. X*, 2, 26, 5. Cf. *Ruffini*, p. 61, who upheld the authenticity against *Hildebrand*). *Reich* connects it with the Germanic law ("Rechtsverweigung") — *Dig. X*, "de præscr., cap. ult." (20). This decretal of Innocent III is only the c. 41 of the 4th Council of Latran, 1215 (*Hefele*, "Conciles," French translation, VIII, 141).

⁵ *Hostiensis* (contrary to *Bernard de Parme*), *Bartolet* and *Balde* decide that

Canon law were going to triumph.¹ But a distinction was made between the prescription of ten and twenty years, for which good faith and color of title were indispensable, and that of thirty years, for which no title, and consequently they said, no good faith, were requisite.² The only satisfaction given the canonists was the rejecting of the Roman rule, "*Mala fides superveniens non nocet*," with regard to the prescription of ten years.³

§ 288. **Immemorial Possession**,⁴ or the prescription of one hundred years,⁵ which is only an application of this rule, serves to establish, for example, the existence of seigniorial rights, of private or public rent, of local franchises, of Customary rights over community lands or seigniorial lands.⁶ Where there had never been any title establishing their formation, or the titles were lost, which was a very frequent thing in the Middle Ages, it was shown that these rights had been exercised "*a tempore cujus memoria non extat*," "*cujus contrarii non existit memoria*" for a hundred years or more; old men attested that from all antiquity it had not been otherwise.⁷ This proof dispensed with title and good faith, or, rather, a conclusive presumption of the existence of the title was seen therein.⁸ In the sixteenth century, and, without doubt,

the canonic rule should be applied by the secular courts, the moment the safety of the soul is affected. But *Balde* maintains that "*de facto non servatur*." *Gérard de Sienne*, "*De Præscriptione*" (a work of which we have only the extracts in *Jean, d'André*, etc.). Cf. *P. de Ferrière*, "*Practica*," cited by *Ruffini*, p. 116; *J. Faber*, "*Inst.*," "*de Usuc.*," 2. — As to the Italian Customs, cf. *Lattes*, "*Diritto Consuetudin.*," p. 121. — German law: *Stobbe*, I, p. 579.

¹ "*Gr. Cout. de Fr.*," p. 198. *Loysel*, 730: "The possessor in bad faith cannot have the benefit of prescription" (note and bibl.) — "*Siete Part.*," 3, 29, 12 (especially). — *Struve*, "*Jurispr.*," ed. 1733, p. 134: The canon law was followed in lands of the Empire and in Saxony.

² *Gui Pape*, "*Q.*," 416, 199 (*Ferrière* on the q. 416 states that practice allows one to have the benefit of the prescription of thirty years without lawful title or good faith), "*Quæst. Capellæ Tolos.*," 74 (is good faith required for prescription in personal actions?); *Pasquier*, "*Inst.*," p. 299; *Lamoignon*, title on prescription; *Domat*, "*Loix Civ.*," 6, 7; *Pothier*, no. 34. *Dunod*, I, 7, enumerates the five opinions which have arisen on the point of knowing whether the canon law should be followed in preference to the civil law.

³ The theologians were even in doubt whether one could keep the thing obtained by usucaption without committing a sin: *Buchereau*, "*Inst.*," p. 158. — Cf. the question of knowing whether prescription can be officially supplied by the judge: *Britz*, p. 964.

⁴ *Ferrière*, see "*Poss. imm.*"; *Guyot*, see "*Prescr.*"; *Pasquier*, "*Inst.*," p. 303; "*Digest. Ital.*," "*Ab immemor.*" (*Schupfer*); *Stobbe*, § 69 (bibl.); *Britz*, 1013.

⁵ *Loysel*, 726 et seq.; *Dunod*, 2, 13, distinguishes them; *Biernmann*, "*Trad.*," 25.

⁶ *Guyot*, loc. cit.; *Pasquier*, p. 303; *Masuer*, 22, 23. It was applied especially to servitudes which had been interrupted. *Contra*, *Lamoignon*, p. 214. Cf. *Lalaure*, "*Servitudes*," I, 3.

⁷ Delays in *Dunod*, 2, 14; *Stobbe*, loc. cit. Cf. *Dig. X.*, 5, 40, 21, 26; "*Sexte*," 2, 13.

⁸ "*Siete Part.*," III, 29, 7 (note); *Dunod*, 2, 14, cites the "*Glose*."

in later practice, "immemorial possession is equal to title."¹ This Customary institution, to which it was an absolute mistake to try to attribute a Roman origin,² has played a large part in the formation of feudal society; it is this institution which gave to the latter its laws and its rights.³ The canonists and the regalists attacked it by their theory of imprescriptible rights, which they understood as applying not only to ordinary prescription, but to immemorial prescription, in which, however, they did not see a real prescription:⁴ "he who has eaten of the king's goose gives back a feather a hundred years later."⁵ In 1850 the reformed Custom of Paris limited the application of this institution to private matters by deciding, for example, that no servitude could be acquired by virtue of long enjoyment (Art. 186).⁶ It has disappeared from the modern codes; there was no more room for it under a system of strict regulation and general application of written proof.

§ 289. **The Roman Prescriptions. Prescriptions of Ten to Twenty Years and Prescriptions of Thirty Years.** — The Roman practice at the time of the invasions scarcely recognized any but the acquisitive prescription of ten to twenty years and the extinctive prescription of thirty years (without good title or good faith).⁷ These institutions are once more found in the Frankish period, not only in the Roman laws and documents,⁸ but even in those

¹ *Loysel*, 727. "Non tam est præscriptio quam titulus," says *Dumoulin*, "Cons.," 26; cf. on "Paris," 12, 13, 14, "Cod. Fabr.," 7, 13, 7; *Legrand*, on "Troyes," Art. 61, gl. 5; *Pothier*, no. 281. From whence it follows that it can even be applied to rights which the laws declare cannot be lost by prescription.

² *Dig.*, 39, 3, 1 and 2; 43, 20, 3, § 4.

³ *Brie*, "Gewohnheitsrecht," 1899; *Gény*, "Méthode d'Interprét. et Sources en Dr. Privé," 1899.

⁴ Cf., for example, *Gui Pape*, q. 357, 416; (a) "jura superioritatis non præscribuntur" (as the feudal system had only been a long prescription of the sovereign rights); (b) controversy as to the "jura quæ princeps possedit ut privatus," such as fiefs, etc.: *Masuer*, 23, 13; *Chopin*, "De Doman.," 3, 9, 3; *Bacquet*, "Œuvres," ed. 1744, I, 613: against the king one cannot acquire by prescription of however long a time, even of one hundred years: "Ord.," 1539, etc.; *Dunod*, III, 5; *Lefevre de la Planche*, "Dom.," 12, 7. Those who have the seigniorial rights, such as the lords' immediate rights and rents, cannot lose them by prescription: *Loysel*, 735; "Cout. Not. du Chât.," 125; "Paris," 123 *et seq.*; *Masuer*, 22, 7; *Desmares*, 309; "Gr. Cout.," p. 308; "Paris," 114 ("Rentés"); "Toulouse," 146. As to the tithes and enfeoffed tithes, which cannot be lost by prescription, cf. *Loysel*, 728, 729; *Pasquier*, p. 306; *Desmares*, 115; *Masuer*, 22, 18.

⁵ *Loysel*, 726; *Chaisemartin*, "Prov.," p. 194.

⁶ *Ferrière*, on this article; *Lalauze*, "Servitudes," p. 239.

⁷ "Cod. Théod.," 4, 13, 2; 4, 14, 1; "Nov. Valent.," III, t. 26 and 30, 34. Cf. "Cod. Just.," 7, 39, 3; "Reforms of Justinian" in 528 and 531; "Cod. Just.," 7, 39, 8 and 31, 1; *Esmein*, "Mélanges," 215.

⁸ "L. Rom. Wis.," "Cod. Théod.," 4, 12 (13); "Nov. Valent.," 8 and 9;

which are of a Germanic character, for example, in certain formulæ and in laws where the Roman origin of these institutions cannot be doubted.¹ Custom realized a reform which Justinian must have made at the same time in the East, by transforming the extinctive prescription of thirty years into usucaption; for this very reason it was given precedence over decennial or twenty years' prescription, which required conditions that were rather difficult to fulfill.² In the books of Customs of the thirteenth century these prescriptions of a Roman origin are almost the only ones admitted under the name of *long tenure*. For the thirty years' prescription no color of title is demanded, but there was hesitation on the subject of good faith.³

Paul, 5, 2 (prescription of 10 and 20 years); *Papien*, 31; 39, 44; "Edit. Théod.," 12; "Petrus," 3, 10; "Brachyl.," 2, 9, 10, 11; "R. Bourg de l'ens.," 1874, 43.

¹ The laws of the Burgundians and the Visigoths only mention the prescription of thirty years: "Burg.," 79 (in 515), ed. *Salis*, p. 103; cf. *ibid.*, 17. As to the interpretation of these texts, see *Zeumer*, "Gesch. d. Westgoth. Gesetz.," p. 400 ("N. Arch. f. ätt. Deutsch. Gesch.," t. 23). They deal with a prescription of fifteen or twelve years "sine testiis" (without protest) and not "sine tertiis": "Wis.," 10, 2, and "Cod. Euric," 277 (50 years, "sortes gotice" and "tertia Romanorum"); *Dahn*, "Westgot. Studien," p. 79. — "Dec. Childeb.," 596, c. 3: possession of ten years as between people who are present, of twenty years between people who are absent, and with respect to orphans; in general, "tricenaria lex." The "Præc." of *Clotaire*, II, c. 13, recognizes the thirty-year prescription by which property can be acquired for the benefit of the Church, of clericals and of the "provinciales" (Gallo-Romans, cf. *Loening*, "D. Kirchen.," II, 284), provided it rests upon a lawful title ("Capit.," ed. *Boretius*, I, 15 and 19). "Capit.," I, 107, c. 17; 293, c. 9, 206 and 219; II, 25 (mention of the prescription of forty years as opposed to the Church): *Schroeder*, p. 378. See the statutes cited by *Thévenin*, "Textes," Table, see "Prescription" (it is always the prescription of thirty years which is contemplated; they limit themselves to saying that the interested parties have been "legaliter vestiti" during thirty years, and that they have possessed "quiete"). — As to the Lombard law, cf. *Schupfer*, "Allodio," nos. 41 *et seq.* "Roth.," 227, 231, is concerned with the possession of five years, and *Grimoald*, 1 *et seq.*, introduces the prescription of thirty years: he who can prove that he has been in possession for thirty years is released from the duel in any litigation as to the ownership; it is sufficient if he give an oath. Cf. "Liut.," 115 (the possession of thirty years based upon a false grant is of no value): "Ratchis," 2; "Aist.," 9, 14; "Liut.," 69 (forty years among relatives); 77 (sixty years with regard to property of the king). According to *Schupfer*, possession of thirty years would not make one acquire the ownership, but would merely give one a means of defense against reclaiming upon the part of the owner. But *Albertus* states that practice did not thus understand it: "cum prescriptione adquiritur dominum" (p. 141, ed. *Anschütz*).

² See preceding note. "Petrus," III, 10: the possessor in bad faith "dominus non erit, nisi per 30 annorum spatium"; *Pertile*, IV, 216.

³ *P. de Fontaines*, 368; "Artois," p. 68; 30 years, according to the general custom, which is contrary to certain local Customs that have upheld the tenure of a year and a day, and to the written law according to which a possession of from 10 to 20 years is required (cf. t. 26). *Beaumanoir*, 24, 3, 4: user for a year and a day gives the seisin; tenure of 10 years gives the ownership and the seisin, provided that it is based upon a sufficient consideration; user during thirty years has the same effect without its being necessary to allege any consideration; cf. 8, 9; 16, 4; 20; "Jostice," 15; 16, 2: a long,

§ 290. In the Sixteenth Century the Customary law becomes fixed;¹ the Customs admit, as a general rule, two acquisitive prescriptions, — that of ten and twenty years,² with color of title³ and good faith (during the whole time of the possession),⁴ and that of thirty years, with neither title nor good faith.⁵ Possession only leads to prescription if it is peaceful,⁶ public,⁷ was not gained by

peaceful tenure of 7 or 10 years and from the lord (this last condition is also contemplated by *Beaumanoir*); "Et. de St. Louis," ed. *Viолет*, I, p. 111 (and texts cited); "Summa Norm.," 52, 7; 111, 13 (30 yrs.); "Gr. Cout.," 2, 8; *Desmares*, 232; *Boutaric*, I, 47, 48; *Masuer*, XXII; "Const. du Châtelet," § 53 (note, ed. *Mortet*); "N. R. H.," VIII, 335; "Cout. d'Anjou," ed. *Beaumonts-Beaupré*.

¹ Outside of the writings of the Romanists, see the "Confér. des Coutumes, de Guenois," II, 6; *Ferrière*, on "Paris," Table, see "Prescription"; *Loysel*, 711 *et seq.*; *L'Hommeau*, 244 *et seq.*; *Domat*, "Loix Civiles," 3, 7; *Dunod*, *op. cit.*; *Pothier*, *id.*; see *Ferrière*, *Guyot*. — *Serres*, "Inst.," 2, 6 (p. 157, ed. 1771): in countries of written law one can no more acquire immovables than movables excepting by a prescription of thirty years (as a consequence of a false interpretation of the "Nov.," 119, c. 7, from whence was derived the "Auth. Malæ Fidei," "Cod. Just., de Præscr. X, vell XX Ann."); *Julien*, "Elém. de Jurisp.," p. 181; on "Provence," Prescription. — Bibl. in *Brillon*, "Dict. des Arr.," see "Prescr."; *Britz*, p. 962. — As to the prescription which applies to movables, cf. *Britz*, p. 1028; *Struwe*, "Jurisp.," p. 141.

² Ten years in the case of people who are present and twenty years in the case of people who are absent: *J. Faber*, "Inst. de Usuc.," 8 *et seq.* Several systems: 1st. *Common Law*. The parties are supposed to be present when they are domiciled in the same diocese. "Et. de St. Louis," II, 161, in the same bailiff's or seneschal's jurisdiction (countries of Customs), or within the jurisdiction of the same Parliament (countries of written law): *Loysel*, 717; "Paris," 116. — 2d. *Exceptional Customs*. It is the nearness of the immovable which has been prescribed that settles the question of presence or absence. "Sedan," 313: they are present who live within ten leagues of the immovable. Same system in the Civil Code, 2265. — 3d. *Serres*, p. 159: absence from the kingdom "reipublicæ causa" (Parliament of Toulouse). Cf. *Boutaric*, I, 20, 47.

³ *Beaumanoir*, 24, 4; "Gr. Cout.," 2, 8; *Desmares*, 232; "Paris," 113 *et seq.* Generally a reputed title was deemed sufficient because a lawful title was only required as an element of good faith: "Paris," 114; *Dunod*, p. 12; *Pothier*, no. 97. *Contra*: *Lemaître*, on "Paris," 6, 1, 1; *D'Argentré*, on "Bret.," 266, 1, 6; Civil Code, 2265. — As to defective title, cf. *Dunod*, p. 47. — *Buchereau*, "Inst.," p. 161.

⁴ In countries of written law, as in the Roman law, it is sufficient if the good faith existed at the time of the purchase; thus: Civil Code, 2269. — In the countries of Customs, on principle, it is necessary for the good faith to last during the entire possession, thus following the canon law; but, as a matter of fact, it would be necessary for bad faith which occurred during the time of possession to be well established in order to prevent usucaption. This practical point of view seems to us to decide in favor of the opinion admitted by the Civil Code: *Lamoignon*, p. 213. Cf. *J. Faber*, "Inst.," fo. 37; *Struwe*, "Jurisp.," p. 239.

⁵ "Orl.," 161; *Pothier*, no. 179; *Dunod*, p. 107. Prescription of twenty years between persons who are present or persons who are absent with or without title: *Ponthieu*, 116; "Boulonnais," 121. Other variations: *Britz*, p. 972.

⁶ *Desmares*, 232: without disturbance. That is to say, not civilly interrupted: *Pothier*, no. 38; "N. R. H.," 1875, 534. As to disturbance in fact and disturbance at law, cf. *Argou*, II, 10; see *Ferrière*, *supra*, "Possession"; Civil Code, 2229, 2233. — Things stolen or the possession of which has been obtained by violence are not free from prescription; a prescription of thirty years runs against them: *Serres*, 2, 6, 2. Cf. *Landsberg*, p. 207 (Glossators).

⁷ As to concealment, cf. "Possession"; "Melun," 170; "Orl.," 253. *Pothier*,

another's consent,¹ and has lasted² without interruption during the required time.³ One can join to one's own possession that of one's grantor.⁴ Once acquired, prescription confers ownership,⁵ and, as nothing is to prevent an owner from depriving himself of his property, when he has gained it by prescription, he can renounce the benefit of the prescription; on the other hand, an anticipated renunciation cannot be lawful.⁶ Differing from short prescriptions, that of ten to twenty years or thirty years runs neither against those who are absent⁷ nor against minors.⁸ Nor can it be

28, *Dunod*, p. 31, admit that one must go back to the beginning of the possession in order to decide whether it is public or concealed. *Guyot*, see "Prescr.," § 17.

¹ Mere withholders (usufructuaries, farm tenants, etc.) cannot alter the means by which they hold possession. The status of tenure at will lasts indefinitely "etiam per mille annos." As to the interference of the title, *cf.* *Argou*, II, 10; *Dunod*, p. 36; *Pothier*, no. 35; Civil Code, 2236 *et seq.* — Acts of mere toleration: Civil Code, 2232; "R. crit.," 1880, p. 450. — As to acts entirely dependent upon one's power, *cf.* *Pothier*, I, 338 (ed. B.); *Dunod*, p. 80 *et seq.*; *L'Hommeau*, 285; *Guyot*, see "Prescriptions," § VII; *Britz*, p. 967; *Struwe*, "Jurisp.," p. 140.

² An interruption of the prescription (*Desjardins*, "N. R. H.," 1877, 293) generally results from a demand at law or an adjournment (Order of Jan. 22, 1655). It was asked whether good faith ceased when this demand was accepted: "Ord.," 1539; 1667, 2, 1; *D'Argentré*, on "Bret.," 266. As an exception, in certain provinces extrajudicial summonses had the same effect: *Salviat*, "Jurispr. de Bord.," p. 109; *Dunod*, I, 9. Distinct acts of assignment, purchasing and distraint were even more like it in this respect: *Pothier*, "Oblig.," 697. As to acknowledgment, *cf.* *Dunod*, p. 58. — "Toulouse," 146; "L. d. Droiz," nos. 420 *et seq.*

³ "Probatis extremis præsumitur media," *Britz*, p. 966.

⁴ *Dunod*, p. 19 (Civil Code, 2235). *Argou*, II, 10: he who wishes to gain something by prescription may, if he chooses, make use of the possession of his grantors and join it to his own; he may also make use of his own possession only and reject that of his grantors: *L'Hommeau*, 249 *et seq.* (the bad faith of the predecessor injures the heir). As to the doctrine of the Glossators, *Landsberg*, p. 191; *Thévenin*, no. 25.

⁵ "Gr. Cout.," 2, 8; *Desmares*, 106, 222; "Cout. Not.," 99, 130, 125, 152. — In countries of written law, as in countries of Customs, the purchaser of an immovable outlaws mortgages which encumber it by a possession of from ten to twenty years: *Serres*, p. 157. *L'Hommeau*, 269: the mortgage action which is joined to the personal action is outlawed in thirty years in countries of Customs and forty years in countries of written law. *Serres*, *ibid.*, maintains that this prescription of forty years against the mortgage action which is given to the debtor has never been admitted in practice: *Guyot*, see "Prescr.," § 11; *Glasson*, VII, 353.

⁶ *Dunod*, p. 112 (bibl.); *Masuer*, XXII, 22.

⁷ That is to say, those who have disappeared: *Boutaric*, I, 27; *Guyot*, see "Prescr.," § 14 (absent persons), 15 (madmen), 16 (minors); *Britz*, p. 1001.

⁸ According to our old jurisprudence, prescription is suspended as long as it is impossible for the man against whom it is contracted to act and consequently to interrupt it, for he is not at all to blame. This rule seems to come from the Canon law (*Gratian*, II, 16, 3, 13 *et seq.*), and is consistent with the spirit of this law in matters of prescription, and is one which has been attributed to the commentary on I, I, § 2, "Cod. Just.," "de annali except." But no agreement was reached as to its application: *Masuer*, p. 385, ed. 1600; *Gui Pape*, "Q.," 416; *Dunod*, p. 62; *Pothier*, no. 22; "Oblig.," no. 680;

set up against privileged persons, such as the king, communities, or the Church.¹ The prescription of forty years² is usually the period required against the Church; against the Holy See or the king, that of one hundred years.³ These derogations of the common law have ceased to exist; one can say as much, not of the rules concerning things which are imprescriptible, — for example, the rights of sovereignty (they have been maintained for the most part),⁴ — but of customs and jurisprudence with regard to fiefs, manors, and ecclesiastical benefices.⁵ The old feudists held out logically for imprescriptibility in the relations between lord and vassal or copyholder. Dumoulin still lays down the principle that the “lord and the vassal cannot gain anything by prescription against each other.” In the eighteenth century there was seen in this nothing but a prejudice, and for a long time the rule had come to be almost annihilated by the limitations which were unceasingly brought to bear upon it. According to Dumoulin,

Domat, “Loix Civ.,” 3, 7, 5. The canonists decided that “prescriptio dormit tempore hostilitatis cum jura in civitate non redduntur.” Was it necessary to apply this explanation to cases where obstacles of a less absolute character impeded the exercise of prescription (minority, absence, lack of knowledge, etc.)? Civil Code, 2251. The king was recognized as having the right of freeing one from prescription for just cause: *Masuer*, XXII, 1. Divergences among the commentators, details in: *Landsberg*, p. 201; *Loyseau*, “Déguerpiss.,” 3, 2. Action on a declaration of mortgage devised in order to allow of the interruption of the prescription running against the mortgage; the mortgage action could not be begun until after the seizure and sale of the property of the mortgagor: see *Ferrière*. — Does prescription run against married women? *Post: Glasson*, VII, 356.

¹ *Desmares*, 232; “Gr. Cout.,” p. 199: thirty years against the king, forty against the Church, one hundred against the pope: *Laurière*, on “Paris,” 123. Other persons privileged in the old law: the Crusaders: *Loysel*, 731 (bibl.); *Bridrey*, “Thèse,” 1899. Cf. *Boutaric*, I, 47. The Order of Malta: *Bourjon*, I, 1093; *Guyot*, see “Malte.”; *Brillon*, see “Prescr.”; *Britz*, p. 992.

² Divergences between the Theodosian (*Gratian*, 2, 16, 3; Dig. X, 2, 26), and the Justinian law (“Nov.,” 9; 100 yrs.; Dig. X, 2, 26, 13; “Nov.,” 111, 131; 40 yrs.; *Hincmar*, “Op.,” II, 737); and, finally, the Lombard law (“Aist.,” 9); “Capit.,” V, 389; cf. “Auth.,” “Quas Actiones,” “Cod. Just.,” “de Sacros. Eccles.,” taken from the “Nov.,” 131, c. 6; *Julien*, “Epit.,” 119, 6; “Arles,” in *Giraud*, II, 1; *J. Faber*, “Inst.,” fo. 37, V; *Loysel*, 722, 729, 736 (bibl.). The canonists and the glossators are at variance: *Landsberg*, p. 198; *Gui Pape*, “Q.,” 161; *Ruffini*, “Buona Fede,” p. 36; *Desjardins*, “Aliénation et Prescription des Biens de l'Eglise dans le Droit du Bas-Empire et dans le Droit des Capitulaires” (“R. h. Dr.,” VI, 254); *Dunod*, “De l'Alién et Preser. des Biens de l'Eglise,” following his treatise on “Prescr.”; *Ordonnances*; *Masuer*, XXII, 21.

³ *Loysel*, 725 et seq.; *Gratian*, “Decret.,” II, 16, 3, 17; *Biermann*, “Frad. F.,” 25.

⁴ Theory of the Glossators: cf. *Landsberg*, p. 196. As to the real property given by way of marriage portion: *Masuer*, 22, 4; *J. Faber*, “Inst.,” fo. 38; *Rouss. de Lacombe*, “Rec. de Jur. Civ.,” see “Prescr. in F.”; *Guyot*, § 21; *Bourjon*, I, 1093.

⁵ *Guyot*, see “Prescr.,” § 36; *Dunod*, pp. 300 to 408.

himself, possession for one hundred years did not give prescription. As concerns the lord, the prohibition of gaining the fief by prescription was reduced to the single case of feudal distraint; by means of prescription it was possible to change the fief into a manor. Of this there only remained the idea that the vassal was merely a holder at will and could not by himself alter the status of his possession. The nature of the quit-rent lease was opposed to the copyholder gaining freedom from the rent by means of prescription; by ceasing to pay it, he could not thus change his lease into an allodial tenure; moreover, certain Customs ("Auvergne," "Bourbon") laid down that the rent was lost by the prescription of thirty years, and that everywhere arrears, which were a portion of the rent, could be lost by prescription.¹

In the existing French law prescription has the same "raison d'être" as it had in the Roman period; it strengthens ownership because it makes its proof easy;² the required periods of time, and its other rules, prevent its degenerating into a spoliation.³ Whilst it has lost some of its usefulness, it is still a necessary part of our system of real property. They have only succeeded in doing away with it in the systems which are called systems of *enrolment* (like the Torrens Act and Prussian Law of May 5, 1872), where the question of ownership is reduced to knowing whether one's name is or is not inscribed upon the public registers.

¹ *Loysel*, 735; *Guyot*, see "Prescr.," § 26 *et seq.* (bibl.).

² It is not sufficient in practice to obtain this result: see in *Aubry and Rau*, "Cours de Droit Civil," II, 219, the system organized by French jurisprudence with the object of still further simplifying the task of the owner. As to the existence of an action allowing the person in possession to recover a thing against which usucaption had begun to run in his favor in our law, cf. *Appleton*, "Hist. de la Propr. Prétor.," 1889; *E. Lévy*, "Thèse," 1896.

³ Discussion among our old authors as to whether prescription sprang from natural law (*D'Argentré*, on "Bret.," 14, 10; *Puffendorf*, "Dr. de la Nature," 12, 9; *Vattel*, "Dr. des Gens," II, 11, *Dunod*, 1) or from the civil law (*Cujas*, on I, 1, Dig., "de Us.," *Grotius*, "De J. Belli," 2, 4; *Pothier*, no. 20). The supporters of this last opinion refused to give foreigners the benefit of this prescription: *Denisart*, see "Etranger," 9. They also admitted that a natural obligation survived prescription: *Guyot*, see "Prescr.," § 19.

TOPIC 6. ACQUISITION OF THE OWNERSHIP OF IMMOVABLES — DELIVERY

§ 291. The Transfer of Ownership by Agreement.	§ 312. (V) The Common Law of the French Customs. System of Pretended Delivery.
§ 292. Frankish Period.	§ 313. The Same. — Origin.
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§ 291. **The Transfer of Ownership by Agreement** took place in Rome by means of delivery: "traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur" ("C. J., 2, 3, "de pactis," 20). The Civil Code, on the other hand, demands neither delivery nor any other material act; ownership is transmitted by simple consent (Arts. 711, 938, 1138, 1583). The contract, sale, gift, etc., by virtue of which this transmission takes place, were, at the most, productive of obligations in the Roman doctrine; our old authors qualified it as "titulus ad adquirendum"; it has become a "modus adquirendi"; it gives at one and the same time a credit, having for its object the property alienated, and the ownership of this property; and, as this latter right generally renders the former one useless, it is the latter alone which is taken into consideration. The modern theory is found to be the reverse of the Roman doctrine; we must now investigate how it came to be formed.

§ 292. **Frankish Period.** — The principle of the Germanic legislation is none other than that of the Roman law: no transfer of property "solo consensu,"¹ necessity of a material surrender or

¹ Mere consent is not sufficient, even to create obligations. Some of the formulæ of the common Roman law might lead one to believe the contrary, — for example, *Rozière*, I, no. 160; *Marculfe*, II, 19; "Roth," 183.

delivery. It can be accounted for, as we shall see, with regard to contracts, by reasons drawn from popular psychology, or relations between families, — relations out of which, to a great extent, the primitive law has sprung. In the eyes of a man of the people a simple verbal declaration has not any very great importance; it does not bind him, it is only recognized by the law in proportion as it is explained, is confirmed, and becomes established in the eyes of all, by some external manifestation; the will should in some way become incarnate, take form in the shape of some formality, in order to be recognized; the ceremonial of the oath, where the formula is still accompanied by a gesture, is a persisting vestige of the old usages; and in former times formalities were the more necessary because the relations between two important groups, such as were the ancient families, were being regulated.¹

§ 293. **Real Investiture.** — Delivery was originally extremely simple, without any element of artificiality; it consisted of two acts: 1st. The *apprehension* or taking possession of the land by the vendee;² he went upon it in person, installed himself there and performed certain acts of ownership.³ 2d. The *surrender*;⁴ the grantor, after having taken the grantee upon the land, retired and abandoned the land, declaring at the same time that he gave up his rights over it; the whole thing took place publicly, — that is to say, in the presence of witnesses.⁵ The spoken word and the ges-

¹ As to the origin of the principle, cf. Zallinger, "Wesen, u. Urspr. d. Formalismus," 1898; Heusler, I, 65.

² "L. Rib.," 60, 1. Cf. "Bai.," 15, 2; 17, 2; "Burg.," 60, 2. Mentioned in the statutes. "Tradidit . . . factum est super ipsam terram": "Cart. de Redon," no. 22; Thévenin, "Textes," Table, see "Tradition Récele"; Act of 848, nos. 81, 82; Pollock and Maitland, II, 88. Cf. "L. Sal.," 46 (appointment of an heir): "sessio triduana" (Geffcken, bibl.). Statutes of 835 and 846, gift from Count Vivien to the Monastery of Cunault, in the county of Angers, and delivery by his "advocatus": "Raynald," in Juénin, "Hist. de Tournus," 1733. As to the fixing of the boundaries of the land conveyed, cf. "Bai.," 17, 2 and tit. 11; "Alam.," 81; Grimm, "R. A.," 527, 542. See also "Liber Term." (first half fourteenth century) cited by De Ribbe, "Soc. Provenç.," p. 185; Glasson, "Gr. Encycl.," see "Bornage"; Schroeder, p. 59; Thévenin, no. 158, etc. Current forms for a domain: "terris," "domibus," "ædificiis," "mancipiis vineis," "pratib.," "pascuis," "campis," "cultis incultis," "aquis aquarumque decursibus" etc., "rem exquisitam" (or "inexquisitam"). Cf. Thévenin, no. 124; "Et. de St. Louis," I, 138; Boutaric, pp. 211, 268, 775; "Justice," p. 149 et seq.

³ It may be that at a very early period the taking of possession became more simple and was reduced to the giving of a clod of earth to the grantee, etc. When a rather extensive estate was involved this was almost a necessity.

⁴ "Werpitio, exfestuatio, resignatio. Me exinde foras expoli et absasito feci; sibi foras exitum, alienum vel spoliatum esse dixit." No essential formulae are given. Cf. Grimm, "R. A.," p. 52 (formulae), 555; "L. Sal.," 58.

⁵ "In presentia omnium," etc. (market, court), "coram testibus legitimis": "Rib.," 59, 60 (the number of witnesses varies according to the value of the

ture thus became united in an indivisible proceeding, which was called in Latin "traditio," or "vestitura"; in the Germanic language "sala."¹

§ 294. **Symbolical Delivery**² was established at an early period alongside of real investiture, and in the end even took its place.³ The material acts of which the original form of delivery consisted and which were carried out upon the land itself, became simplified; the grantee was limited to receiving from the grantor symbols⁴ varying according to peoples,⁵ and which may be classified into two groups: (a) some representing the land itself, from which they are detached;⁶ the part is taken as representing the whole; such are the clod of earth (delivery, "per wasonem," "per cespitem"), the branch of a tree ("per ramum"), the knife which has served to cut them,⁷ the stone of the house, or the door and the hinge, the vessel full of water (in the case of a pond), the rope of the bell of

object; there must be twelve, seven or three; and the same number of children are added to them, who are given blows and have their ears twisted). "Bai.," 16, 2 ("testes per aurem tracti"); "Burg.," 43, 1; 60; 99; "Roth.," 172 ("non absconse, sed ante liberos homines"); "Wis.," 5, 4, 3; 2, 6; "Capit.," 803, 6, etc.; "L. Rom. Cur.," 8, 5, 1; *Chaisemartin*, "Prov.," p. 210: "He who wishes to buy the land must summon the people"; *Grimm*, "R. A.," 4th ed., Index, see "Zeuge"; *Brunner*, "Forsch.," p. 88; "Gerichtszeugniss," in "Festg. f. Heffter Urk.," I, 230 (a subscription in deeds by witnesses); *Schupfer*, p. 142 *et seq.*; "Cart. de Redon," no. 46, etc.

¹ "Sala" (Got. "saljan" equals "tradere," "vendere"). — *Grimm*, "R. A.," 554; "Capit.," I, 380. Often the name "sala" is reserved for the sale whose delivery is only its carrying out; but such does not seem to be the language of the texts. Moreover, we believe (*post*, "Contracts") that a sale which was brought about entirely by mutual consent was not obligatory in the old Germanic law; it did not become so until there was total or partial execution, so that it was more often than not confused with investiture. Cf. *Sohm*, p. 103. The lack of a "justa causa traditionis" would not have prevented the latter from being valid (*cf.* doctrine of Julian at Rome).

² *Pérard*, "Rec. de Pièces p. l'Hist. de Bourgogne," p. 22 (in 840), 25 ("inter altare et corpus Benedicti tradidit"); p. 57 (in 882); *cf.* p. 33 (in 756); "Cart. de Redon," no. 165 (in 832); "Form. Lindenbr.," 18, 55, 27, 58, 75, 82, etc.; *Mabillon*, "De Re Dipl.," p. 542 (in 870); *Mollenbeck*, "De Trad. Symbolica," 1708; *Schaumburg*, *id.*, 1727.

³ Towards the tenth century real investiture was not sufficient to transfer ownership; *cf. post*, "Feudal Period."

⁴ As to the symbolism in Germanic law, *cf. post*, "Contracts"; *Grimm*, "R. A.," 110; *Michelet*, "Orig.," p. 114; *Thévenin*, "Textes," p. 263; *Du Cange*, see "Investitura," etc.; *Kraut*, "Grundriss," nos. 15 to 27; *Heusler*, I, 65; *Schroeder*, p. 59; *Zallinger*, "Wesen u. Ursprung des Formalismus im Alt-deutsch. Privatr.," 1898; *Huber*, IV, 702.

⁵ "Cartul. Langob.," "M. G. H., L. L.," IV, 595.

⁶ In the end, moreover, they took objects of some kind, "corporeum quod libet," whether they were taken from the piece of land or not: *Sohm*, p. 94, n. 3 (they give a stone out of the road).

⁷ "Cart. de la Ste.-Trinité du Mont" of Rouen, p. 455. In many deeds one reads: "Mittere terram super altare per cultellum." There are still in existence charters to which are attached knives, *Pollock and Mailland*, II, 87, 89.

a church, etc.;¹ (b) others express the power which one has over the thing which is alienated: they are the hand, the glove ("manus vestita"),² the lance, the arrow,³ the "festuca," etc. This last symbol, which was in use especially among the Franks, is made use of alike for the transfer of ownership and for the formation of contracts.⁴

¹ As to these various symbols, cf. *Grimm*, p. 110; *Michelet*, "Orig.," p. 116. In the very old times the vanquished gave up his land to the conqueror by presenting him with some grass, "herbam porrigere": *Pliny*, "Nat. Hist.," 22, 4; *St. Augustine*, cited by *Fournel*, "Adultère," p. 194. On the "herba pura" of the feodals, cf. "Liv.," 1, 24. Cf. "L. Sal.," 58; "Chreneeruda" (*Geffcken*, p. 217); "Mélusine," V, 145, 1898, p. 33; *Gaius*, IV, 16, 17. "Alam.," 81 (84): proceeding as to boundaries; they take a clod of the ground in litigation, they plant in it branches cut from the trees that are found there; at the time of the duel the pleaders touch the clod of earth thus prepared with their swords: *Michelet*, p. 117 (persistence of customs of this nature in Flanders); the owner of the land given or sold cut from it with a knife a clod of turf in the form of a circle and the width of twenty fingers; he put in it a wisp of grass, if it were a pasture; if it were a field, a little branch the width of four fingers, in order to represent the land granted; and he placed the whole thing in the hand of the grantee. These symbols could be brought into court; also they were kept with great care in the churches: "Mélusine," VI, 41 (formal entry into Paris of Henri d'Anjou as the chosen king of Poland). As to the brotherhood of the turf, cf. *Michelet*, pp. 195, 206. As to the "scolatio," or throwing of the earth into the breast of the grantee, see: *Du Cange*, Dig. X, 1, 4, 2; "L. Sal.," 58 ("terra pulverem"). *Biermann*, "Traditio Ficta," p. 131; "Z. S. S., G. A.," 1890, p. 255 (clod of earth thrown into the cloak of the purchaser in the presence of witnesses, after which the two parties took each other by the right hand and seized each other's beards, while saying that the ownership of the grantee shall be as firm as the beard is firmly affixed to the chin. Swords thrust into the ground in 1680); 1892, 276 ("span" and "rasen" in 1819); "Cart. de St. Père" of Chartres, I, CXXIV; of Cluny, no. 10, etc.; "N. R. H.," 1885, 206.

² "Per ostio et anaticula" or "et axadoria," door and hinge. *Post*, "English Law."

³ As to the symbolism of the hand, cf. "Mundium." Investiture by simple "Handschlag," in giving the hand: *Pérard*, p. 152 (in 875). As to the "manus vestita," cf. *Heusler*, I, 96; *Amira*, 138. The glove is not only a symbol made use of for the formation of contracts, it is also a symbol of investiture: "per wantonem." Instead of a glove they also make use of a gauntlet(?). "W[andelanc]: per festucam atque andelangam, per wadium et andelangum": see *Du Cange*; *Grimm*, "R. A.," 186. Unless one translate "andelang" by a hand clasp ("Hand," hand; "langen," to clasp). In Saxony the declaration is made "curvatis digitis": *Schroeder*, p. 59; *Amira*, "Dresden. Bilderhandschrift des Sachsenspiegels," 1902 (one is struck with the care with which the movements of the hands and the body are described; the artist has enlarged the hands and lengthened the fingers in order that one may clearly see the gesture prescribed by custom): "Annal.," of *Einhard*, ad. in 776; "Capit. de part. Saxon," 27 (I, 70).

⁴ *Schupfer*, p. 148; "Roth.," 167, 172, 375, 386; "Liut.," 54. *Post*, "Investiture of Fiefs." Investiture "per baculum, fustum, calamum, lignum, veru, virgam"; see *Du Cange*. The "festuca" serves especially for abandonment; in this case it is thrown: *Rozière*, "Form.," 286 ("Sens.," 19); *Thévenin*, no. 137. — But, whatever may have been said, it is also made use of as a symbol of the putting in possession (delivery "per baculum"); cf. "Form. Lindenbrog.," 18; "Cartul. Langob.," 2; see *Ragueau*, "Fust.," "Rain." As to the nature and the part played by the "festuca," controversy. Cf. *post*, "Contracts," "Cart. de St.-Bertin," no. 29; "L. Rom. Cur.," 24, 2 (*Paul*, 2, 3, 1); *D. Vais-*

These methods allowed the parties to carry out the delivery away from the land, — in court, for example, — and the transfer of the immovable property was then reduced to a simple declaration confirmed by the throwing of the “festuca” (“per festucam se exitum dicere, se absacitum facere”),¹ “exfestuatio,” “warpitio resignatio” (cf. the “Auflassung” of the German law of the Middle Ages).

§ 295. **The Same.** — The symbolical delivery originally appeared, so it seems, under the form of **delivery in court.**² Before the tribunal of the Frankish king,³ in actions relating to claims to immovables,⁴ the party who lost was held bound immediately to carry out the restitution of the land to the party who won; the land was abandoned, “per festucam.” The same procedure was made use of at the end of the eighteenth century before the ordinary tribunals.⁵ It could not have been long before symbolical delivery not performed in court, was looked upon as regular.⁶ It does not seem that delivery “in mallo” was made obligatory.⁷ The Capitulary of 809,

settle, “Preuves,” no. 64. The monk renounces the world “cum stipula.” In the “Roman de Renart” the king, taking the wisp of straw, pardons Renart for all his misdeeds. The “Procères Francorum” declare while throwing the “festuca” that they no longer recognize Charles the Simple as their “senior”: *Pertz*, “M. G. H., S. S.,” IV, 124. The “festuca” is sometimes replaced in the twelfth and thirteenth centuries by the thread of a garment or a hair of the beard: *Ibid.*, II, 374; “Ord. des Maiours,” pp. 318, 322 (“N. R. H.,” 1878).

¹ Cf. the preceding note. In title 58 of the “L. Sal.,” “de Chrene cruda,” the insolvent throws earth upon his relatives. Then he goes away, — that is to say, abandons the house and the enclosure by climbing over the hedge which serves to close it in: *Geffcken*, “L. Sal.,” p. 217. — There is no mention made of the throwing of the “festuca”: “App. Marculf,” 19; *Thévenin*, “Textes,” nos. 136, 141, 148, etc. As to delivery to a third party (“Salmann”), who is charged with giving the thing to some designated person, cf. *Stobbe*, “Z. R. G.,” VII, 405; *Thévenin*, no. 124. *Post*, “Testamentary Executors,” “Appointment of an Heir.”

² Example in *Thévenin*, “Textes,” Table, see “Tradition” (no. 132, etc.). — It is clear that symbolical delivery is not by itself a legal act any more than investiture.

³ *Pertz*, “Dipl.,” I, M. 35 (in 658), 73 (in 709 fictitious action); A. 16, 18, 21, 22 (in 746–750). Cf. *Hübner*, “Z. S. S., G. A.,” 1891; *Stutz*, *ibid.*, 1896, 154.

⁴ *Schupfer*, p. 110.

⁵ *D. Vaissette*, “Preuves,” no. 5 (in 781); “Trad. Fuld.,” in 819.

⁶ According to *Sohm*, p. 91, the validity of extrajudicial, symbolical delivery was only recognized in the middle of the ninth century; the Capitulary of 817, c. 6, still looked upon real investiture as a necessity, because it compelled the man carrying out the delivery to give “fidejussores vestiture.” But I have difficulty in considering this argument as decisive. The “fidejussore vestituræ” are only necessary if the delivery is carried on at a distance. Already delivery “per cartam” was admitted with its full effect in the barbarian legislation. Cf. “Capit. Leg. Add.,” 803, c. 6 (I, 113); 817 (I, 282, 379). Cf. I, 113, 151, 182 (Index, see “Traditio”).

⁷ The “L. Rib.,” 59, 1, declares that delivery should be made “in mallo,” the price paid, and the thing received (clod of earth, sod?) if the purchaser wishes to have a “testamentum venditionis.” Cf. t. 60 (nothing, in t. 59,

Chap. 26, is limited to the prohibition of secret deliveries ("de traditionibus ut in abscondito non fiant propter contentiones diversas"); they must take place "coram testibus legitimis." But the publicity with which the "traditio legitima" was sought to be surrounded was better realized than ever when the act took place "in mallo"; in order to give voluntary alienation the same effects as forced alienation, recourse to the expedient of fictitious actions of claims was devised;¹ whether it were a question of real or fictitious actions, the intervention of the tribunal had the advantage of setting aside beforehand the claims of third parties, and of giving the grantee a secure position.²

§ 296. **Putting in Possession in Fact** was thenceforth distinguished from delivery in law, as it had not been in primitive times.³ The former became the necessary complement of the latter. The terminology commonly adopted in our day reserves for delivery in law the name of "traditio," whereas, the taking of possession is preferably termed "vestitura," and the agreement which precedes delivery, and which is ordinarily a sale, is sometimes called "sala." But the wording of the sources is far from being as clearly defined as this; these words are often used for one another.⁴ The entering into possession is described,

indicates that a piece of land is being dealt with; should one not understand it as applying to a sale of a movable, contrary to the general opinion?). See *supra*, Capitularies of 803 and 817. *Bulow*, "Utrum ad Transfer dom. Resignatione solemn in Judicio facta Opus fuerit," 1870; *Pertile*, IV, 227. Cf. "Edict. Théod.," 53: if there is no magistrate, defendant "duumvir," the delivery must take place before at least three "curiales"; even then it is not valid unless the entering into possession takes place to the knowledge of the neighbors: *Marculte*, I, 14; *Thévenin*, nos. 81, 82, 121, 124. Cf. *Sohm*, n. 41.

¹ In England fictitious actions were resorted to for transfer of ownership until 1833.

² *Post*, "Auflassung" in Germanic law.

³ Various systems to account for this splitting up of one act into two distinct acts, the delivery and the "vestitura." — 1st. Public delivery "in mallo" in the presence of the popular assembly is connected with the collective form of ownership. If this were so, it would have been rigorously demanded in the most ancient documents, and just the contrary is what has been established. — 2d. Advantages in fact resulting from public delivery (facility of proof, protection for grantee). Secret purchase seems like a fraud. Those who take part in the public assembly can set up their rights. According to this opinion delivery "in mallo" must have been required, and this is not so. — 3d. A borrowing from the Roman common law, imitation of the delivery "per cartam." It seems to us more correct to say that these two forms of delivery are derived from the same tendency. — 4th. Symbolical delivery was applied in cases of gift for the benefit of the Church: "Cart de Redon," no. 99 (in 866), 142, 143, etc. Example in the sixteenth century in Switzerland: *Huber*, IV, 702. — 5th. The cases of the giving up of possession at law are the oldest cases of symbolical delivery that we know of.

⁴ *Thévenin*, "Textes," see Index, no. 82 *et seq.*; see *Du Cange*; *Grimm*, "R. A.," 555 ("Sale" and "Gewere"). Expressions such as "vendidi et tradidi."

sometimes with great lavishness of detail, in the documents of the Middle Ages up to a recent period: the new owner is shown riding over the land on horseback or in a cart "in signum realis et vere apprehense possessionis," cutting branches of trees, tearing up tufts of grass, causing the earth to be worked, entering the house, making a fire therein, embracing a column, sitting down upon a seat, etc. It was not a rare thing for analogous ceremonies to be practised in the installation of functionaries, the crownings of kings, the enthroning of popes and bishops.¹

§ 297. **Juridical Effects of these Acts.** — The real investiture of the primitive law conferred possession and ownership at one and the same time.² When the delivery and the investiture became separated, each one of these acts had its own special effects. If the descriptions which are found in documents (the "notitiæ," made of the transaction) are any indication of the importance which the taking of possession in fact had, it is no less true that the symbolical delivery constituted in law the essential portion of the operation. It carried with it the transfer of ownership; the grantee had the right to put himself in possession in spite of the opposition of the grantor, or of third parties who might have received the land from him (real action).³ Between two successive assignees of the same assignor, the one who had first received delivery was preferred, and not the one who had first taken possession.⁴

¹ Grimm, p. 184; Michelet, *loc. cit.*; Schupfer, p. 159; Pertile, IV, 228; "R. h. Dr.," 1869, 151; XII, p. 85 (taking possession of a village in Alsace in 1728); "Acad. lég. Toulouse," IV, 28. In the archives of the Haute-Garonne are to be found documents establishing the conveyance of the building of the Temple to the Order of Saint Jean in 1326 by the cowl and the keys of the doors; the giving of a garden by the spade and the ring of the door, etc. (communicated by M. Pasquier). To what extreme details they went one may judge by this citation borrowed from *Pollock and Mailland*, II, 89, 3: (the grantor) "reversus versus parietem cepit mingere." As to the "sessio triduana" in Germany, cf. Grimm, p. 190; Kraut, p. 172; Thévenin, nos. 121, 146, etc.; solemn "Circuitus," Beseler, "Erbvertr.," I, 90.

² The previously existing contract, for example, the "sala" or sale, was only effective if it was made a part of the investiture, cf. *Sohm*, p. 98.

³ Brunetti, "Cod. Dipl. Tosc.," I, 103. — Was the payment of the price necessary to the validity of the delivery? "Rib.," 59, 60; "Bai.," 15, 2; Marculte, II, 19; Schupfer, p. 141 (Lombard deeds); Pertile, IV, 225. The deeds and formulæ according to the Roman law constantly mention the payment of the price; the Germanic deeds insist rather upon the symbols of the delivery, and it seems that the transfer of the ownership had become an independent act which was valid when removed from the consideration upon which it depended.

⁴ "Capit.," 817 (I, 282, 380), c. 6: delivery carried out outside of the county where the land was situated; it is sufficient to give surety that one will perform the "vestitura"; the ownership is transferred independently of the actual taking of possession: "Cap. Olon.," 825, c. 11 (I, 331); *Anségise*, IX, 19;

§ 298. **Delivery "Per Cartam."**¹ — It was customary among the Romans to draw up a writing in order to establish the transfer of property, and to give it to the grantee, to whom it served as a title. The Germans had recourse to this proceeding because of its practical advantages, but they gave it a new bearing and character: the giving of the "carta" became for them the symbol of alienation;² they saw a delivery "per cartam"³ where there was only a "traditio cartæ" for the Romans. The fusion of Roman practice and German law took place so thoroughly that formulæ are met with according to which, upon the "carta" laid on the ground, there was placed the clod of earth and the bough of the tree; the whole thing was then taken up from the ground and presented to the grantee.⁴

§ 299. **Feudal Period.** — The transformation of the system of

Thévenin, no. 105, etc.; *D. Vaissette*, no. 88; *Fumagalli*, "Cod. Dipl. Ambros.," no. 57; *Meichelbeck*, "Hist. Eccl. Fris.," no. 611. See especially the example cited by *Schupfer*, p. 154 *et seq.* (dipl. of 791: the grantor takes possession of his own authority). — *Pertile*, IV, 228, maintains that delivery does not transfer ownership, but only creates an obligation to put the purchaser in possession; the "fidejussorres vestituræ" would be necessary, because the obligation would not pass to the heirs. Cf. *Capitulary*, 7, 362. Cf. *post.*, "Gift is not Equivalent to Seisin."

¹ Example in *Thévenin*, "Textes"; in the formulæ and in the Cartularies, where the symbols are often lacking, — for example, *Cart. of Savigny*, of *Beaulieu*, etc.). Cf. the rule, "Ecclesia vivit lege Romana": *Biermann*, "Trad. Ficta," 1891, p. 18 *et seq.*, 33.

² Delivery "per cartam" is looked upon as the equivalent of delivery by the Germanic methods. For example, "Form. Lindenbr."; "Cart. de Redon," no. 142. Importance of the giving of the "carta" in the Anglo-Saxon law: "Bocland," *Sohm*, p. 101, n. 3, believes that the Frankish law did not without difficulty admit the delivery "per cartam"; thus in the "Cart. Lombard," he points out that the delivery takes place by the clod of earth, the glove, etc.; after which the "carta" is given to the notary "ad scribendum." To the contrary, *Brunner*, *op. cit.* Cf. "K. V. J.," 7, 3, 388 (Tyrol).

³ The Frankish king transfers the ownership by the giving of a "Præceptum": *Sohm*, p. 101, no. 3, "in f." (bibl.), p. 116. Cf. *post.*, Anglo-Saxon, "bocland."

⁴ The "levatio cartæ" seems to have been especially in use among the Franks: *Brunner*, "Urk.," 107; "Z. S. S., G. A.," 1883, 113. Examples in *Rozière*, "Form.," nos. 159, 314 *et seq.*; *Thévenin*, "Textes," nos. 136, 137 (Index, see "Tradition," "Charte"); "Cart. Langob.," "M. G. H., L. L.," IV, 595; "M. G. H., Dipl.," no. 280; "Burg.," 41; "Alam.," 1, 19, 20; "Bai.," 15, 2 and 12; "L. Rom. Cur.," 24, 2; *Brunner*, "Urk.," pp. 130, 288; *Prost*, "N. R. H.," 1880, 10; *Pertile*, IV, 226 *et seq.* In the thirteenth century delivery "per cartam" in Bavaria: *Haeberlin*, "System. Baarb. Meichelb.," 1824, p. 204. One must distinguish between the giving of the parchment to the notary in order that he may draw up the deed ("traditio ad scribendum") from the giving of it to the purchaser ("traditio ad proprium"): "Cart. Langob.," form 2; *Porro*, "Cod. Dipl. Lang.," 482. The notary confirms the giving: "post traditam ["cartam" understood] complevi et dedi"; *Schupfer*, p. 149 *et seq.*; *Stouff*, "R. Bourg.," 1899. — Cf. English law: livery in deed and giving of the deed and a clod of earth, a bough, etc.: *Brunner*, "Urk.," p. 539.

the ownership of land which characterizes Feudalism had its result upon the methods of alienation. Between grantee and grantor the lord was interposed, which resulted in making the operation more complicated. Even originally, the fief and the copyhold, grants which are made "*intuitu personæ*," are inalienable, just as they cannot be transmitted by inheritance; the vassal and the tenant could not alienate them; the most that was allowed them was the power of abandoning the land which they occupied, in which case it reverted to the lord; he kept it for himself or disposed of it for the benefit of whom he pleased by making a new grant.¹ Fiefs and copyholds became patrimonial, — that is to say, they could be inherited and they were alienable. But the feudal theory of the transfer of ownership for a long time felt the result of this primitive conception:² this is the point of departure and the foundation of it.

§ 300. **Fiefs and Copyholds.**³ — Alienation is divided into two acts: (a) *Disseisin or divesting*; the vassal or the copyholder gives back the land to the lord from whom he holds it (lord of the land), at the same time declaring that he disseises himself of it into the hands of the lord; (b) *Investiture* for the fief, *giving of seisin* for the copyhold; they still say "vest," "vesture," "werp," etc.; the lord delivers the land to the grantee, at the same time declaring that he seises him of it. Thus one can say that alienation takes place by means of *disseisin-seisin, vesting and divesting*.⁴ If a fief

¹ "L. Feud.," 2, 9, 44, 55; "Ass. de Jérus.," I, 64, 288, 297 (ed. B.); "Schwabenspiegel," p. 68 (éd. Matile). Influence of these ideas: (a) on the capacity to acquire the fief (commoners, people in mortmain): *Mourmant*, "Thèse" ("Précédents de l'Edit. de 1749," 1900). (b) on partial alienation (prohibition of cutting down the fief): cf. "T. A. C., Norm.," 89 *et seq.*; "Gr. Cout. Norm.," 32, 115. England: measures relative to sub-infeudation: "Magna Charta," 32; "Statute Quia Emptores," 1290, which had the effect of greatly extending the alienation of fiefs; *Pollock*, "Land Laws," p. 70. No one but the king was any longer permitted to make alienations in Frankalmoigne; it was desired, in fact, that the grantee of a portion of the fief become the immediate vassal of the dominant lord. *Post*, English Law; *Glasson*, "Inst.," IV, 253; *Gui Pape*, pp. 46, 102, 112; *Bucherellus*, "Inst.," p. 138.

² *Merlin*, in *Guyot*, see "Devoirs de Loi," p. 526 (ed. 1778): he who sells the feudal or servile inheritance does not transfer the ownership thereof to the buyer; he merely renounces the right which he holds from the lord and deprives himself of it, handing it to the overseers of the latter, who then give it to the purchaser, about as the titular of a benefice hands in his resignation to the collator, who then confers it upon the person whom the man resigning has pointed out to him. Cf. also "Resigning from an Office."

³ *Pitou*, "Thèse," 1899 ("Invest. féodale en Dr. Germanique").

⁴ "L. Feud.," 2, 2; "Cout. d'Artois," ed. *Tardif*, XXIII (p. 64): a personal belonging can be sold in three cases: by agreement of the heir, because of poverty, and to buy a more fitting inheritance. After the lord and the men of his court have ascertained that the vendor has not encumbered the land

is concerned, swearing of fealty and homage are joined to the investiture; this is the principal difference that is to be observed between the alienation of the fief and that of the copyhold.¹ In both cases the land is supposed to revert to the grantor, which permits him to exercise the right of repurchase by way of retention,² and the more easily to demand the transfer tax.³ Disseisin and seisin were ordinarily carried out by means of the giving of the twig, or the stick, the piece of wood and some earth, the stick from the border of the wood; these symbolical objects passed from the hands of the grantor into those of the lord, and from the latter they passed to the grantee.⁴ For the investiture of large fiefs, either at the death of the vassal or in case of alienation, use was made of the banner, the sceptre, the lance, or the sword.⁵ It

(by means of an assignment, *post*, "Mortgages") the latter buys back the inheritance by the branch and the rod ("rain et baston") from the lord. The court, upon the demand of the lord, pronounces judgment to the effect that the lord give the seisin to the purchaser; and the lord then does so, after having asked the seller if he has been paid and if he is sure of the integrity of the purchaser, by saying to the purchaser, "I give you the seisin, excepting all my rights": "Gr. Cout. de Fr.," II, 23 (p. 264). Cf. c. 25, 26; *Desmares*, 189; "Cout. Not.," 124, 135, 72, 53; *Boutillier*, I, 67, p. 397 (ed. 1603); *Loyzel*, 641. The "Grand Cout.," *loc. cit.*, no doubt establishes the general custom by saying that one should obtain letters of seisin. Cf. *Beaumanoir*, 20, 35; 6, 4; "Const. du Chât.," §§ 82, 85, 86; "Schwabenspiegel," ed. *Mat.*, p. 75; "Ass. de Jérus.," "C. des Bourg.," II, 253, 271 *et seq.*, ed. *B.*

¹ According to the "L. Feud.," 2, 4, investiture should precede fealty and homage: "Gr. Cout.," p. 271.

² See: "Retrait Beam.," 51, 21; *Desmares*, 204; "Gr. Cout.," 2, 25. Cf. "Paris," 20.

³ *Beaumanoir*, 27, 7; *Desmares*, 189 *et seq.*, 201, 364; "Gr. Cout.," pp. 265, 273. For the fief, the lord's fifth; for copyholds, the lord's due and sales: *Loyzel*, 572 *et seq.*, and treatises on the Feudal law, — for example, *Boutaric*. The "Gr. Cout.," *op. cit.*, distinguishes between sales and seisins, the due to be paid because of the sale and the due to be paid because of the investiture. *Beaumanoir* only speaks of sales (see especially c. 27 and c. 52); according to him it is the vendor who pays them; but, as they come out of the inheritance, the buyer is authorized to keep back a portion of the price in order to pay them if it is necessary; the parties may furthermore agree that this payment shall be made by the buyer. And no doubt it is upon the buyer that the obligation comes in the last analysis. The lord only proceeds to give seisin after he has been paid: "Gr. Cout.," pp. 267, 276 ("Quint et Requent"); "Paris," 24. — Cf. "Toulouse," 135, 137, 142 *et seq.*; "Montpellier," 11, 41, 61, 66, 108, VIII; "Bordeaux," 128.

⁴ *Du Cange*, *loc. cit.*; *Ragueau*, see "Rain," "Mettre la main au baston" (the vassal can have the use of his fief until it is taken possession of by the rod or until he is freed from his oath), "Adhérance" (taking of seisin by the purchaser), "Deshérance" (disinheriting); *Brodeau*, on 51, "Paris," no. 7 (bibl.); *Pasquier*, "Rech. de la France," 8, 58: sometimes it is the seller and sometimes it is the judge who gives the rod to the buyer (cf. *post*, "Freeholds"): "Ass. de Jérus.," I, p. 218 (ed. *B.*); II, p. 253 (at law); "Parloir aux Bourg.," pp. 145, 162; *supra*, p. 317, 2.

⁵ "L. Feud.," 2, 2. Cf. 2, 33, etc.; *Ragueau*, see "Rain"; *Du Cange*, *loc. cit.* To the lance was also added the standard for the investiture of principalities. The bishops and abbots were invested with their offices by the giving of the

was not upon the land itself that these formalities took place, but at the lord's court, before the lord or his officer.¹ By this means the exigencies of the old law were satisfied, as far as publicity was concerned, and the usage of symbolical deliveries and deliveries in law was upheld. It would have been hardly practical, and scarcely in accord with the part played by the lord in this act, to compel him to go upon the land.² Under these conditions the investiture of the fief, or the taking of the seisin of the copyhold, had to be accompanied by a putting in possession in fact, in order to procure for the grantee all the advantages of possession;³ it was also preceded by a *preliminary agreement*, a sort of "justa causa traditionis."⁴ But of these three acts, the one which carried out the transfer of ownership was the investiture or giving of seisin.⁵ One may even ask oneself if this did not mean the acquiring of the possession in law, — that is to say, of the right to bring the possessory actions.⁶ It is beyond a doubt that the grantee who was invested, or given the seisin, had the right to enter into possession upon his own authority.⁷ The investiture was estab-

"virga pastoralis," of the crozier and the ring: "Sachsensp.," 3, 80, 1. As to the "querelle des investitures" (assizes of investitures), cf. *Schroeder*, p. 399; *Esmein*, "Bibl. Ec. Hautes Et.," I, (*Yves de Chartres*).

¹ *Supra*, notes. To the contrary, "Bayonne," 91, 1: the lord of the manor goes upon the land and withdraws the seller from it upon payment of a due for going out and installs the buyer upon it upon payment of a due of entry.

² "Paris," 63; *Loysel*, 531 (portable rent).

³ Can the tenure of a year and a day take the place of the seigniorial investiture as against third parties? *Desmares*, 189.

⁴ The man selling keeps the ownership until the lord has conferred seisin; but the seller can be compelled to carry out the investing or the conferring of the seisin: *Boutaric*, I, 67; *Beaumanoir*, c. 27, 7, 8 (if there has been a giving of seisin the seller cannot take back his land excepting by virtue of a new sale); *Beaumanoir*, 35, 20 (deed of sale); 23 (letters of leasing); "Gr. Cout.," pp. 266, 267, 301; *Biermann*, "Trad. Ficta," p. 277 (bibl.).

⁵ Procedure in a case where the lord refuses to give the seisin: "Gr. Cout.," pp. 268, 280, 285.

⁶ Does not the seigniorial giving of seisin which makes the buyer the owner also make him the possessor? *Desmares*, 62, 177; "Cout. Not.," 53; "Gr. Cout.," 2, 19, p. 234; *Ragueau*, "Gloss.," see "Vest: investitura non facit possessorem"; *Loysel*, 747. — The tendency of the Romanists is to require a material delivery. Practice resisted this: *Biermann*, "Traditio Ficta," p. 61; *Gui Pape*, "Q.," 415; the investiture does not give possession, but the right of putting oneself in possession of one's own authority: cf. "Q.," 46 (where he distinguishes between copyholds and freeholds, *post*, "Clause of Tenure at Will").

⁷ *Beaumanoir*, c. 34, 13: the purchaser who has been given the seisin by the lord wishes to take possession of the inheritance; the farm tenant or the mortgagor repulses him; their claims will be set aside by the law. The only means that the farm tenant and the mortgagor have of obtaining a right which they can oppose to the purchaser consists in having the seisin conferred upon themselves by the lord from whom the land is held. Cf. *post*, "Sale is preferred to lease."

lished at an early period by a written deed; but in the eighteenth century these deeds were no longer required, as we shall see; the acts of fealty and homage took their place as regards fiefs, and the performance of the seigniorial rights as regards copyholds. Moreover, one knows that the seigniorial rights of acknowledgment and census were often established by means of the *Rolls*.¹

§ 301. **The Same.** — The lord gave the investiture, “always saving all rights.”² The result of this reservation was that the rights of third parties were not cleared away, as one would be tempted to believe, as a consequence of the reversion of the land to the lord. It is probable that this was not the primitive law; the lord ought to take back the property free from all rights; at least, those which his vassal or his copyholder had granted could no more be set up in opposition to him than could an alienation of the whole property.³ The only doubtful case was that in which ownership was contested; the grantor might be only an apparent owner; had the “*verus dominus*” the right to reclaim the property as his own after the investiture or giving of seisin to a third party? The answer depended on the rôle one gave to the lord and to the feudal court; if they were compelled to look into the circumstances upon which the alienation was based, to pass upon the rights of the grantor, then the confirmation of the deed, if it was done with a knowledge of the facts, might have the result of extinguishing the rights of third parties, even supposing that they had not been present.⁴ It seems as though this tendency were to be found in the early Feudal law;⁵ but it was the contrary tendency which prevailed.⁶ The intervention of the lord and of his court becomes almost a mere formality; they were contented with estimating the apparent irregularity of the deed, leaving to the tenure of a year and a day the effect of speedily wiping out the claims of third parties, as well as those of the assignees of

¹ See *Ferrière*, “*Le Parfait Notaire*,” I, 15, c. 7 and 8.

² “*Artois*,” “*Gr. Cout.*,” etc.; *Beaumanoir*, 20, 2; *Varin*, “*Arch. de Reims*,” I, 844.

³ See “*Alienation of the Fief*.”

⁴ *Precedents in Barbarian law*.

⁵ This is what may be deduced from the provisions of the “*Ass. de Jérus.*,” *Jean d'Ibelin*, c. 185, 187 (I, pp. 64, 288, 297, etc.); from the “*Cout. d'Artois*,” XXIII, and from *Beaumanoir*, 51, 18. The feudal court assures itself of the validity of the rights of the grantor.

⁶ “*L. Feud.*,” 2, 8; “*Cout. d'Artois*,” ed. *Tardif*, XXV; *Beaumanoir*, 51, 18. Simply because the man who has been put out of possession had the seisin, the lord should invest the third party in whose interest the disseisin has been made.

the grantor, or those of his family.¹ The investiture or giving of seisin thus only took place with a reservation of the right of the lord himself and the rights of others.

§ 302. **Freehold Tenure.**² — There could be no question, as far as a freehold estate was concerned, of the investiture or giving of seisin by the lord, because disseisin into the hands of the lord would have been a denial of the right of the freeholder.³ The law of the barbarian period thus persisted on principle, excepting for a tendency to assimilate the alienation of freeholds to that of fiefs or copyholds. In the South, in countries of written law, delivery takes place “per cartam,” or, at least, a deed is drawn up by the notary in order to establish the sale and the delivery or “guirpitió.”⁴ Without doubt, there was not any taking of possession by the grantee; the parties were content with declaring before the public officer that they had sold and delivered (“vendidi et tradidi”).⁵ The deed once drawn up and delivered to the grantee,⁶ it is the *delivery of the deed*⁷ which is sometimes accompanied by symbolical acts, like the delivery of the notary’s pen.⁸ The grantee, by virtue of this act, has the right to put himself in possession by his own authority.⁹ But under the influence of the Roman law, an actual delivery prevailed

¹ See “Tenure of a Year and a Day.”

² “Dig. Ital.,” see “Allodio.” See investiture and the giving of public notice at Metz. As to burgage and free urban tenure, cf. *Génelal*, “Thèse,” 1900; *Desmares*, “Et. sur la Propriété foncière dans les Villes du Moyen Age,” 1898.

³ “Gr. Cout.,” 2, 33 (p. 325); *Boutillier*, I, 83 (p. 490, ed. 1603).

⁴ Examples in the Cartularies (“Cart. de St.-Sernin,” numerous deeds of the twelfth century; we read there merely “gurpivit et vendidit” or similar formulæ; “facta carta” and the date; “hujus rei sunt testes N.”).

⁵ “Cout. de Toulouse,” Art. 93 (ed. *Tardif*); *Tardif*, “Dr. Privé au XIII^e siècle,” 1886.

⁶ These deeds of purchase have served as a basis for the drawing up of the Cartularies.

⁷ “Cède” or “cédule” (from “scheda”), deed, writing: *Serres*, “Inst.,” II, 1, 44: feigned delivery, which takes place by the delivery of the keys as well as that which takes place by the lease of the deed or of the pen of the notary, which are mentioned in the I, 1, “Cod. Just.,” “de don.”; *Soulatges*, “Cout. de Toulouse,” 1770, p. 236; “Théorie et Prat. des Notaires,” Grenoble, 1629, p. 141. — This means the lease or handing over of the contract of sale, and not the deeds of ownership of the seller; this is what the expression “lease of the deed” means. — As to the doctrine of the Glossators and the post-Glossators on the subject of the “instrumentalis traditio,” cf. *Biermann*, “Traditio Ficta,” pp. 22, 47, 102, 273. See especially Azo, “Lect. ad. l. 1, C. de don. si vendidi et traditur instrumentum emptionis.” *Post*, nos. 22 *et seq.*

⁸ It is the pen with which they write. Sometimes a touching of the hands of the seller and the purchaser. — The Romanists protest against these old practices; thus *Hostiensis* (cited by *Gui Pape*, “Q.,” 22).

⁹ “Toulouse,” 93. *Post*, nos. 22 *et seq.*

over a symbolical delivery; practice had to find a means of preserving for the deed its former effects (see below, agreement in lieu of delivery, clause of tenure at will).¹ — In countries of Customary law, where the freehold is more rarely found, the law is rather confused. The drawing up of a written matter and material delivery are sometimes required.² At other times the parties go before the lord³ and proceed with the disseisin-seisin without the lord himself taking any part; the stick passes directly from the grantor to the grantee; or, at least, if the lord gives it,⁴ it is not as a sign of his sovereign power; he only takes part in the matter in order to give it the required publicity, because of his judicial authority, which extends over freeholds as it does over fiefs and manors of his tenure. This is the system of the Customs of public nams described below.⁵

§ 303. **Monarchic Period.** — The system of transfer just described followed the vicissitudes of feudal ownership, and was modified like the latter, or even almost entirely disappeared, — so much so, that Customary France was divided into two parts upon this question of the transfer of ownership. 1st. **Countries of public nams**,⁶ an important group of provinces of the North and East, to which the Netherlands were attached as a natural dependency. 2d. The provinces which followed the **common law**, — that is to say, the larger portion of the Customary country, which was here subjected to a legislation almost identical with

¹ *Biermann*, "Traditio Ficta," p. 37 *et seq.*

² *Boutaric*, I, 84: a declaration made before a notary and letters, or made under his seal before witnesses, if he has a seal that is known, "Laon.," 133: taking of actual possession: "Sedan," 217; "Vitry," 126; "Troyes," 144, etc.; *Chénon*, "Alleux," 191.

³ "Hainaut," 106, 94, 30, 34 (giving of seisin before four owners of freeholds and a fifth one who asks them to establish the regularity of the transaction ["les conjures"]): *Merlin*, "Rép.," see "Francq-Alloetier"; "Guisnes," 16; "Luxembourg," tit. V; *Prost*, "N. R. H.," 1880 (Metz); *Varin*, "Arch. de Reims, Cout.," I, 711.

⁴ "Reims," 139, 162 *et seq.* (the method of alienation which is used for the copyhold is applied to the freehold).

⁵ There is every reason to believe that it is connected with the method of alienation of the feudal period: *Salvioli*, "R. Ital. p. l. sc. Giur.," 18, 2.

⁶ [The French word "Nantissement," so important as a classification, has so many and various suggestions, that any common English word, conveying fixed implications, would be radically misleading. "Nantir" is to pledge or to assure; yet "nantissement" conveys the notion of a public registration. Etymologically, the word is identical in origin with our now obsolete "nam" (as in "withernam"); this is seen especially in the history of mortgages (*post*, Topic VI). To avoid misunderstanding, the term "public nams" has here been coined (see "nam," "nim," in the Century Dictionary). This keeps the French root, and also the implication inherent in the French word. — TRANS.]

that of the countries of written law. To these two systems, which were still in force at the time of the Revolution, we may add by way of interesting variations the **Breton Public Investiture, Taking by Proclamation** at Metz, the "**Auflassung**" of the German law, and, finally, the **English practice** under its different forms. In general, everywhere there is a tendency to get away from the feudal forms, because they are troublesome, and because they no longer agree with the condition of the law. The majority of the Customs went too far in obeying this need of simplification and logic. Others, more faithful to tradition, respected the old forms; they even finished by giving them, while they touched them up a bit, a signification and a bearing which they scarcely had when they originated; by diverting them from their object, they were brought into conformity with new needs, and there were discovered in them advantages of a nature to make up for the fetters upon the freedom of contracting which they carried with them. Between these two tendencies the Nineteenth Century has hesitated.

§ 304. (I) **Customs of Public Nams.**¹ — The practice of public nams² (of duties or acts of law,³ seisin taken by a purchaser, etc.)⁴ is only a changed form of the old feudal system, and was maintained in the North of France and in the Netherlands⁵ because of practical advantages which were foreign to the original con-

¹ *Ragueau, Guyot*, see "Nantissement," "Véture," "Devoirs de Loi," "Adhérance," "Main Assise," "Mise de Fait," "Werp," "Gurpir," "Vest," etc.; *Britz*, p. 903 (Belgian bibl.); *Héricourt*, "Vente des Imm. par Décret," 1739, p. 264; *Desmares*, *op. cit.*

² This word has two meanings: 1st, a judicial deed or group of the formalities of acts of law; 2d, the effect of this deed, — that is to say, the acquisition of an inheritance by right of ownership, usufruct, mortgage, etc. Cf. "nam," "namps," "nants" pledge, a word which is connected with the German "nehmen," to take (*Haltus*, "Gloss," 1405); "Summa Norm.," VII, "de liberatione, namnorum"; *Schmid*, "Ges. d. Angels.," "Gloss.," see "Nam," "Cout. de Reims." In *Varin*, "Arch. de R.," I, 733, the creditor presents to the lord (or to his court) binding letters of debt and asks him to secure them out of the inheritances held from him as fiefs or copyholds, so that he shall not invest any one with these inheritances excepting subject to a mortgage.

³ As to the word "loi," cf. *Ragueau* ("lois de ville jurée" means body of aldermen; "villes de loi" means a body of aldermen, etc.). "Œuvres de loi" (acts of law) thus means "œuvres de justice" (acts of justice, or of the court). Cf. "leges," or legal proofs of the "Summa Norm.," 10, 2 ("loi simple" means proof of oath; "loi apparaissant" means proof by duel, etc.).

⁴ They also say "werp," disseisin-seisin, conversion into money, etc.

⁵ "Hainaut," 94; "Liège," 6; "Artois," 71; "Lille" ("La Salle"), 10; "Vermandois, N. C.," 126 *et seq.*; "Cambray," 5; "Amiens," 137; "Chauny," 2; "Reims," 142, 162; "Boulonnais," 115; "Ponthieu," 111; "Douai," ("des don. et vend."), "Ribemont," 51; "Péronne," 259; "Laon," 126; "Valois," 13 *et seq.*; "Sedan," 258; "Senlis," 19; "Noyon," 34.

ception. The solemnities of the investiture, or the giving of seisin, which were destined to assure to the lord the payment of his profits, served especially to give to the transfer, or to the establishment of real rights, the authenticity and publicity which are demanded by a well-organized system of land credit. At least it is in this sense that the law progressed, tending more and more to depart from its feudal connection.¹

§ 305. The "Acts of Law" consisted in the vesting and divesting, such as we have described them, but with this difference, that they were not generally carried out before the lord,² but before the seigniorial or royal judges. The tribunal to which one must apply varies. Sometimes a distinction is made between fiefs and villein tenures, in conformity with the Feudal law; in the case of fiefs it is the feudal court, composed of a bailiff and men who hold fiefs; in the case of copyholds the aldermen's court, which is composed of a provost, mayor and the copyholders. These two courts are those of the lord of the tenure within which the property is to be found; sometimes, due to a noticeable progress, it is the tribunal or the lawyers of the locality where the land is situated.³ Freeholds are subjected to these formalities as well as fiefs and copyholds, — at least, in the Netherlands (for example, the presence of four freeholders, and a summonser who calls upon them, that is to say, requires them to establish the regularity of the transaction).⁴ The "acts of law" are thus judicial acts; the symbolical formalities have lost their importance and have become detached from it in certain Customs. There are localities where everything is reduced to a simple recognizing of the contract at law;⁵ the same person could then play the part of grantor and

¹ This is what was declared in the Placards of the princes of the House of Austria for the Netherlands of February, 1528, and Dec. 6, 1586: to avoid frauds and deceitful selling; cf. especially the "Edit Perpetuel" of 1611. This motive accounts for the extending of the feudal custom to freeholds (cf. as to this, "Hainaut," 106), publicity by means of registers. Ordinarily, it was required that contracts transferring real rights should be authentic: "Vermandois," 119; "Reims," 180; Regulating Order of the Parliament of Flanders, Oct. 4, 1765; Aug. 27, 1676; "Roisin," p. 444.

² Cf., however, *Merlin*, in *Guyot*, see "Devoirs de Loi" (the lord can replace his bailiff or his provost, because this comes within his gracious jurisdiction).

³ Details in *Merlin*, *loc. cit.*; *Britz*, p. 906; *Raepsaet*, "Orig.," no. 103; Placard of Sept. 16, 1673.

⁴ Placards of Feb. 10, 1538; Dec. 6, 1586. Holland: vassals also. "Hainaut," 69, 106; "Luxembourg," 5, 7 (under the azure of the sky). "conjure" is in the Netherlands a formality essential to every public name.

⁵ "Amiens," 137; "Péronne," 264; "Douai," 2, 2.

grantee, could disseise himself in the name of the grantor and seise himself in his own name, which would have been too repugnant in a place where the custom of the giving of the stick or the fagot had persisted.¹ Several Customs demanded that contracts by virtue of which legal duties passed should be proved by means of authenticated deeds. As in the case of vesting and divesting, the extent and the limits of an inheritance which was sold or mortgaged had to be specified therein.² From this it resulted that general mortgages were not possible in countries of public nams, any more than were secret mortgages.³ The publicity which constituted an essential element of the system of public nams would have been temporary if it had been limited to the formalities of vesting and divesting; it was made permanent by demanding, in order to make legal duties valid, that they should be registered in the clerk's office of the judges who had received them; ⁴ for the register upon which, in the order of their dates, the giving of pledges was inscribed, was accessible to the public.

§ 306. **The Same.** — This system was only applied to the alienation of immovables "inter vivos"; alienations "mortis causa" (by intestate succession and by will) did not give rise to it; it was then said that the transfer took effect by operation of law. This no doubt was due to two reasons, — first of all to the feudal origin of public nams, and then again to the fact that in the case of changes caused by death the transmission of property was surrounded with a sufficient publicity because of the circumstances under which it took place.⁵ Subject only to this distinction, one can say that alienations of a part were not treated differently from alienations of the whole; the "acts of law" were thus

¹ "Verm. T. A. C.," 91; "N. C.," 126; "Lille," 80; "Artois," 2, 7.

² "Reims," 176; Edict of Apr., 1676, etc.

³ At least, generally; for in Vermandois, at Reims, etc., public nams was only required in cases of mortgages formed by agreement. Cf. *Merlin*, see "Nant.," § 2; "Cambrai," 5, 11.

⁴ "Vermandois," 119 *et seq.*; "Reims," 177; "Amiens," 145; Placard of Sept. 16, 1673. — *Contra*: "Artois," "Hainaut," *Merlin*, see "Devoirs de Loi." — *Giry*, "Hist. de St.-Omer," p. 187: "greffe des werps" in the fourteenth century.

⁵ Partitions because of their declaratory character and contracts of marriage because they include advancements of heirship were treated in the same manner as wills. Let us observe outside of any divergencies upon these points that there is a tendency to submit wills to a judicial ratification and to registration. *Guyot*, see "Rapport de Loi," "Nantissement"; *Britz*, p. 912. — Alienations carried out by the sovereign and alienations of fictitious immovables, such as a constituted rent or an office, are also converted into money of absolute right because of other motives: *Varin*, *loc. cit.*, *supra*.

required in order to establish real rights,¹ and especially for the establishment of a mortgage.²

§ 307. **The Effects of public nam**s are remarkable. — (I) "*Inter partes*." The ownership is not transmitted nor the real right established as long as the public nam has not taken place. This does not mean that the contract — for example, the sale — is not valid; it holds good, and there results therefrom a personal action for the benefit of the buyer against the vendor.³ (II) "*Erga alios*." All the more can the alienation *not* be challenged by third parties on the ground of lack of investiture. Of two grantees, the first who takes public nam prevails over the other; of two mortgage creditors, the first who takes public nam is preferred to the other (excepting if there has been fraud). Thus the effect of the public nam is to get rid of the rights of third parties over the immovable, if these rights have not themselves been vested by means of the taking of seisin by the purchaser. But the "verus dominus" by public nam, and the mortgage creditor by public nam, preserve their rights, pursuant to the feudal rule (*ante*, § 301) that the lord gives the seisin, always saving his right and that of others. The effect of Breton public investiture was different, as we shall see; for the basis of the formalities of that system was a summons to the interested parties to set forth their rights, under penalty of losing them. — The taking of possession in fact⁴ could not take the place of public nam; the most that it allowed a grantee was to make use of the possessory action;⁵ but, undoubtedly, under the influence of the Roman law, in the end it was admitted that prescription (ten years in Vermandois) was as good as taking of seisin by the purchaser.⁶

§ 308. **The Public Nam Customs** differed too greatly from the common law of monarchic France to remain immune from an attempt to assail their special system with relation to the alienation of immovables. The Edict of June, 1771, Art. 35, and the Declaration of June 23, 1772, abolished the usage of seisin and

¹ "Edit Perp.," July 12, 1611, Art. 24 (Netherlands): no real right over immovables can be acquired unless by acts of law.

² "Cambrésis," 5, 1; "Cout. de La Salle de Lille," three motives for creating a mortgage.

³ *Merlin*, p. 125 (in *Guyot*, see "Nant.," ed. 1781, XLI).

⁴ The taking of seisin by the purchaser gives him the ownership of the property and the right to take possession of it of his own authority: "Liège," 6, 8. In Vermandois taking possession in fact is sufficient in the case of freeholds.

⁵ "Vermandois," 129; "Chauny," 34; "Reims," 167.

⁶ "Sedan," 261: possession of ten years is equivalent to investiture.

public nam in so far as it applied to mortgages. But their provisions were only applied in Picardy and in Vermandois within the jurisdiction of the Parliament of Paris; the Parliament of Flanders and the Sovereign Council of Artois refused to record them. Public nam was only really done away with by the Law of September 19–27, 1790, Art. 3, and if it was proscribed, it was because of its feudal character. Moreover, the Revolutionary law was less radical in reality than in appearance; if the idle formalities of vesting and divesting disappeared from localities where routine had preserved them, the registering which accompanied them was preserved under the name of **transcription**.¹ Deeds of conveyancing and mortgage had to be copied upon a register at the clerk's office of the court of the district in which the property was situated, under penalty of not being valid against third parties who had contracted with the vendor and had conformed to the law: such was, at least, the distinction made by the Law of the 11th Brumaire of the year VII (2, 26).² Thus, public nam survived under this simplified and more modern form of transcription, and the Law of the 11th Brumaire, year VII, was able to make of it the basis of our system of mortgages, for there were met with therein the advantages which are especially sought for: *facility* of proof, publicity, and specialty. If the Civil Code retrograded by not demanding transcription for the validity of the alienation of immovables, the Law of March 23, 1855, revived the provisions of the Revolutionary law upon this point.

§ 309. (II) Public Investiture by Means of Proclamation³

¹ Transcription means copy. The ordinances dealing with registration prescribe that all or part of the deed of gift should be transcribed on the register. Cf. *post*, "Gifts." — As to transcription, cf. "R. h. Dr.," 1855, 97, 471; *Dramard*, "Bibl. du Code Civil." *Post*, "System of Mortgages."

² Law of the 11th Brum., year VII, 2, 26: transcription in the office where mortgages are kept. The Law of Sept. 20, 1790, made the alienation dependent upon the fact of transcription without making any distinction between third parties and the parties themselves. It has been contended that the Law of the 11th Brum., year VII, made this distinction as a consequence of a mistake made by the reporter, Crassous (de l'Hérault), upon the legislation of the countries of public nams. It is rather a result of the change brought about by the Revolution in the theory of public nams. The principles of the Feudal law led people to say that the ownership was not transferred even "inter partes" if there were no public nams; but in the modern law we have ceased to be concerned with the rights of the lord and only take into consideration those of third parties.

³ "T. A. C., Bret.," ed. *Planiol*, c. 39, 40, 44 (com. of the 14th cent.; cf. as to the date, *Brunner*, "Z. S. S., G. A.," 1898, 110); "A. C." (1539), 267; "N. C." (1580), 269; "Comment." by *D'Argentré*, *Sauvageau*, etc. — See *Guyot*, *Couchouren*, "Thèse," 1888 (bibl.); *Planiol*, "N. R. H.," 1890, 463; *Chénon*, "L'Ancien Droit dans le Morbihan," 1894.

according to the Custom of Brittany.¹ — This institution, the existence of which is not verified before the thirteenth century,² is connected with the tenure of a year and a day.³ It serves to protect the grantee, in the first place, when there has been a sale, and afterwards when there has been a gift, an exchange, or an alienation of part of a nobleman's inheritance when he has been put in actual possession by an owner who has himself been in possession during a year.⁴ Three "bannies" or proclamations take place when Mass is over, on three consecutive Sundays, with the object of letting the purchase become known to the public.⁵ In the fourteenth century petitions are even addressed, in order to be more sure, to the relatives of the vendor.⁶ The procedure is concluded by the certification of the proclamation, made by the tribunal within whose jurisdiction the inheritance which has been sold is to be found;⁷ and this tribunal is not content with giving effect to the formalities which have been accomplished; it pronounces a real adjudication of title for the benefit of the purchaser.⁸ The Edict of August, 1626, demanded the registration of the contract before any taking of possession, so as to avoid alienations which were sudden and of such a nature as to escape the knowledge of interested parties (thus, in the Civil Code,

¹ Normandy had, as it were, an embryo of this institution. It is not dealt with in the "Summa," c. 116, but the "Cout." of 1583, Art. 452 *et seq.*, provides for a reading of the contract of sale after Mass is over on three consecutive Sundays; and these publications are entered on the back of the contract. They merely constitute the beginning of the delay of a year and a day within which the repurchase by a person of the same lineage may be exercised; if these readings have not taken place this repurchase may be exercised during thirty years: *Basnage*, on "Norm.," p. 355; *Houard*, "Dict.," see "Clameur." Cf. also *Beaumanoir*, 44, 25, 26.

² Deeds of the eleventh and twelfth centuries, — no proclamations; but publicity (witnesses, sureties, seals). In the thirteenth century the proclamations are looked upon as being an ancient custom: *Planio*, p. 438. The oldest deeds in which they are mentioned relate to compulsory sales.

³ Or, rather, with the procedure of the "missio in bannum." *Post*, "Distinction between Persons who are Present and those who are Absent." The necessity of a year's possession on the part of the grantor is only a discordant element in the Breton system of public investiture, a borrowing from the theories of the Romanists. *Post*, "Common Customary Law." Cf. procedure of the forced decree or adjudication upon a dstraint of immovables.

⁴ No public investiture for transactions, judgments other than those of an adjudication, nor for a mortgage which is an accessory of claims.

⁵ In the eighteenth century the proclamations are read and posted up.

⁶ Cf. "Repurchase by a Person of the Same Lineage" (offer). Afterwards these petitions fell into disuse, which is to be accounted for by the weakening of the rights of the family.

⁷ "T. A. C.," 40. A certificate given by the court upon the record of the sergeant who has made the proclamations. Cf. Certification of the public announcements in case of a compulsory decree.

⁸ Practice has a tendency in this direction: it admits of the appeal.

transcription precedes paying off). Before proceeding to the first proclamation it was compulsory to wait for the expiration of six months, dating from the time of registering.¹ Public investiture had for its effect the confirming of the purchase by making it almost invulnerable.² Interested parties who were *present*, that is to say, who happened to be in Brittany, only had eight days after the last proclamation to offer opposition; this period having expired, they were foreclosed; by reason of its shortness it was found necessary to prolong it until the certification of the proclamations. As to those who were *absent*, they were only barred by the tenure of a year and a day on the part of the purchaser.³ The normal encumbrances on ownership, such as servitudes, feudal rents, and ground rents, survived public investiture; but every other right over the immovable disappeared as though by the effect of a paying off:⁴ thus the power of repurchasing by the relatives or the lord, the rights of mortgage creditors, those of the true owner, and even those which guaranteed the payment of the price to the vendor. Public investiture remained in force until the first of Nivôse, year IV (December 22, 1795); the Decree of the 9th Messidor of the year III, which repealed them, as well as public nams and the "acts of law" (Art. 276), went into effect that same day.

§ 310. (III) **Investiture and Giving of Public Notice at Metz.**⁵ — In the old times at Metz, according to the old Customs, the transfer of the ownership of real property took place by proclamation in court, that is to say, in the presence of the court held by the aldermen with the assistance of the mayor, who alone had the right to pronounce the proclamation;⁶ the grantor himself invested the purchaser in the presence of the aldermen and the leading men. But at the beginning of the thirteenth century it was the

¹ People complained that public investiture was degenerating into a despoiling.

² In a system of property which was as complex as that of the old law the public investiture must have appeared as a real benefit: it avoided actions and allowed the purchaser to dispense with an investigation of the rights of his grantor.

³ A thing which allowed of fraud: people who were absent lent their names to the relatives who were present and took back the land for the latter.

⁴ The purchaser becomes the owner, although the seller may not have been. Neither the voluntary decree nor the public nams have such far-reaching effects.

⁵ *Prost*, "N. R. H.," 1880, 1 and 301; 1878, "L'Ordonnance des Maiours," 189 and 283; "R. de Législ.," 1876 (Judgment at Metz in the thirteenth century).

⁶ As to the proclamations in court at the opening of the term of the latter, *Prost*, "N. R. H.," 1878, 209. — See *post*, Judicial "Auflassung."

mayor, assisted by the aldermen, who performed the *investiture*, that is to say, who gave the purchaser the seisin; this act became one of public authority, perhaps as a consequence of the influence of the Feudal law. It was not long before they went further in this direction and gave to public authority a more important place; during the course of the thirteenth century¹ investiture was supplanted by another procedure, the *giving of public notice*, that is to say, the solemn proclamation of the taking possession by the purchaser, which was made by a public officer under the authority of the mayor. There took place as many as four of these public notices; the first fixed in an authentic manner the beginning of the possession of a year and a day, which should do away with all adverse claims; the first three public notices were proclaimed within the year at the courts of Easter, Christmas, and the middle of August; at the fourth, that is to say, at the beginning of the following year, the proceeding was closed and the right was acquired.² Up to that time, at each giving of notice, interested parties had the right to offer opposition ("escondit"); they were even asked to do so, as is shown by the formulæ which were made use of: the master alderman said, "I give public notice for ——— in copyholds and freeholds," upon which the mayor got up and cried out three times, "Does no one speak against these public notices? no one speaks"; and, without doubt, if no one raised any protest, the master alderman replied, "and it goes on." These formalities accomplished, the public notice was cried through the town. The giving of public notice was thus superior to simple investiture; it was surrounded with greater publicity; it cleared off the rights of third parties who had neglected to appear before the aldermen to offer opposition. This accounts for the giving up of investiture; this also accounts for the extension which was afforded to the method of public notice; it was made use of for every change of ownership³ "inter vivos" or "causa mortis,"⁴ by act of law or by extrajudicial act.⁵ In time the municipal institution

¹ Before 1220 no giving of public notice; after 1263 no more investiture.

² Inscribing of the giving of public notice upon rolls (which were kept from 1220 until 1546). — "Amiens," 1209, 46 (three terms of court a year).

³ Or establishing of a real right. Investiture "en aine et en fond," "inani et tranffundo" (cf. "aysina" meaning "superpositum," "suppellex") is the granting of absolute ownership; on the contrary, investiture in "gagière" is carried out by way of a pledge. In the case of a fief the lord alone conferred the investiture; it seems that the giving of public notice was possible without his intervention.

⁴ Inheritance upon intestacy, gift, dower, partition, etc.

⁵ Judicial deeds (which were no doubt the beginnings of the procedure):

became modified;¹ the forms of the giving of public notice were simplified; it fell into decline, and in the sixteenth century we find it scarcely made use of, excepting on the occasion of loans upon immovables,² until in 1641 it disappeared, to make room for the mortgage system of the Custom of Paris. If it is easy to understand that the Customary common law replaced these archaic usages, their origin is, without doubt, in the Frankish practices of the “*missio in bannum*,” and one is struck by their analogy to certain institutions of countries of public nams, such as the seizure and delivery in fact.³

§ 311. (IV) **German Law.** — Three phases are to be distinguished therein: (a) the practice of the barbarian period, which we have already described; (b) the system of the judicial “*Auflassung*” of the thirteenth and fourteenth centuries; (c) the modern system of land registers, which is derived therefrom, although it is inspired by a practical object which is entirely different. The “*Auflassung*” of the Middle Ages is especially designed to protect the interests of the lord, of communities and of families; it is only as a side issue and in addition to this that third parties and the parties themselves get any advantage out of it. On the other hand, under the system of land registers, the interest of third parties and of the parties themselves is alone taken into consideration. It was possible for evolution to take place in this direction as soon as the judicial assemblies in which the free men only had the right to take part, upon condition of being land owners, ceased to be held, and in proportion as plebeian ownership gained strength at the expense of the seigniorial ownership, individual ownership at the expense of the rights of the family. The Roman law contributed to these changes, but at the same time acted as a disturbing force in the progress of jurisprudence.

The “*Auflassung*,” or giving of seisin at law, is very closely connected with the Frankish usages; we have already seen in them

delivery in court (following a judgment); “*estault*,” or distraint upon the movable property (entirety) of the debtor by the creditor who is upheld by the law; “*conduit*,” or being put in possession of an inheritance by the authority of law after the “*huchement*” (proclamation) of the Thirteen (authority of the police power); “*exurement*” and “*relèvement*,” taking of possession by the creditor of the inheritances encumbered with rents and their taking back by the debtor.

¹ In 1552. After 1641 there were no more aldermen, mayors, or giving of public notice.

² *Prost*, “N. R. H.,” 1880, p. 371. “*Ord.*,” 1564: only one giving of public notice. Delay of two years and one day.

³ See *Guyot* (“*Main Assise*,” etc.). *Post*, “*Mortgages*.”

that alienations of immovables often took place at law "in mallo," in the Frankish practice. The "Sachsenspiegel" makes the intervention of law an absolute condition of the transfer of property (I, 52, 1: without the consent of the heirs and without the "echte Ding," no one can dispose of his possessions and his men). This is owing to the fact that the majority of possessions are fiefs or copyholds, and that their alienation assumes a reversion to the lord, — a reversion which takes place in the presence of the feudal court or of the plebeian court (which is the old "mallus" in survival). In towns the jurisdiction belonged to the municipal authorities; now the latter must have some interest in an act which, like the acquisition of land, confers important rights and imposes obligations (such as that of contributing to the public expenses); also, it is not rare to find the townsmen of a locality forbidden to dispose of their lands for the benefit of anybody excepting one of their fellow townsmen.¹ From this it resulted that in the towns the "Auflassung" took place before the "Stadtrath" or Council of the town. From the "Hofrecht"² and the "Stadtrath" the necessity of the act at law extended without difficulty to the "Landrecht" and the "Landgerichte."³ Moreover, outside of motives due to the feudal system and the town laws, the interest of the parties and that of third parties justified this extension: facility of proof, publicity of the deed, guarantees against third parties, — such were the advantages of the system of the "Auflassung."⁴

The formalities of the "Auflassung" are the following. The parties, after having come to terms by means of a preliminary agreement ("Gelübde," for example, sale) which corresponds to the "justa causa traditionis" of the Roman law,⁵ proceeded at law with the transfer of the ownership or the "Auflassung"; the giving of material possession, or the "Einweisung," completes the act. The "Auflassung" is nothing at bottom but the disseisin of the French law; the word itself signifies, properly speak-

¹ Heusler, II, 85; Huber, IV, 706. *Id.*, in France, cf. Giraud, II, 260.

² Examples in Huber, IV, 706.

³ "Schwabensp.," I, 38, 40; Huber, IV, 706.

⁴ The parties received a writing attesting the conveyance and furnished with the seal of the judge ("Fertigung"); this was the chief advantage contemplated first of all: Huber, IV, 703. The judicial deed did not become obligatory in Romanic Switzerland, whereas it was obligatory in German Switzerland.

⁵ From this there arises an obligation which can be transmitted to the heirs: "Sachsensp.," I, 9, § 1 *et seq.*; Brünneck, "Gesch. d. Grundeigenth. i. Preussen," 1895.

ing, disseisin or quitting; but it also serves to designate by an extension of the whole operation, the disseisin and the giving of seisin which follows it. The grantor declares that he abandons the land for the benefit of the grantee; and to this declaration there are joined or not, according to localities, the old formalities of the giving of the glove, the stick, the clod of earth, or the making of the symbolical gesture (*"curvatis digitis"*).¹ Upon which, the judge calls upon the participants three times to plead their rights, and in default of any claims, declares that the right has been transferred, that is to say, he ratifies the act and places his peace upon the property, or, in other words, forbids anyone from disturbing the grantee.² A report of the proceeding is drawn up in the same way as for a judgment or municipal debate, and inscribed on the registers of the court or of the Council of the town, or even on special registers, *"libri resignationum,"* which are the origin of the modern land registers (*"Grundbücher"*). The inscribing in these registers constituted a proof, just as the testimony in court. In certain localities this inscription came to be the most important formality and the *"Auflassung"* a secondary one (Bohemia, thirteenth century).³

The effects of the judicial feoffment in German law are more radical than those of the French public nams. The ownership which was transmitted⁴ was not such as the man making the grant had, but such as the judge declared it to be, so that the situation of the grantee might be better than that of his grantor;⁵ in fact, he found himself protected from any attack by virtue of the legal formalities. The most that third parties had was the resource of acting within a year and a day before the *"rechte Gewere"* was required by him.⁶ The part played by the tribunal

¹ In many localities giving of the ownership to the judge by the grantor and a transfer of it by the judge to the grantee. Cf. Saxony, *"investitura allodialis."*

² Legal forms, cf. Laband, *"Verm. Kl.,"* p. 236, which does not mean to say that there was a fictitious action. — Brunner, *"Urk.,"* p. 286.

³ Sometimes conveyances and the formation of real rights are written one after the other in the order of their date; sometimes a chapter is opened upon each piece of land so as to include every act of what might be called its civil status: searches then become easier and more certain. Letters were delivered to the parties (*"Gerichtsbrief," "Wehrebrieff"*), Stobbe, § 67.

⁴ As to possession (*"Gewere"*) there is a controversy: Stobbe, II, 191. Often a procedure was organized for the *"Einweisung"*: *"Sachsensp.,"* III, 83 (*"sessia triduana"*).

⁵ His grantor could have been evicted by the *"verus dominus"*; the assign is not exposed to this danger. But this consequence was not at first recognized because in the beginning the judicial deed was not necessary. Huber, IV, 704.

⁶ Prescription may make up for a lack of *"Auflassung."*

makes this consequence a reasonable one; it took an active part in the deed, summoned third parties to plead their rights, and, if they did not raise any claims over the property, placed its peace upon the latter. In certain localities it even went so far that control of the court modified the contract itself, which served as a foundation for the alienation (sale, gift, etc.).¹ And, in order to give more publicity to the transaction, when justice was no longer rendered by popular assemblies, it was sought to bring it to the notice of everybody by means of public placards.

Thus we see that the modern system of land registers,² and the principle of the "legal title" which gives the grantee so much security, and which places landed credit upon such a firm basis, have their origin in the "Auflassung" of the Middle Ages, very much as registration sprang out of public nams in France. But the influence of Roman law disturbed and complicated in a singular manner the German practice from the sixteenth century.³ The modern legislator has had to make it over and put some order into this chaos, so as to educe from it the system of mortgages which has been proposed in our days as a model for other countries.⁴

§ 312. (V) **The Common Law of the French Customs.**⁵ **System of Pretended Delivery.** — The common law of the Customs of the sixteenth century is formulated by Loysel, 746, in the following

¹ *Huber*, IV, 710: they even go so far as to make the legal "Fertigung" obligatory for the formation of a contract, in the same way as elsewhere they require the drawing up of a notarial deed. It is only in our century that the contract and the transfer of property have been clearly separated. See also the system practised at Bremen since the thirteenth century: *Frommhold*, p. 150; *Challamel*, "Bull. de la Soc. de Législ. Comp.," 1878, p. 482.

² *Bibl.* on the history of the "Grundbücher": *Brunner*, "Grundz.," p. 176; *Huber*, IV, 711; *Flammer*, "Dr. Civil de Genève," p. 168; "Z. S. S., G. A.," 1893, 1; *Aubert*, "Z. Gesch. Deutch. Grundbücher"; *Rehme*, "Gesch. d. Münch. Grundb.," 1903 (in the "Festg. f. Fitting," *Halle*).

³ Thus was revived the double ownership of the classic Roman law, by contrasting the "dominium civile" or ownership inscribed upon the land register, upon which a reclaiming could be based, and which could be lost only by another registration, and the "dominium naturale," or possession based upon title, protected by the action and a defense "rei venditæ et traditæ." Cf. Prussian "Landrecht," I, 10, 1 *et seq.* In various localities the old formalities were abandoned, where they were looked upon as a hindrance (every citizen has his own chancery, they say in Zurich, — that is to say, that he himself seals and authenticates his deeds): *Biermann*, "Traditio Ficta," 1891. *Post*, "Common Law of the Customs."

⁴ *Besson*, "Les Livres Fonciers et la Réforme Hypothécaire," 1891; "Procès-verbaux de la Commission Extraparlem. du Cadastre," 1891 *et seq.*

⁵ Texts in the "Confér. de Guénois," pp. 344 and 315; *Ferrière*, on "Paris," 82 (bibl.); *Tiraqueau*, "De Jure Constituti Possessorii," "Opera," 1597, IV; *Domat*, "Loix Civ.," I, 2, 2; *Pothier*, "Propriété," IX, p. 101, ed. *Bug.*; *Guyot*, see "Tradition," "Clause de Constitut.," etc.; see *Ferrière*, *Denisart*; *Bourjon*, I, pp. 270, 470 (ed. 1770). Works on Arts. 711 and 1138 of the Civil Code, cf. *Dramard*, "Bibl. du Code Civil"; "Encicl. Giur. Ital.," see "Const. Poss."

terms: "Disseisin and seisin made in the presence of notaries and witnesses are as good as, and are the equivalent of, delivery and release of possession."¹ In contracts which transfer immovable property there is inserted a clause setting forth that the formalities of disseisin-seisin have taken place; the majority of the time this is contrary to the truth; the notarial report is untrue; but none the less are these formalities held to have been carried out. The delivery on paper has the same effect as actual delivery.²

§ 313. **The Same.**—**Origin.**³—Alongside of actual delivery, we already find in the Roman laws cases of the transfer of ownership without an actual giving of the thing to the grantee: "interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam" ("Inst." of Just., 2, 1, 44). Let us cite, as examples of these, the delivery of the keys of a warehouse containing goods sold, the delivery of documents for a sale of slaves, the delivery "brevi manu" when the occupant (for example, a tenant) acquires the land which he occupies, the agreement in lieu of delivery when the possessor becomes a holder "pro alio," for example, by reserving the usufruct of the property which he alienates, or by becoming the tenant of the grantee.⁴ These proceedings had, it seems, neither revolutionized the doctrines nor the practice which always adhered on principle to material delivery. But during the barbarian period delivery "per cartam" may be connected with it. In cases where it was hard to carry out an actual delivery of the land alienated, this delivery was dispensed with at first by conveying with a fictitious reservation of the usufruct (for a few days only); from the sixteenth century, in Romagna, the "retentio usufructus" is considered as the equivalent of the "solemnis et corporalis traditio."⁵ A little later on, in the eighth century, the fiction of the reserving of the usufruct was abandoned for the giving of the deed which established the intent to convey; it was customary to draw up deeds of this

¹ "Lorris," XI, 7; "Orléans," 278; "Meaux," 3, 13; "Sens," 230.

² Judicial sentence, *Masuer*, X, 9 (feigned delivery useless); *Landsberg*, pp. 140, 142.

³ *Brunner*, "Rom. u. Germ. Urk.," I; *Landsberg*, "Glosse des Accursius," 1883; *Biermann*, "Traditio Ficta," 1891; cf. *Savigny*, "Possession," etc.

⁴ *Dig.*, 18, 174 ("claves apud horrea traditæ"); 18, 6, 14, 1 ("trabes signatas"), cf. 1, 2 ("dolium signatum"); 41, 1, 9, 5 (delivery "brevi manu"); 41, 1, 18 "pr." (agreement for possession, in lieu of delivery; 18, 1, 75; 19, 1, 21, 4, lease; 21, 3, tenure at will); "Cod. Just.," 8, 53, 28 (reservation of the usufruct); "Cod. Just.," 8, 53, 1.

⁵ *Marini*, "Papiri Diplom.," 1805, no. 86 (in 553); *Spangenberg*, "Juris. Rom. Tabulæ negot. sollemn.," 1822, no. 183, etc. On the "epistolæ traditionis," cf. *Biermann*, p. 24.

nature from the time of the Roman period; the delivery was set forth therein, but they were merely means of proof; in the eighth century the giving of the writing had the effects of the "corporalis traditio."¹ Already, before this period, delivery "per cartam"² had been introduced into France, a fact established both by formulæ and by deeds, and which the Germanic ideas no doubt favored as to symbolical delivery. The school of the Glossators could not fail to respect the Roman principle of the necessity of the actual delivery, but it understood the exceptional cases which figured in the texts in a broader way. Thus the Gloss holds that the giving of the deed³ bearing the word "tradidit" and analogous terms has the effect of transmitting possession, and Azo declares that "traditione instrumentorum acquiritur dominium vel possessio";⁴ so, too, it recognizes unrestrictedly the delivery⁵ by formal recital, and the practice of the time followed it, as is evident from the notarial formulary of Rolandinus Passagerius,⁶ which was so widespread. With true inconsistency, or, rather, owing to a scrupulous regard for the text, the Gloss does not recognize the "investitura abusiva," or symbolical delivery, as having the effect of transferring possession. The Post-Glossators gave, as it were, a practical meaning to these doctrines,

¹ We already read in a gift from Justinian to the Church of Ravenna: "Corporaliter per epistolam tradi fecit"; "Z. S. S., G. A.," 142. Texts and proofs in *Biermann*, p. 28; *Brunner*, "Urk.," p. 112.

² *Brunner*, p. 288. The "Interpr." of *Paul*, 1, 12, 6, does not yet attribute to the conferring of a title the effect of transmitting a real right. But the "L. Rom. Cur." is to the contrary: *Zanetti*, "La Legge Romana Ret. Coir.," 1901; "Form. Turon.," 14, 15; various statutes (804 at Angers, etc.); *Biermann*, p. 31; "Petrus," 2, 3, 13: the grantee only becomes owner if he is "corporaliter inductus in possessionem"; but "pro traditione rei habetur, quocumque modo res vendita remaneat apud venditorem nomine emtoris, sive nomine depositi, sive commodati; sive conductionis jure; vel etiam si venditor usumfructum retinuerit." According to this idea the "Petrus" settles the conflict between two successive buyers or two donees; but in this last case it is only a question of the "investitura corporalis."

³ Is the delivery of the "instrumenta emtionalia" understood to apply to the title deeds of the vendor or to the deed of sale? Controversy.

⁴ Commentary on the words "tradita sit" in law 2, "Cod. Just.," 7, 32: "vel per hæc verba tradidit vel per hoc confiteor me tuo nomine possidere, cum constat me possidere." Cf. law 48, "D.," 4, 1.

⁵ It is probable that this name is due to Azo, "Summa," on "Cod. Just.," 7, 32; "illud quod meo nomine possideo constituo me possidere nomine alieno." The word "constituto" seems to be borrowed from law 17, § 1, D., 41, 1. The Commentators see cases of agreement in lieu of delivery in the reservation of the usufruct, the tenure at will, and the lease. The validity of the agreement in lieu of delivery is not dependent upon any special form.

⁶ Formula of sale (cited by *Biermann*, p. 65). "Summa Totius Artis Notariæ," ed. 1583; *G. Durand*, "Specul.," 1, IV, t. "emt.," nos. 30, 32.

without succeeding in establishing them on fairly secure theoretical foundations.¹ For them, feigned delivery contrasted with real delivery, and it has scarcely less importance. If they refuse to recognize the transferring of property "solo consensu,"² if they do not take into account the frequent clause "vendidit et tradidit,"³ it is in order to give the "formal recital" of delivery the widest extent,⁴ and in practice this comes to the same thing: they tell us that there is, so to speak, no act of alienation in which the clause of "formal recital" does not figure, and several of them maintain that, if it has been forgotten to insert it, it should be implied;⁵ it is the "communis consuetudo Italiae."⁶ As in the case of real delivery, they demand that the grantor should be in possession at the moment when it takes place, without which it would be of no effect.⁷ In the case of two successive deliveries of the same land, the first one pretended and the second one real, they say that the first one prevails.⁸ At the same time, they did not go so far as to give symbolical delivery the same effects as had the "recital" in lieu of delivery. But the "usus modernus Pandectarum," in Germany, did not hesitate to do so. For the authors who have formulated it, the giving of possession is only one form of the declaration of the will to alienate and acquire, which

¹ One will find in *Biermann* a sketch of these theories, according to which the feigned delivery would consist of an "actus corporalis": "Siete Part.", III, 30.

² *Balde*, "Com. in Usus Feud.," no. 28; "Consil.," 337, n. 12.

³ Jason and others state that this clause "semper dici solet in instrumentis"; a minority see therein a tacit agreement in lieu of delivery: *Biermann*, p. 80.

⁴ Thus they not only allow of the agreement in lieu of delivery which is dependent upon a "causa detentionis" (for example, a reservation of the usufruct) but the abstract agreement in lieu of delivery, simply because the grantor declares: "constituo me tuo nomine possidere." *Biermann*, p. 107. Cf. as to this, Commentary on "tradita sit."

⁵ *Biermann*, p. 197.

⁶ Cf. *Biermann*, p. 308 (the agreement in lieu of delivery is very frequent: "apud Gallos, Italos, Germanos," they say in the sixteenth century). — Cf. the Italian practice: in Sicily, sales before the tribunals in the fourteenth century; publications in the popular assemblies in the public squares. In Venice, "iudices ad contractus," public registers. In Florence, register of transcriptions with immovables in the fourteenth century. In Naples, a sort of cadastral survey. — "Acta tirolensia," II, 1899.

⁷ *Biermann*, p. 112. Some justify this solution by the notion that "nemo dat quod non habet"; "Cout. de Toulouse," 93.

⁸ *Guido de Suzaria*, *Jean d'André*, cf. *Gui Pape*, "Q.," 112, 101, 126. The contrary opinion has, however, some partisans, see the notes on *Gui Pape*. The question is asked with respect to the interpretation of the law: "Quoties," 15; "Cod. Just.," "de Rei Vind.," 3, 32. The "Cout. de Toulouse," 93, 147, 148, also admits that the vendor keeps the ownership with respect to third parties so long as the purchaser has not taken physical possession. Cf. on this *Casaveteri* and *Soulatges*; *Serres*, "Inst.," 2, 1, 44.

comes to the same thing as saying that the transfer of ownership results only from agreement.¹

§ 314. **Formation of the French Practice.** — The application of these doctrines, in which there was betrayed a marked tendency towards simplification, took place at a very early period in the countries of written law, where allodial holdings were very numerous; from the eleventh century deeds mentioned the “vendidit et tradidit”; the delivery of the deed, the delivery of the notary’s pen,² are obviously connected with the Frankish period. Fictitious agreements of tenure at will, of lease, of a reservation of the usufruct, are also in use as a consequence of this; the grantee is authorized to take possession when it shall suit him and of his own authority; until that time the grantor has possession in his own name.³ These clauses became typical ones and were understood, if need be, in deeds.⁴ Moreover, in the case of fiefs the Customs of the thirteenth and fourteenth centuries still clung to the old system of disseisin-seisin.⁵

In the North, the general custom from the fourteenth century seems to have been to recite in deeds the imaginary act of formal disseisin-seisin; this clause became typical, as did the clauses of tenure at will and reservation of the usufruct, which were frequently joined to it,⁶ but, thus differing from what had taken place in the South, it was not presumed when it was not recited. “He who does not wish seisin, does not take it.” Such is already the rule of the “Grand Coutumier,”⁷ and an exception is only made in the case of fiefs; investiture by the lord had for a long time been looked upon as indispensable for this category of possessions,⁸ but in the end they were not treated any differently from copyholds, and the only difference which has lasted between fiefs and copyholds is the necessity in the case of the latter for the

¹ See in *Biermann*, p. 217, details on the German law since the time of *Carpzov*.

² *Soulaitges* on “Toulouse,” p. 237.

³ “Théorie et Pratique des Notaires,” 1629, p. 130. *Masuer*, XI, 40: the buyer or the donee can only take possession of his own authority if the deed specifies that there has been delivery. — Cf. *G. Durand*, “Spec.,” IV, 3.

⁴ *Serres*, “Inst.,” 2, 1, 41. Cf. *Domat*, “Loix Civ.,” 1, 2, 2, 5; *Julien*, “Elém. de Jurisp.,” p. 306; *Astruc*, “Tr. des Tutelles,” 1758.

⁵ “Toulouse,” 129; “Agen,” 38; “Tonneins,” 161, etc.

⁶ “Paris,” 175, and the “Conf. des Ord. de Guénois”; *Pothier*, IX, no. 67, ed. *Bug.*; *Masuer*, XI, 37, 61 (tenure at will); “Meaux,” 3, 13, etc. (retaining of usufruct).

⁷ “Gr. Cout.,” 2, 19, p. 233; “Cout. Not.,” 72.

⁸ “Gr. Cout.,” 2, 19, p. 233; from this passage it would seem to follow that nothing can take the place of investiture by the lord, neither lease nor letters

swearing of fealty and homage; "true seisin of a fief cannot be acquired without fealty or the consent of the lord" (Loysel, 747).¹

At the same time, let us notice that the giving of seisin by the lord has not lost its entire usefulness.² The year accorded for repurchase by a person of the same lineage begins to run from this time, according to various Customs which have remained faithful to the old traditions. Sometimes this formality was dispensed with by admitting that "taking possession in fact equals seisin" (that is to say, the giving of seisin by the lord). In some localities, for example, at Senlis, in Valois, there is a special kind of giving of seisin in the case of rents; their establishment is written on the public register; rents given by means of seisin are preferred to others.

§ 315. **Conditions and Effects of Pretended Delivery.**³ — Pretended delivery did not transmit ownership excepting under certain conditions; it assumes: (a) a notarial deed;⁴ this is at least a necessity in fact;⁵ (b) the clause of disseisin-seisin, or a clause which is its equivalent;⁶ (c) a grantor in actual possession of the land, in such a way that the grantee can put himself into possession; in this way the fiction approached the reality; it is only accepted when it is not too much opposed to fact. If the grantor

of sale, nor the keeping back of the usufruct; but this is only true as applied to fiefs.

¹ Thus it was no longer necessary to receive the seisin from the lord. Moreover fealty and homage were themselves reduced to the drawing up of a written deed.

² An Order of the Council of August 7, 1703, regulated the conferring of the seisin of property situated upon the land held from the king. Pothier still speaks of the giving of seisin and the right of seisin to which it gave rise, independently of the lord's due and sales. As to prices, cf. *Kérallain*, "Th.," p. 142. — The formalities of the giving of seisin were only completely abrogated by virtue of the Law of Dec. 5-17, 1790.

³ *Charondas*, "Rép.," II, 62; *Ricard*, "Don.," I, 901; *Argou*, "Inst.," III, 23.

⁴ Necessity for a notarial deed for every contract relating to immovables according to the Statutes of Vaud., I, 6, 4; *Huber*, IV, 709; *Loysel*, 746.

⁵ *Pasquier*, "Inst.," p. 256. The notarial deed assures to the vendor a claim over the thing sold as security for the payment of the price. Sale by deed under private seal or a verbal sale would not give him this; it would be difficult to prove, especially a verbal sale, since the Ordinance of Moulins. Furthermore, the mortgage creditors under a public deed would be preferred to grantees by deed under private seal. *Soulatges* on the "Cout. de Toulouse," p. 238, assuming a conflict between two purchasers, — one by public deed, the other by private deed, — gives the former precedence unless the latter has been put in actual possession. — The public deed is absolutely necessary in the case of a gift.

⁶ Clause of the agreement in lieu of delivery by which the vendor who keeps the property declares that he appoints himself possessor for and in the name of the owner. Clause of tenure at will, by means of which he declares that he only possesses at will, subject to the pleasure of the owner. Retaining of the usufruct.

who declares that he disseises himself is not in possession, the facts contradict the recitals of the deed, and it is only these facts which are taken into account.¹ So that, if the owner of a piece of land had made a real delivery of it to a first grantee, the latter would be preferred to a later grantee who had obtained the pretended delivery of the land.² There was discussion as to the opposite case: did a pretended delivery prevail over a real delivery which was later in date? Pothier believed so, but Ferrière, Guyot, and Henrys maintain that the real delivery should have preference over the other; according to these authors, because of the clauses by which the seller reserves the usufruct and others, the ownership is not transferred as against third parties.³ The same difficulties were presented in case there was a conflict between a grantee and a creditor of the seller who had a mortgage or levied a dstraint upon the land sold. If the vendor,⁴ or, in a more general way, the grantor, was the owner, the grantee became the owner; but, on the other hand, he had no more rights than had his grantor (differing in this from what took place in the other systems of transfer, where the buyer could become the owner without the vendor's having been so). Secret alienation could not virtually create a new title for the grantee; he steps into the place of his grantor; the most that he has is the advantage of the usucaption of from ten to twenty years.

§ 316. **Estimate of the System of Pretended Delivery.** — The practice which we have just described constituted an absolute rupture with the old law and its system of symbolical deliveries surrounded by publicity and hampered by the rights of the lord and those of the family. This practice corresponds to that phase

¹ As to the rule, "to give and to withhold is invalid," *cf. post*, "Gifts"; *Argou*, "Inst.," I, 292: delivery is necessary that the gift may be valid; but outside of the countries of public nams a pretended delivery carried out by means of the retention of the usufruct and the clauses of the agreement in lieu of delivery and the tenure at will are deemed sufficient: "Paris," 275; *Louet*, I, V, s. 1; *La Thaumassière*, on "Berry," VII, 1; *Denisart*, see "Clause"; *Masuer*, XI, 36.

² "A. C., Bourg.," 62, in *Giraud*, II, 279.

³ *Pothier*, "Vente," no. 322; *Guyot*, *Ferrière*, see "Tradition"; *Soulatges*, *op. cit.*, p. 238; *Henrys*, "Œuvres," IV, 5th ed., p. 528 (sale, no. 20). *Cf. P. de Fontaines*, 17, 18; "Petrus," 2, 3, 13; *Glück*, "Pandect.," XVII, 215.

⁴ Let us observe that in the case of a sale it is required, in order that the ownership may be transferred, that the price shall have been paid in conformity with § 41, "Inst. Just.," "de ré. div.": *Pothier*, no. 242. *Rousseaud de La-combe*, see "Précaire": the purchaser declares that he holds by virtue of a tenure at will until the entire payment of the price; the only result in favor of the vendor is a security upon the land: *D'Olive*, "Quest. Not.," 4, 9; 2, 17; *Despeisses*, 1, 6, 19; *Landsberg*, p. 114.

of the history of real property in which the rights of the lord and the family were becoming weakened; as against persons of the same lineage, the right of the individual stands out; as against the lord, the inheritability of fiefs and copyholds. The formalities of symbolical deliveries thenceforth fell into disuse, for they served especially to enforce rights which had disappeared; there only remained of them their mention in notarial deeds.¹ Actual delivery had already been thrust into the background by those usages; it was left there excepting for the Romanists, who in memory of the past gave it a Platonic worship: it was understood in the South as vesting and divesting was in the North. Thus, as far as the larger part of France was concerned, a uniform system of feigned delivery was arrived at; and from this issued the simpler rule of the Civil Code that ownership is transferred by consent alone.²

The theorists of natural law had already formulated this rule; it is found in Grotius, and his opinion, which is accepted by Puffendorf, did not pass unobserved by the civil jurists, because Pothier mentions it.³ It is true that the civilians avoid saying that ownership is transferred by consent alone; this would be a direct attack on the venerated texts and an open break with tradition; they preferred to connect their explanations with the clauses which were in use in notarial deeds. From the sixteenth century certain Customs speak of *clauses transferring ownership*.⁴ A little later on, Loysel, alongside of customs wherein the past still finds expression, recognizes the new law: "One has no sooner sold a thing than he has nothing left"; if there could be any doubts as to the meaning and the bearing of this rule, his commentator, Laurière, undertook to dissipate them: "Thus," says he, "among us, as soon as the sale is perfected, the dominion over the thing sold is transferred without delivery, contrary to the provision of Law 20, 'de Pactis.'" Domat implies the clause of "tenure at will" in sale and arrives at the same result. Ricard complains that delivery

¹ Vain protestations of Dumoulin, on "Paris," I, 20, 5, 16: "neque vera neque ficta traditio."

² Almost the only innovation of the Civil Code consisted in doing away with the inserting in deeds of a clause which had become popular and in no longer demanding the drawing up of a notarial deed: *Héricourt*, "Ventes par Décret," 186, 352; *Endemann*, *op. cit.*, II, 83.

³ *Grotius*, "De J. Belli," 2, 8, 25; 2, 12, 15; *Puffendorf*, "Dr. de la Nature," 2, 9, 8; *Pothier*, "Propriété," no. 245. — Already the Commentary on I, 23, "Cod. Just.," 1, 2, and on the "Inst.," 2, 1, 45, admits that the Church and the "civitas" acquire ownership as a result of the agreement without any delivery: *Covarruvias*, "Resol.," II, 19, 3, and others hold the same thing with respect to the sovereign: *Landsberg*, p. 140, 12.

⁴ "Sens," 250.

no longer serves to swell the number of the clauses in contracts. The Romanists, and among others Pothier, are the only ones to resist the general impulse; and, again, this is only as far as form is concerned.¹

The system of our old jurisprudence has been variously estimated. It seems that, having to choose between two systems, the one secret and full of inconveniences, and the other consisting in publicity and offering the greatest possible advantages, it rather blindly pronounced itself in favor of the worse. But those who look upon these things from this point of view mistakenly carry into the past ideas which may be all right for our own times. The most serious reproach charged to the system of feigned delivery is that it leaves ownership uncertain: the third-party grantee and the mortgage creditor are never sure that they are negotiating with the owner of the property which one of them is buying and upon which the other takes a mortgage, because a secret alienation can at any moment cause the ownership to pass from one person to another. But this inconvenience existed more in theory than in practice. Generally, the grantee of the piece of land was a neighbor; it was hard to take him unawares. And, when there was a risk of this happening, the intervention of the notaries prevented it nine times out of ten, for the notary, who had to be resorted to for conveyances as well as for the creating of mortgages, was well aware of the rights of the parties; he could only act knowingly, under penalty of involving his own responsibility. Thus there were in customs and usages palliatives which rendered the system adopted by the French Customary law tolerable. Otherwise it could not be explained why the Civil Code came back to it in an exaggerated form when it was contemplating the system of publicity borrowed by the Revolution from the "public nam" Customs.²

Nor must we forget that royal legislation had itself attempted to react against the secret transfer of real rights. Thus, the Ordinance of Villers-Cotterets, 1539, Art. 132, prescribed, under penalty of nullity, the entering or registering of gifts at the clerk's office in the royal jurisdiction.³ (Cf. Ord. 1566-1731.)

¹ *Domat*, "Loix Civ.," 1, 2, 2, 5; *Ricard*, "Don.," no. 902; *Ferrière*, see "Constitut.," *Pothier*, nos. 186, 245; *Serres*, "Inst.," p. 130.

² This is not the best thing done by the Civil Code; but it would be ridiculous to think that its framers have, from mere caprice or from hatred of Revolutionary institutions, resuscitated a system absolutely condemned by long experience. — Cf. *Flammer*, "Dr. Civil de Genève," p. 169.

³ Ordinance of Villers-Cotterets, Aug., 1539, Art. 132; Ordinance of Moulins, Arts. 57, 58; Ordinance of 1731, on gifts.

By this means it was suggested that they be made public, so as to avoid every kind of fraud and to protect third parties, whoever they might be, who might be injured by them, even creditors by simple contract, legatees, and heirs. When the Law of the 11th Brumaire, year VII, established transcription, gifts of immovables were found to be subject to the double formality of registry and transcription. It is thus also that the Edict of May 3, 1553, decided that neither ownership nor rights in land could be acquired without registration of the sale and of the deed relating to it; but this edict was not carried out. The Edict of December, 1703, which was commonly called the "Edict of Lay Registrations,"¹ and the Edict of October, 1705, ordered the registration, not only of gifts, but of every contract and deed which the public is interested in knowing about, and especially of deeds transferring ownership. All these deeds could not be served, could not be produced in court or made use of to draw up other deeds, and, as a general rule, could not be established in public usage, excepting upon condition of being registered; unless they were registered, they had absolutely no effect "in law or otherwise."² We shall see further on that measures were also taken, but without success, for the publishing of mortgages.

§ 317. (VI) **English Law.** — Leaving aside the Anglo-Saxon period, about which little is known,³ it is easy to prove that in

¹ *Guyot*, see "Contrôle," "Insinuation." As to control see Edicts of 1581, 1693, 1699; *Isambert*, see Table, Restricted publicity; cf. Edict of 1581, Art. 8, and Law of 22 Frim., year VII, Art. 58. Fiscal object of the edicts.

² *Guyot*, "Insinuation"; *Ferrière*, "Sc. des Notaires, in F."

³ A remarkable characteristic of the Anglo-Saxon law is the distinction between "**Bocland**" and "**Folcland**": *Schmid*, "Ges. d. Angels.," see "Gloss." By "bocland" is understood a land granted "per cartam" (from whence its name, "boc," "liber," "carta", and "land," or the Latin equivalents, "terra codicillaria," "testamentaria"); thus it is that in the ninth and tenth centuries the king, with the consent of his "witan," grants domains to churches, to monasteries, and sometimes to the laity, by conferring upon them very extensive rights, — the full ownership (from whence is derived the translation "allodium" which we sometimes find). This would have been individual ownership as opposed to collective ownership represented by the "folcland" (land of the people, "ager publicus"). But this meaning of "folcland" (generally received from the time of J. Allen, 1830) is rejected to-day; *Vinogradoff* ("Eng. Hist. Rev.," Jan., 1893) restoring to honor an explanation by *Spelman* ("Gloss. Archæol.," 1689) has shown that the "folcland" was the land possessed by virtue of popular law, of the Custom, without a written title. All land, on principle, comes within this category, "bocland" being only an exception, an institution of foreign origin introduced in the interest of the Church. The "folcland" may belong to the king or to ordinary individuals, may be an object of individual or collective ownership; but everything leads us to believe that common lands were very numerous at this period. As to alienation, cf. *Pollock*, "Land Laws," 199; *Maitland*, "Domesday Book," p. 226 et seq.; *Brunner*, "Rechtsg. d. Rom. u. Germ. Urk.," 1880.

England evolution took place towards simplification, as it did in the common law of the French Customs,¹ towards the security of the grantee as in countries of public lands. But the system of landed property is so complex there that the question of the conveyance of immovables shows the effects of it; it was solved in various ways, according to the nature of possessions and the character of the rights transferred. Perhaps it would be a good thing to remember now that there is no allodial ownership in England. All land is held mediately or immediately from the crown. Also, Williams was able to say, "The first thing which a student in law should do is to disabuse himself of the idea of an absolute ownership; no one, according to our law, is the absolute owner of land; he can only have over it an *estate*." And Lord Sherbrooke, substituting a modern formula for that of the Feudal law, affirms that "the land is a kind of property in which the public has, by reason of its very nature, in common with the owner, a kind of interest which slumbers."² Without wishing to find out whether "the awakening of the one jointly interested" is not likely to give rise to crises of a formidable seriousness in the future, let us note that in the past this kind of ownership, combined with entails, with various incumbrances, with rights of reversion (remainder, reversion)³ has offered a thousand difficulties to transactions with relation to immovables.

§ 318. (I) **Freehold** or frank tenement, which is a tenure similar to the French fief. — (A) *Feoffment with Livery of Seisin* (inféudation with putting in possession, "feoffamentum," "traditio saisinæ"). In the strictness of the law, the granting ("dare et concedere," give and grant) of an inheritable right, or a right for life, a frank tenement requires as an absolute necessity the actual putting in possession of the grantee. It takes place in fact or

¹ Pollock, "Land Laws," p. 73: they passed from a simple but annoying publicity to the most absolute secrecy with regard to transactions in immovables, without the legislator having done anything to bring this about, and even, to tell the truth, contrary to his will.

² "Ann. de Lég. Etr.," 1887, p. 43.

³ Statutes "De Donis Conditionalibus," 1285; "Quia Emptores," 1290; of Mortmain (cf. the Mortmain Act of 1890, 1892). The first of these statutes contributed especially towards complicating the system of the ownership of land in allowing of the creation of, or rather, in the developing of, the fee tail ("feodum talliatum," that is to say, limited). Its inconveniences were infinite, says Coke; if all the estates had been in fee simple, purchasers would have been sure of their purchases, farm tenants of their leases, and creditors of their claims; the king and the lords would have had their escheats, forfeitures and other seigniorial rights. The "forma doni" caused trouble and confusion everywhere by substituting for simple rules the entanglement of individual caprices.

at law.¹ (a) *In fact*, when the parties are on the premises; the lord who is making the grant places in the hands of the grantee the hammer or the knocker of the door (“tradere per ostiam, per haspan vel annulum”), where a house is concerned; a rod or a glove (“per fustem,” “baculum,” etc.), where a piece of land is concerned.² (b) *In law*, when the land is in sight; the lord shows the immovable to the tenant and asks him to take possession of it (“tradere per aspectum”) and the latter takes advantage of this invitation.³ In the thirteenth century, at least, it was customary without being a legal necessity (excepting since 1845) to establish the transaction by a sealed writing (*deed* equals “factum”) and the symbol and the writing are given at one and the same time.⁴ But ownership is not transferred, says Bracton, either by homage, or by the drawing up of a writing, or by a fictitious delivery; nothing can take the place of actual delivery.⁵ It is difficult to account for the strictness of this exigency at a time when symbolical delivery was so widespread on the continent, and when its efficaciousness was not at all doubtful. Here we have a phenomenon of regression towards the materialism of the primitive law, the cause of which must perhaps be sought in the Anglo-Saxon customs or in a return to barbarism following the Norman Conquest. It even found a support in the doctrines of the Glossators, in whose opinion material delivery was necessary on principle. Whatever the reason may be, these ceremonies often rendered impossible the transfer of ownership (absence, illness, etc.).

§ 319. **The Same.** — (B) *Lease and Release* (lease and relinquishment, “laxare et relaxare”).⁶ This is the “brevi manu” transfer of the Roman law. At the same time that it adhered strictly to the necessity of an actual handing over, the English practice admitted, from the thirteenth century, probably under the influence

¹ In deed and in law (*Coke*).

² *Bracton*, f. 40; *Britton*, II, 9 (“C.” 40, ed. *Howard*); *Littleton*, 70. There would take place, be it understood, a previous disseisin from the lord, if it were a matter of a fief which had already been established.

³ *Bracton*, f. 41. Cf. *Azo*, “Inst.,” 2, 1, 40; “*Summa in Cod.*,” p. 436; *Glanville*, VII, 1.

⁴ *Littleton*, 370. It is not rare for the deed to be drawn up in triple indenture; one is given to a third party, — for example, to the lord paramount.

⁵ Cf. *Littleton*, 66. For example, the heirs of the grantor would not be bound. — The “*traditio saisinæ*” was not required for the inferior tenures (for a term or at will), that is to say, for those which were not free (for life or inheritable). The mere delivery of the deed of grant was sufficient to transfer incorporeal things (rights of patronage, of reversion, rents, etc.). *Post*, “Uses” (deed of grant).

⁶ *Bracton*, f. 41, 45; *Littleton*, 444 *et seq.* Another expression: “*reddere et quietum clamare.*”

of the Romanists, that there were cases in which "*sine traditione transit dominium*." Thus, when a freeholder has leased his land so as to put it into occupation by the tenant, he is free to grant him his own rights by a second deed; "*ipso facto*," without there being any need of the formalities of the livery of seisin, the tenant becomes the owner. But this is a solution which can only take place under exceptional circumstances. It is an accident in the law of this period, for the *release* does not satisfy either the materialistic tendencies of the common law or the exigencies of the Feudal law; it still has the fault of being secret, the transfer (*grant*, *remit*, *release*) only being made known by a sealed deed which was given to the grantee. The release no more protected the grantee from the claims of third parties than did the livery of seisin. The publicity of conveyances and the security of grantees were only obtained by the judicial methods with which we are about to deal.¹

§ 320. **The Same.** — (C) *Fine*, or recognizance at law.² Following a fictitious action between the grantor and the grantee,³ a lawsuit in which the latter pretended that he had been dispossessed by the former,⁴ the defendant petitioned for a settlement; the

¹ **Attornment** (that is to say, acknowledgment, recognizance). If the vassal or the copyholder can substitute a third party for himself by granting to the latter his fief or his copyhold, the lord is authorized on his part to grant his seigniorial rights and thus to subrogate a third person in the exercise of his rights. The man in possession of a manor ordinarily holds one part of it as his domain, and another part he lets out for services and it is held by his vassals or tenants. When he wishes to alienate this manor it is necessary that all his vassals or tenants should give their expressed consent by saying to the new grantor at the time the grant is carried out, "I attorn to you," etc., and giving him a "pfenning"; their tacit consent, by carrying out for his benefit those services which they owed. As we can see, attornment is the opposite of the vassal's obligation of obtaining the consent of the lord when the former alienates his fief; and both of these matters are to be accounted for by the personal character of the feudal relations. Under Edward III the vassal was recognized as having a right to alienate his fief without the authority of the lord, upon condition of a fine paid to the king, and, owing to the reciprocity which was no more than just, the consent of the tenants could be supplemented by a writ from the king. Attornment also served for the transfer of rents for which the consent of the tenant was at first necessary; in the end it was deemed sufficient if he were notified of the grant: *Littleton*, 551; *Britton*, 41; *Glasson*, IV, 241. Same system in Brittany: *Ragueau*, see "Attournances." Cf. *Collinet*, "N. R. H.," 1895, 647.

² "*Finalis concordia quia imponit finem litibus*"; *Glanville*, 8; Statutes "*de modo levandi fines*" (date? character?), "*de finis levatis*" (Edward I), etc. (in "Statutes of the Realm"); *Littleton*, 441; *Coke*, "Inst.," II, 511; *Blackstone*, II, 21, and Appendix no. IV; *Pollock and Mailland*, II, 94. It is said that a "*finis*" is levied. On this expression, cf. *Du Cange*, see "*Finis, Finem, levare*"; *Brunner*, "Urk.," p. 286.

³ In order to begin the action one had to pay a due or fine to the king, and one paid him another fine for his authority to compromise.

⁴ Because the former did not carry out the agreement which had been entered into between them.

court gave the parties permission to come to an understanding, and the deed of compromise by which the defendant acknowledged the right of ownership of the grantee was publicly read before the judges (or before commissioners) whose duty it was to ascertain the capacity and the freedom of the parties.¹ A deed of the whole proceeding was drafted, and this, at least since 1195, in three indented copies, one of which, called "pes finis," was preserved in the royal treasury, and one of the others given to each of the parties.² This procedure had the same advantages which a judgment in real litigation has: 1st, easy proof of the deed, the preservation of the "pes finis" in the treasury being a first-class guarantee against loss or falsification of titles; 2d, assured execution; 3d, and especially, the cutting off of all claims which were not brought forward at once, or, at the very latest, within a year and a day:³ "non in regno Angliæ providetur vel est aliqua securitas major vel solemnior per quam aliquis statum certiore habere possit quam . . . finem in curia domini regis levatum." Nor by itself does it transfer the seisin, any more than a judgment does; if the grantee wishes it to be equivalent for him, to the feoffment with livery of seisin, he will have to put himself in possession of the land in whatever way he can, good or bad. The consequences of the fine, which were very far reaching, took place all too soon; the Statute of Edward III (fourteenth century) gave third parties the right to assail it at any time; the remedy was radical, but it had the fault of taking away from this institution its

¹ Necessity of possession on the part of the grantor; without which any two people might have been able to deprive the owner of a piece of land by bringing a pretended action for this land. The same remark applies to common recoveries.

² The "finis" was first of all proved by the court record, later by written deeds. The drawing up of three copies, one of which was kept in the treasury, dates from 1195; in the name given to this latter copy there is a pun on the French "pes" (peace, transaction) and the Latin "pes" (foot), just as there is one in "fine," which can be connected with the Latin "finis" and the French "finer" (finance), to pay a fine or due (fine means a pecuniary penalty, a transfer tax). Examples of fines from 1182 to 1272, *Pollock and Maitland*, I, 18.

³ This is the most remarkable effect of the "finis": an alienation thus carried out, says the Statute "Modus Levandi Fines," not only binds the parties and their heirs, but all the world. This is to be accounted for because of its very origin. This method of acquiring assumed first of all a real process for reclaiming begun before the local court; now, the frank-tenement holders were obliged to take part in these trials; there was nothing wrong in declaring that they were stripped of all rights so long as they did not protest against the sentence which was pronounced; if they were present they did wrong not to take part in the judicial assembly. — Among other consequences of this result let us notice the extinction of trusts; the trustee who alienated property held in trust by making use of the fine (or the common recovery) brought the trust to an end.

chief usefulness; few men were assured of their possessions. Also, under Henry VII (end of the fifteenth century), Parliament, taking a middle course between these two solutions, permitted claims to be made up to five years dating from the public reading of the fine; the rights of minors, of married women, of the insane and of those who were absent, were preserved.

§ 321. **The Same.** — (D) *The Common Recovery*,¹ which is of more recent date than the levying of the fine, rests like the latter on a fictitious action. According to the common law, the monasteries and other establishments in mortmain could not receive any lands without the authority of the king, under penalty of having them confiscated. But this rule was evaded. The holder sold his land to the monastery and at once took it back by another transfer as coming from this monastery; as the latter had not had the seisin, the confiscation was found to be avoided, and in one way or another, for example, by way of expiration, the monastery then took the property. The Great Charter of Henry III, c. 36, forbade these frauds. But it only mentioned sales. The religious houses, instead of buying lands, leased them for a thousand years, and still escaped the confiscation, at the same time attaining their object. The Statute "De Religiosis," under Edward I, even forbade long-term leases. The monks did not acknowledge themselves as beaten; they then brought a suit to recover, on a fictitious claim against the owner, who allowed judgment to go against him. By the second Statute of Westminster it was decided that every action of recovery brought by a religious community should be subject to an inquest carried out by a jury, so as to annul it in case of fraud. Under Edward IV (end of the fifteenth century) procedure became more complicated: "the possessor who was sued in an action of recovery would vouch, by way of defence, a third party whom he pretended to be his warrantor; the latter defaulted; the judge gave judgment for the default of the warrantee against the warrantor; but at the same time he gave judgment against the warrantee for the benefit of the demandant. By means of this procedure, the heirs were more surely shut out; they had no right to complain, because their ancestor, at the same time as he lost the immovable, had a right to its equivalent from his warrantor." There was some hesitation

¹ Procedure so called because one is considered as recovering one's property and because it is commonly made use of. Abolition of fines and recoveries, 3 and 4, William IV, c. 74.

felt about absolutely stripping them, but there was no hesitation about choosing as one's warrantor an insolvent, a man of straw, and this rôle finally devolved upon the crier of the court of justice, who was called in exercising this function the common warrantor (common vouchee, "vocatus"). "From this period on (1472?), conveyances in the form of recoveries became more and more frequent, and they ended by being openly admitted" for the benefit of ordinary individuals. Their great advantage consisted in defeating entails and rights of reversion which rendered ownership uncertain; and such was sometimes the entanglement of incumbrances and rights of reversion that individuals, despairing of knowing the condition of their property, found themselves reduced to the extremity of petitioning Parliament to give them a new title clearing off all previous rights.¹

§ 322. (II) **Copyholds** (tenure by copy of court roll).² This sort of property began by being a servile tenure; also, the tenant whom the lord could expel at his will (tenant at will) had no power to convey his right. But, if the lord was always the official owner of the copyhold, the situation of the copyholder did not cease to gain strength; it has ended by differing very little at bottom from that of the freeholders. It is thus that towards the end of the fifteenth century they acquired the right of alienating their tenure in spite of the lord.³ Then copyholds became like the French copyholds ("censives"). Their complete emancipation only dates from yesterday (1894). The forms of alienation of copyholds always felt the influence of their origin. This act takes place by means of surrender and admittance, which is about the same thing as the vesting and divesting of the French law. (1) The tenant reconveys (surrenders) the property of the lord, ordinarily in his court, by giving him a stick, a glove, an ear of wheat, etc. (2) The lord admits (admittance) the grantee in his stead and place by the same proceeding. The deed is inscribed on the register of the manor in which the land is situated, and a copy of this is delivered to the grantee, whose title it constitutes. This method of alienation expressed the dependence of the copyhold with regard to the manor too well for its abandonment, or even its simplification, to be thought of.

¹ *Blackstone*, II, 21 (French trans., III, 217).

² *Littleton*, 78 et seq.; *Blackstone*, II, 22; *Pollock and Maitland*, I, 337; *Pollock*, "Land Laws," p. 208.

³ Cf. the clause of "free sale" claimed by the tenants in Ireland, and which belongs to those of Ulster: *P. Fournier*, "La Quest. Agraire en Irlande," 1882.

§ 323. (III) **Formation of Uses.** — The complicated mechanism which we have just been outlining was all the more difficult to put in motion as in many cases the owner had his hands tied. This system of impediments did not have the result which was expected of it; it only stimulated the ingenuity of practitioners and led them to invent the boldest expedients in order to avoid their application. If they pretended to respect it in theory, the practice of uses resulted in often reducing it to the condition of a dead letter, and in establishing alongside the ownership of the common law (the “legal estate”), an enjoyment, or rather, a sort of equitable ownership, with which many could be content and which escaped all the rules of the strict law. Such, to a certain extent, at Rome, was the Prætorian ownership, or the ownership of provincial lands.

This institution was originally only a pious fraud,¹ one of the proceedings employed by the clergy to evade the nullity which grants in mortmain were affected with. Instead of granting his lands to a monastery, the owner transferred the ownership to a third party for the *use* of a monastery; the enjoyment which resulted to the profit of the latter was not recognized by the common law, but the “*cestui que use*” could have it protected by the court of equity. Its situation has been compared to that of the Roman “*fidei-commissus*.” The person interposed was the owner at law; in equity he must fulfill all the obligations which had been imposed upon him. This expedient, which appeared under Edward III, was forbidden under Richard II, but only as far as it related to people in mortmain. Ordinary individuals had had the time to accommodate it to their interests; and they preserved it.

The use, being a creation of equity unknown to the Feudal law, it was admitted that it could be constituted “*solo consensu*,” without the giving of seisin, in a secret manner, and could be proved by any means. Neither confiscation nor expiration were to be feared, because the use was not held from any lord. One has no difficulty in seeing what an advantage this right presented because of the facility of transactions, over the institutions of the common law. In return, it was reproached, and Bacon was the first to do it, with ousting many people from their rights, — the woman from her dower, the husband from his right of courtesy, the creditor from his right of distraining, the tenant from his es-

¹ Fear and fraud, says *Coke*, were the true inventors of the use.

tate. The creditors of the “cestui que use” had to be allowed to attack his enjoyment. Alienations with the reservation of the use were forbidden, because the grantor preserved the possession of the property and too easily enjoyed an imaginary credit (from the time of Edward III). Bacon complained that one could not know who was the true owner of land, the person interposed (trustee) or “cestui que use.” And the fact is that neither one nor the other could alienate separately, which was a source of embarrassment and frauds. Various statutes tended, by solving the questions of detail, to recognize that “cestui que use” was the real owner. The matter was finally regulated by the Statute of Uses of Henry VIII, 1535; this act was inspired by a thought hostile to uses and the facility of alienating which their establishment had introduced into the body of English law; yet it only strengthened the established practice. It converted the use into possession; this was to create of it an ownership no longer in equity but at law, and to give jurisdiction to the judges of the common law. But, as they showed themselves not very favorable to uses, the courts of equity profited thereby to take back a part of the ground which they had lost; they intervened when there was any attempt to restrain the effects of the use and compelled the fiduciary to carry out everything which he was held bound to in conscience. By the intervention of a trustee or fiduciary (from trust, confidence, deposit) the ownership was transferred without formality. The sale itself had for its effect to make the buyer the owner by the fact alone that there was an agreement of the wills of the parties, “bargain and sale”; for the vendor became the trustee of the buyer and was in possession for the benefit of the buyer, in the same way as in the formal recital of delivery of the Roman law. So, to, the transfer “*brevi manu*,” under the form of lease and release, was applied in a normal manner as a regular proceeding, so much was it in harmony with the institution of the use (this, however, was not done without discussion until the year 1620). Of all the obstacles placed in the way of alienation by the common law, nothing remained, — no more in reality than in form. The new system, which was infinitely more flexible than that which it replaced, had, to counterbalance this fact, a very serious defect: the changing of ownership was private, so that the true owner often remained unknown and loans upon land as a security rested only on false appearances. Such inconveniences were too serious not to lead speedily to some thought of remedying them. Under

Henry VIII it was sought to give some publicity to alienation, especially the form of simple bargain and sale, by providing that conveyances should be registered with a court of justice or the Keeper of the Rolls. The laws of 1704 and 1735 even required registry for all deeds "inter vivos" or "mortis causa" which transferred ownership or created real rights; but they were only applied in the counties of York and Middlesex. Nowhere else did this publicity exist. In our own day, another step was taken along the path of simplifying, and the Law of October 1, 1845, brought to a close the long evolution, the various phases of which we have described, by enacting that the execution and delivery of a deed under a private seal should thenceforth operate as a transfer of corporeal property just as efficaciously as actual delivery of the land (like the deed of grant already in use for incorporeal property). But at the same time there took place a reaction in the direction of the publicity of the transfer of ownership; if they did not dare break with the tradition of centuries, yet at last there was instituted a system of registration (1863-1875). It resembles the enrolling upon land books of the German law, with this peculiarity, which conforms well to the English spirit, that registering is optional and not compulsory.¹

¹ Cf. "Ann. de Législ. Etr.," 1889, p. 212. On the Torrens Act of 1858, see *Ch. Gide*, "Bull. de la Soc. de Législ. Comparée," 1885, XV, 388; *Besson*, "Livres Fonciers," 1891.

TOPIC 7. RIGHTS IN LAND AND ENCUMBRANCES UPON LANDED PROPERTY

§ 324. Multiplicity of Rights in Land; Their Relations to Feudalism and Serfdom.	§ 329. Usufruct.
§ 325. Leases for a Long and a Short Term.	§ 330. Right of the Beneficiary over an Ecclesiastical Benefice.
§ 326. Free Urban Tenure.	§ 331. Real Servitudes.
§ 327. Rents and Charges, or Burdens on Real Property.	§ 332. The Same. — (I) Natural Servitudes.
§ 328. Rights of Profits.	§ 333. The Same. — (II) Servitudes established by the act of man.

§ 324. **Multiplicity of Rights in Land; Their Relations to Feudalism and Serfdom.** — The system of land ownership was formerly complicated by a great number of rights in land and burdens upon landed property.¹ Some of them were like a cutting down of the beneficial ownership which belonged to the copyholder (leases for a long and a short term); others were more analogous to the domanial rights (rents); certain of them presented themselves as a survival or an imitation of collective ownership (rights to use the woods belonging to a community, or woods belonging to the lord); some of them, those most nearly approaching the modern usufruct, were related to the formation of the family (dower); many of them were merely predial servitudes; finally, the pledge and the mortgage served as a protection for credit.² This confusion of rights upon the same piece of land gave rise to difficulties and litigation; it also had many inconveniences in economic order;

¹ Cf. the "Reallasten" of the German law, which differ very little from our charges upon land, and the nature of which has been widely discussed. The English law is a masterpiece of construction, with its learned hierarchy of estates and its theory of uses. Thus, outside of hereditary estates, whether in fee simple or substituted fee (fee tail) over free tenements (freeholds) we find: (A) estates which are not inheritable: (a) "pur autre vie," during the life of a third party who is called "cestuy que vie" (if the tenant died before "cestuy que vie" the first comer could take possession of the property just as though it had been without an owner, unless the grant had been made expressly to the grantee and his heirs); (b) for life, either by virtue of the law (dower, curtesy of England) or by agreement or will (settlement); (B) inferior estates: (a) for a term (long-term leases, leases from year to year); (b) at will; (c) by mere tolerance. Let us superimpose uses, and let us place alongside of them the copyholds, and we shall succeed in understanding that the English jurists based everything upon the idea that no one can have an absolute right of ownership over an immovable. As to the term of years, cf. *Pollock and Maitland*, II, 105.

² Cf. "Summa Norm.," 93, 7: disseisin of lands, pastures, revenues ("red-ditus"), "faisances" (charges paid by farm tenants) and services.

for this small-change of ownership was far from possessing the virtues of the latter. Modern legislation, taking this experience into account, has reduced as far as possible the number of real rights, following the example of the Roman law in this. It has changed the nature of many of them in order to make them come within the category of personal rights or credits; by this means it has freed the owner from encumbrances, and it has made his freedom to act more absolute, while at the same time it has given rather a wide range to the individual's will and particular interests in the upholding of obligations. In our day ownership tends unceasingly to come back to what is looked upon as its normal state, that is to say, to the reuniting in the same hand of all its attributes, "usus," "fructus," "abusus," with their very fullest effects. On the contrary, the normal condition of ownership in the old law was the splitting up of this sheaf and the subdivision of the parcels which had been drawn from it, without making any attempt to give them the cohesion which seems so natural to us. To-day, no man thinks himself an owner unless he can do everything he pleases with the thing owned; in the olden times one was far more easily satisfied; the master was only half a master.

The multiplicity of real rights made them prejudicial; their character rendered them odious; feudalism and servitude had put their stamp upon many of them, or, at least, they were scarcely to be distinguished from feudal rights; they carried with them, as did the latter, the servitude of the person or the property, the superiority of a man or a piece of land; they were surrounded with the same proscription.

§ 325. **Leases for a Long and a Short Term.**¹—Reasons of a political and economic nature made the old law the epoch of perpetual or long-term leases,² and in this method of cultivating the soil the holder is in a position bordering on that of an owner. The short-term lease itself, which was not often met with till much later, produced sometimes, when it was introduced into practice, analogous results; the temporary tenant was treated in certain Customs like a perpetual tenant. Under the influence of the Roman law, the ordinary lease ceased to confer a real right and degenerated to the rank of a simple personal relation; by an opposite phenomenon, due to reasons already set forth, those who

¹ "B. Ch.," VI, 2, 409; *Salvioli*, p. 422 (bibl.).

² "Bailler" means to deliver, to give up to (still this wide meaning in certain Romanic dialects). "Amodiation" means a letting of immovables, farm rent being paid "ad modium," in "muids," in produce.

held by means of inheritance saw their right, protected and strengthened, raise itself little by little until it attained the rank of true ownership. Thus a return was made to the Roman ideas.

The conflict between these ideas and the conception of the Customs was expressed by means of two contradictory rules: "Selling carries with it letting"¹ and "Buying does not annul letting."² This last rule meant that, if the land under lease was sold, the right of the lessee could be opposed to the buyer, because it was a real right; thus the lease was not annulled. According to the first rule, on the other hand, as the holder has only a personal right against the lessor, the buyer, who has become the owner of the land leased, has the power of expelling him; the lease is annulled. This was the Roman solution, and that of the court practice of countries of written law.³ Its great defect was that it rendered the duration of leases uncertain. The practice of the Customs eliminated it by special clauses in the contract of sale; by virtue of these clauses the buyer undertook to uphold the lease; the Civil Code, in Art. 1743, merely enacted that these clauses, which had become typical, should be implied.

Among the number of leases which are to be distinguished from feudal tenures (lease of a fief, lease of a copyhold)⁴ are to be observed the long-term lease, the lease for cash, which is only a variation of the former,⁵ and the lease for possession at will, which is peculiar to Brittany, and which is perhaps of servile origin. — **Long-Term Leases**⁶ only carried with them a transfer of the beneficial ownership when they were perpetual;⁷ where they were

¹ *Loysel*, 472; "Cod. Just.," *loc.*, 9: "Emtorem necesse non est stare colono (nisi ea lege emit)." German law: "Kauf bricht Miethe." *Chaisemartin*, p. 274; *Huber*, IV, 859, 3 (Neuchâtel, Switzerland): "death, marriage and sale break every leasing"; *Loysel* (*contra* this); "Ass. de Jérus.," ed. B., II, 291; *Pothier*, "Louage," no. 296; "Gr. Cout.," p. 248.

² *Chaisemartin*, p. 273: "Kauf hebt Miethe nicht auf." We do not know any formula in French which corresponds to this adage; the one which we give in the text is only a translation.

³ *Serres*, "Inst.," III, 25, 6.

⁴ "Z. S. S., G. A.," V, 69; *Huber*, IV, 756 *et seq.*

⁵ *Viолет*, p. 660, n. 2 ("Cout. de Poitou," 1417); *Bruehl*, "Chartes de Cluny," II, 328 (in 968); *Marchegay*, "Cart. du Bas-Poitou," p. 249; *H. de Pansey*, "Compét. de Juges de Paix," 1827, p. 375; *Masson*, "Exposé de la Législat. rurale," 1879, p. 25; *Alaus*, "Thèses Ec. Chartres," 1885, p. 8; *Grand*, *ibid.*, 1899; *Lamprecht*, p. 196.

⁶ *Viолет*, p. 660 (bibl.); *Anselminius de Orto*, "Emphyt.," ed. *Jacobi*, 1854. Cf. Monograph in "Tract. Univ. Juris," treatises cited by *Salvioli*, p. 424; *Lattes*, "Studi sop. enfiteusi," 1868; *Stobbe*, § 99; *Giraud*, II, 219, 256.

⁷ In Italy the long-term lease seems rather to be perpetual, the "livello" ("libellus") or the tenure at will temporary. But there is nothing very clear in the terminology. Cf. *Pertile*, § 142 (detailed study of the "livello"). The

made for many years, fifty, ninety-nine years, one or several lives, they only conferred a real right, which was, however, very much like the beneficial ownership, because it carried with it, as did the latter, the power to change the ultimate disposition of the land, and it gave rise to preferences, to the lord's due and sales, and to confiscation.¹ The Law of December 18, 1790, reduced the duration of the long-term lease to ninety-nine years maximum; and the laws of the 9th Messidor, year III, and the 11th Brumaire, year VII, classified the right of the holder of a long-term lease with that of the usufructuary among property capable of being mortgaged. It has been questioned whether, under the rule of the Civil Code, the long-term lease was recognized by the law together with its special results, more especially the creation of a real right, or whether it was not confused with the ordinary lease. — The **lease for possession at will**² had two peculiar characteristics. 1st. It could be revoked at the will of the lessor, like leases at will, which were so common in English law; the analogy with copyholds, the holder of which can be freed at the will of the lord of the manor, leads one to think that these were a transformation of servile tenures. 2d. The *holder*, that is to say, the tenant, had a right, however, to buildings and things on the surface of the ground; he could not be expelled until he had been reimbursed for their value. This real right "*sui generis*" represented for him an indemnity by reason of the improvements made on the land.

§ 326. **Free Urban Tenure**, which was sometimes allodial and sometimes free copyhold, with merely the burden of a very light rent, can be likened to leases for a long term, of which it is a higher form. Its origin is a problem with which there has been little concern excepting lately, and which has not yet been entirely elucidated.³ Originally there were seen in it (Arnold) a transformation of the servile or domanial tenure (according to the

"livellario" has the ownership of the profits of the land, but has no right to alienate it. — *Mitteis*, "Z. Gesch. d. Erbpacht i. Alt.," 1901.

¹ Cf. *Argou*, III, 28: there exist very few true long-term leases, unless we include within them rents on land which cannot be bought back and which contain a clause that the taker shall be held to make improvements; but in such a case as this there is neither forfeiture, nor preference, nor lord's due, nor sales. In the countries of written law the long-term lease is confused with the copyhold (thus it has a feudal character). On this last point see: *Chénou*, "Démembr. de la Propr.," p. 49; *Roscher*, "Econ. Pol. rurale," p. 243.

² *Henry*, "Et. du Dom. Cong.," 1894; Law of Nov. 23, 1896.

³ It is useless to bring out the connection which exists between the problem which we are examining in the text and the more general question of town franchises.

“Hofrecht”); in an early stage, the lord alone having the ownership, the tenant could only cede it back to him; during a second period the lord and the tenant were found to be on an equal footing; the tenant sold, the lord gave the seisin to the vendee; during a third period the tenant, who had become full owner, no longer had to obtain the giving of seisin from the lord; still better, the rent, that mark of servitude, disappeared in its turn, and the copyhold became a freehold. According to a rather different explanation, it has been maintained that the holder of a piece of land with the understanding that he is to build upon it (and this supposition is the most common in towns), gaining the ownership in the buildings by way of improvements, in the end acquired the ownership of the soil itself.¹ The documents overthrow both of these opinions and make it clear that from the very beginning there existed in towns two kinds of tenure, the domanial copyhold and the free tenure; the former had become similar to the latter in the course of time (end of the thirteenth century, fourteenth century). Thus, we have to account for the existence of free tenure in olden times. An attempt has been made to do this with the assistance of distinctions: 1st. Between ordinary holdings and those of the Count, that is to say, of the old high Carolingian functionary; it is only in these latter that free tenure could have taken place; the merchants to whom it was granted paid no rent to the Count, excepting the amount due by reason of his right of justice and not because he was owner. 2d. Between the lay holdings and the ecclesiastical holdings, in which case evolution would have taken place more slowly.² But these are only matters of fact, the influence of which has not decided the question. Any lay or ecclesiastical lord, whether he were a count or not, might have been led, by his own interests, be it understood, to grant lands which were unproductive, even without reserving a rent (there are examples of this); the mere presence of new inhabitants on his land ought to be a source of profit to him, and there were to be found lords who were sagacious enough to understand that in subjecting their lands to the severity of domanial cultivation, by making of their tenants serfs or quasi-serfs, they only ended in driving these tenants away from their domains. Thus there were seen upon the founding of boroughs in depopulated localities grants to emigrants of a privileged area for the build-

¹ This is the opinion held by Gobbers and Jager.

² See especially *Desmares* and the examples that he cites.

ing of their houses ("bourgage," "bourgeoisie,"¹ "Freizins,"² "Freigut," etc.). This favor was granted, not only to merchants upon the occasion of the building of bazaars and markets, but also to "hospites,"³ to free men or serfs who were fleeing from their lord and little disposed to enter into the bonds of servitude. The Frankish period already recognized tenures which were little removed from these almost free lands, namely, the tenure at will, especially under its forms of "precaria data" or "remuneratoria."⁴ In the South of France, at least, the persistence of Roman ownership must have contributed to the giving to inhabitants of towns these rights which were elsewhere only attained with difficulty.

§ 327. **Rents and Charges, or Burdens on Real Property.** — Personal charges and servitudes⁵ to which cultivators and serfs were bound came in time to be distinguished from real burdens, such as rent, revenues, tithes, tallage, and duty-service. From personal burdens and servitudes, to which cultivators and serfs were bound, in time there came to be distinguished real burdens such as quit-rents, rents, tithes, tallage, and duty-service. These burdens were no longer looked upon as a consequence of the personal status of the tenants, because the latter had become free; but they were made a debt owed by the land, which had not been enfranchised with the tenants.⁶ Whoever holds lands is subjected to the services with which those lands are encumbered. But it depends upon him whether he shall

¹ As to Norman burgage, cf. *Généstal, op. cit.*; *Delisle*, "Rec. des Jug. de l'Echiqu.", no. 140; "T. A. C., Norm.," 5, 3; 8, 1 and 5; 11, 5; "Summa," 26, 2; (cf. 24; 29, etc., "N. C.," 1583, Arts. 138, 270, 331 *et seq.*, 454). The quality of the burgages varied: some were true freeholds; others, and these were the more numerous, were only bound to a payment of rent to the lord; and, finally, certain of them were held liable for the aids and duty services, and were hardly to be distinguished from the ordinary villein tenures. The special rules which apply to burgage in private law, and which are only a return to the common law of the Customs of the remainder of France, consist especially in restrictions over the repurchase by a person of the same lineage, in the establishment of a community of acquets made in burgage, and, finally, in equal partition among brothers and sisters.

² *Rietschel, op. cit.* (town of Erfurt).

³ As to guests cf. *Sée*, "Les Classes rurales," p. 63.

⁴ *Lamprecht* and especially *Rietschel, op. cit.*

⁵ *Heusler*, "Inst.," II, 220; *Gross*, "Recht an der Pfründe," 1890 (cf. "N. R. H.," 1890, 799); *Pasquier*, "Inst.," p. 287 (likens socome to servitudes); *Ceyssens*, "Le Dr. de Banalité" ("Bull. Inst. Arch. Liège," 1896); *Rioufol*, "Thèse," 1899; *Schwind*, "Reallastfrage" ("Jahrb. f. Dogm.," 33, 1); *Sée*, "Les Classes rurales," 1901; *Huber*, IV, 771, *et seq.* (texts); *Stobbe*, § 100.

⁶ "Leg. Longob. Lud. P.," 31 ("tributaria terra"); *Huber*, IV, 771; "Servitium quale debebat terra."

escape them, at least as to the future, by yielding them or by abandoning them;¹ there were various difficulties and solutions on the subject of accrued arrears. In case the land was divided up, each parcel was held liable for the entire charge, for the latter was indivisible; but one of those among whom the land had been parceled, for example, the elder of the sons of the former owner, habitually rendered the service for all ("portator"). Delay in the payment of arrears resulted in the loss of the land, or its forfeiture, sometimes immediately, sometimes at the expiration of a certain time and after the payment of a fine.² The beneficiary of a charge on real property could alienate his right as though it had been a matter of the ownership of the land, and by the same means.³ These rights and charges tended to disappear, or, at least, to be changed into merely personal rights.⁴

• § 328. **Rights of Profits**, which were especially applied to woods and forests, belonged to the inhabitants of a village, a hamlet, or a parish collectively. The condition ordinarily required to give rise to this right consisted of having a separate home in the locality; a stranger who became established there could not claim it, as a general thing, excepting upon condition of obtaining an express grant from the inhabitants, or of becoming a member, for example, as a son-in-law, of one of the families which had been domiciled there for a long time.⁵ The object of these rights varied greatly. One can cite as the most common objects: "estovers," or the right to take wood for fires;⁶ "marrenage," or the right to take wood for building purposes,⁷ which was not so common; "pannage," or pasture, which was the right to pasture domestic animals;⁸ "acorning," which was the right to turn pigs loose in the

¹ *Beaumanoir*, 24, 7 *et seq.*; "Cout. Not.," 70, 96, 97, 171; *Desmares*, 183; "Gr. Cout.," p. 317. Cf. *De Luca*, "De Cens.," 18.

² *Beaumanoir*, 24, 19 *et seq.*; "L. d. Droiz," no. 391.

³ "Senlis," 275; "Valois," 189.

⁴ Difficulties and controversy in the juridical analysis of these rights. De Luca had already seen in them nothing but obligations, Covarruvias and Carpzov mortgage debts, etc. The legal historian only sees in these theories successive expressions of a varying economic and political condition.

⁵ *Beaumanoir*, *loc. cit.* The "Coutume de Beauvaisis," which was opposed to freeholds, required that a rent should be paid to the lord for rights of user in forests; the latter had to be established by a seigniorial chart confirmed by the sovereign, when they resulted in "essil" (devastation).

⁶ *Beaumanoir*, 24, 17. Cf. after the Frankish period the rights which were called "lignaritia," "focagium," "silvaticum," etc. *Du Cange*, see "Talh et Dath" (Béarn). The rent due to the lord generally bears the same name as the right of user.

⁷ "Materiamen," stave-wood; see *Du Cange*.

⁸ "Olim," Index. See "Pasnagium," "Usagia"; *Du Cange*, *Ragueau*, see

oak groves during the acorn season.¹ As long as woods and forests covered a large part of the soil of France, the indulgence in these rights could be tolerated; but in proportion as clearings reduced the wooded tracts, and these clearings underwent a regular development, these Customs of forestry had to be restrained.² Furthermore, it was unavoidable that they should all disappear, as is the case at the present time.

§ 329. **Usufruct.** — From the time of the Frankish period it is not uncommon to meet with estates consisting in the enjoyment of land for life, which, according to the Roman classification, can scarcely be ranged anywhere but under the title of usufruct, although they may be far from being subject to the same regulations. The beneficiary, the tenant at will, have an enjoyment which is for life or temporary. But what a difference there is between them and the Roman usufructuary! They are already hoping for an estate which is capable of being inherited, that is to say, for full ownership. The dower rights of the widow become very like the usufruct. The "mundoaldus" is rather an owner than a usufructuary of the possessions of his ward. This kind of enjoyment of land seems a little like ownership for life. It makes one think of the rights of the party who is charged with a trust-entail.

This idea has almost entirely disappeared from the Customary law,³ being destined to give way to the Roman theory of usufruct, which is a more clever one,⁴ but which is so well known that it would be useless to deal with it here.⁵ Let us simply notice what

"Pexe," "Dent" and "Jasilha" (to let his flocks sleep, "jacere," upon the land, and let them rest there two nights: Béarn); *Giraud*, II, 14. Cf. *R. Caillemet*, "Exécut. Test.," 274, 330, 378.

¹ *Du Cange*, see "Esca"; *Lamprecht*, p. 119.

² *Loysel*, 250: "No one can have a right of user in the lord's domain of another without title, or without paying a rent for a sufficient time to acquire it by prescription, or if he have immemorial possession."

³ *P. de Fontaines*, 21, 46; "Jostice," pp. 137, 144; "Gr. Cout.," p. 195 *et seq.*; "Anjou" ed. *Beautemps-Beaupré*, Table, see "Usufruit"; *Masuer*, XIII; *Boutaric*, I, 56; *Pasquier*, "Inst.," p. 273.

⁴ *Galvanus*, "De Usuf.," 1630, 1676.

⁵ Let us, however, give a few details: Civil Code, 585 (expenses of labor); *Renusson*, "Douaire," 14, 40 (recompense); *Pothier*, "Douaire," 201, 272; "Introd. à la Cout. d'Orléans," VII, 43 (distinction). — Prices of farm leases: *Dig.*, 33, 2, 58, "pr."; *Pothier*, *ibid.*, 203; *Denisart*, see "Fruits," IX, 3, 3 (acquired by the usufructuary taking into consideration the state of the harvest); *Poullain-Duparc*, "Principes," III, p. 290 (day by day, in Brittany; *id.*, Civil Code). — Mines and quarries, *Pothier*, 196; *Argou*, II, 7; Civil Code, 598. — The mere owner keeps up the house (the main walls, etc.), the usufructuary the rest (partition walls, etc.). The latter has no right to be paid for any improvements or additions which he may have made. — Usufruct for the benefit of a moral person: Civil Code, 619 (100 years); cf. *Dig.*, 33, 2, 56; *R. de Lacombe*, see "Usuf.," 6, 7 (30 years); cf. *Dig.*, 35, 2, 68. — For-

great legal importance the usufruct had. Later on we will deal with the principal cases in which it is recognized; for example, the case of dower.

§ 330. **Right of the Beneficiary over an Ecclesiastical Benefice.** — The holder of an ecclesiastical benefice has over the property which is comprised therein a "jus in re" which allows him to take the profits therefrom, so as to be able to fulfill the office which is entrusted to him; this right is a sort of life estate or usufruct, having peculiarities which relate to the nature of ecclesiastical possessions;¹ in order to enforce this right, the beneficiary may make use of the action for real property and the action for possession.² The acquisition of benefices passed through various phases: the beneficiary was not always appointed by his ecclesiastical superior; he was often chosen by a lay or ecclesiastical patron, and, compared with being chosen by the latter, the intervention of the ecclesiastical superior was of little importance, because this could only be exercised to confirm a candidate who was chosen by a patron. From the choice by the patron there resulted first of all acquirement of the benefices ("beneficium affectum"); neither the patron nor the ecclesiastical superior were authorized to deprive the beneficiary of his right ("variare non possunt"); he was in the same situation as an owner who had not yet taken possession. In proportion as the part played by the ecclesiastical authority increased, to the detriment of that played by the patron, legal theory found difficulty in defining the right of the beneficiary who had been appointed, but upon whom the benefice had not yet been conferred by his superior; the beneficiary did not have the actual exercise of his right, but at the same time the benefice had been set apart for him in such a way that it could not be conferred on anybody else. The canonists declared that this beneficiary did not have any "jus in re" before the bestowal; but, as he had something better than a personal forfeiture for abuse of enjoyment makes its appearance in our old law especially with regard to dower.

¹ The beneficiary has been compared to a vassal, the holder of a long-term lease, the usufructuary, etc.; all these comparisons err in some direction. The benefice is an endowment connected with an ecclesiastical function; from this there result special characteristics. Cf. "Summa" by Huguccio (in 1187), on *Gratian*, c. 13, c. 12, q. 1: clericals can only dispose of profits collected "in usus domesticos et in causas pietatis"; they have no right to dispose of them by will. This is not the same in the case of an ordinary usufructuary. This point of discipline was modified towards the fifteenth century: Dig. X, 3, 22, 2, 4; VI, 3, 3, 1; "Conc. Trid.," s. 22, c. 3 *et seq.*, 23, c. 1 (authority of St. Thomas).

² See as to the possession of benefices: *Grossman*, pp. 199, 263, etc.

right, they recognized the fact that he had a "jus ad rem";¹ this was a forfeiture for him, pending the time when, as in our day, wherever there remain vestiges of the ecclesiastical patronage, the ecclesiastical authority should take upon itself the power of refusing the canonical installment of the candidate who had been designated to it or else only authorize, at any rate, an application of an administrative nature.² The canonical theory which we have mentioned corresponds to a stage of transition in the history of religious functions. This stage furnished Jacques de Revigny with the idea of giving a "jus ad rem" to the vassal who had received symbolical investiture, but not physical delivery. The civil jurists, in their turn, applied it in various ways, for example, to give a "jus ad rem" to the purchaser who had not yet taken delivery of the thing sold; in the end this right degenerated into a mere claim.

§ 331. **Real Servitudes.** — Rights established over an inheritance or *servient tenement* for the benefit of another or *dominant tenement*, — such is the Roman conception of predial servitudes. they are so inherent in the land that they are often spoken of as "attributes of the land"; also, they could no more impose the obligation of performance upon the owner of the servient tenement than they could be established simply for the personal convenience of the incumbent. They seem like restrictions on the right of ownership, and therefore like exceptions which ought to be limited. Our old authors, going back to the Roman tradition, formulated this conception in the following terms: "By the law of nature, every inheritance is free and exempt from servitudes."³ As is ordinarily the case, when they refer to natural law, facts belie their assertions. The Customary law admits the existence of so large a number of legal servitudes which are based upon old usages and an old organization of ownership, that it would be nearer the

¹ Innocent IV contrasts the "concessio episcopi" from which there results for the beneficiary the "jus in re" and "dominium" or "quasi dominium" with the "præsentatio patroni," which only gives a "jus ad rem petendam, ad petendum beneficium" sanctioned by a "personalis actio" (judicial way) or by an "imploratio ad officium judicis" (administrative way); on Dig. X, 1, 2, 9; 1, 3, 19, 38; 1, 30, 6, etc. (about 1245). By this means alone does the bestowal transmit the "jus in re" ("sine traditione rei vel presenciam"); the installation which follows gives the right of retaining. "Archidiaconus" (*Guido de Baysio*), the teacher of *Jean d'André*, is perhaps the first canonist who has made use of the expression "jus ad rem." As to the evolution of the canonic theories and the effects of the "jus in re" and the "jus ad rem" cf. *Grossmann*, p. 169 *et seq.*

² As to this changing of a private right into an administrative right, cf. *Grossman*, p. 274. The beneficiaries of former times may be likened to public functionaries (salable offices).

³ *Labure*, I, 2.

truth to say "Every inheritance is burdened with servitudes; the freedom of a piece of land is an accident." According to this right, nothing stands in the way of the creation of a predial servitude for the benefit or the convenience of a person (e. g., right of pasturage belonging to a corporation of butchers); nor does anything prevent its existing "in faciendo," that is to say, its compelling the owner of the servient tenement to carry out certain acts (for example, keep a way in good condition). The feudal rights here furnish a legal type opposed to that of the Roman law; it is sufficient in proof of this to recall certain real duty-services, or, again, the right of the lords to demand that their tenants come at night and thrash the ponds in order to prevent the frogs from disturbing their slumbers (a right whose existence is disputed).¹ Serfdom, personal and real servitudes, rights over land, and feudal rights, are not very readily distinguished in the minds of our old juriconsults. The memory of those old services abolished by the Revolution still clung to the framers of the Civil Code to such an extent that they thought themselves obliged to lessen the bad impression produced by the word "servitude" by joining thereto the term "real services," which was one of explanation, and which was less compromising (Civil Code, 526).

As we have discussed feudal rights elsewhere, we will only deal with predial servitudes in the Roman sense, that is to say, which imply the subjection of one piece of land to another.² Our old authors borrowed almost everything on this point from the doctrines of the Roman jurists, which had predominated in the end.³ Disputes with relation to these servitudes were decided after an inspection of the locality by experts or juries charged with making a report. They were named by orders of the judge in the presence of the parties. The latter had the right to offer opposition, that is to say, to require a revision or a substitution in this jury. Since the reformation of the Custom of Paris in 1580 (Art. 184) it is only the judge who can order a wider scope of information to be obtained.⁴

¹ *Michelet*, "Orig.," p. 253; *Grimm*, "R. A.," p. 356.

² As to relations of vicinage, cf. *Grimm*, "R. A.," p. 500.

³ *Beaumanoir*, 30, 27; 34, especially 22 *et seq.*; 24, 15, 31; "Jostice," p. 137 *et seq.*, 146; "Gr. Cout.," pp. 196, 355, 790; "Ét. de St. Louis," ed. *Viollot*, I, p. 325; "L. d. Droiz," I, 116; "Cout. d'Anjou," ed. *Beaumonts-Beaupré*, IV, 11; *Masuer*, XXXIX; *Boutaric*, II, 17, 18; "Confér. des Coutumes de Guénois," II, 9; *Loysel*, 2, 3; *L'Hommeau*, III, 411 *et seq.*; *Lamoignon*, "Arr., t. des Serv. Prévôt de la Janès," I, 358; *Argou*, II, 7, etc.

⁴ As to these juries, cf. "Cout. Not. du Chât.," 75; "Gr. Cout.," 2, 39 (p. 361); "A. C., d'Anjou," ed. *Beaumonts-Beaupré*, I, 145; II, 160, etc.; "Paris,

§ 332. **The Same.** — Certain servitudes are **natural and legal**, others established by the act of man. (I) *Natural Servitudes*. The former are, as it were, an integral part of the system of land ownership. I am not here speaking of those which are almost unavoidable, such as the obligation of the owner of a lower piece of land to receive the water which naturally percolates from the higher piece of land, but of those which are less necessary, rather legal than natural, and which vary a great deal with local usage and the state of agriculture. The barbarian laws, and especially the Visigothic laws, thus give passers-by the right to settle themselves for two days upon pastures by the roadside, to pasture their domestic animals thereupon and to cut the branches of trees. Much later on, Loysel still sets up the rights of the passer-by, which are very much lessened in his time, in the gibe, "Everything which comes to the hedge is plunder" (282).¹ At the time when these primitive Customs have disappeared there are to be distinguished:² 1st, *servitudes of public utility* (stepping-stones, towpath, etc.);³ 2d, *servitudes of private interests* (ladder space,⁴ "invetison,"⁵ the right of way over an enclosure,⁶ etc.); 3d, obligations imposed by police regulations (Customary), distance to be kept in planting trees,⁷

A. C.," 79; "N. C.," 184; *Laurière*, on 185 "Paris"; *Guyot*, see "Expert," "Rapport," "Visite," etc.; *Ferrière*, see "Experts"; Edicts of May, 1690: experts appointed to hold office as such; "Ord." of Apr., 1667; Edict of Feb., 1554; June, 1575; May, 1689, etc. Vol. IX of the "Cout. de Paris" has as its rubric: "Concerning Servitudes and Reports of Juries."

¹ "Deutr.," xxiii; "Wis.," 8, 4, 25 *et seq.*; 2, 3, etc.; "Roth.," 358; *Dahn*, "Westg. Stud.," p. 96; *Michélet*, "Orig.," pp. 111, 411; *Grimm*, "R. A.," 107, 554. — The "Cout. de Nivern.," "Champarts," 1, allowed each one to labor upon the land of another, provided that the owner did not forbid it. Cf. *Fournel*, "Voisin," see "Terres Abandonnées."

² Various servitudes in the Customs, and sometimes the same servitudes under different names. "Etual" or drainage in the "Franches Montagnes." For Flanders see *Britz*, p. 631. As to the lawful servitude of aqueduct (irrigation of lands) details in *Pertile*, § 144 (it existed in Italy in the eighth century; numerous provisions in the Italian statutes); § 145 (other lawful servitudes).

³ *Beaumanoir*, 24, 14. As to public ways and their dimensions, *ibid.*, 25, 1 *et seq.*; *Loysel*, 232, 333; "Expos. des Cout. sur la Largeur des Chemins," 1687; *Ragueau*, *Ferrière*, *Guyot*, see "Chemins." — As to dikes, cf. *J. Gierke*, "Gesch. d. Deutsch. Deichrechts," 1901; *Ravel*, "Us. de Bresse," p. 219; *Collet*, *id.*, p. 89.

⁴ Right of placing a ladder upon the land of one's neighbor and of occupying the necessary space for turning the ladder when one had to repair or construct a building. — *Chaisemartin*, "Prov.," p. 171, "Pflugrecht," space sufficient for the turning of a cart, etc.

⁵ An obligation to leave a space of five feet (South) between the neighboring house and that which one was building. Cf. "ambitus" at Rome.

⁶ *Beaumanoir*, 43, 45; "Jostice," p. 142; *Loysel*, 2, 3, 16; *Grimm*, p. 553. Cf. Dig., 2, 7, 12; *Pertile*, § 145.

⁷ Cf. *Loysel*, 256; "Cout. Not.," 107; "Paris," 187.

for the establishment of cesspools, etc.,¹ flow of refuse water and rain water; 4th, cases of compulsory joint ownership, such as party ownership or ownership by agreement, like the ownership of the separate stories of a house, and the relations which spring therefrom between the joint owners; even obligations of enclosing and keeping within boundaries² have a place among servitudes.

In the North, where houses were contiguous and not separated from one another or isolated ("insulæ"), as was often the case in the South, if one owner built up to the edge of his land, he could not prevent his wall from becoming party property owned by himself and his neighbor if the latter should decide to build at the same spot;³ in order to acquire the party ownership, it was necessary to pay the price of half of the wall and half of the land upon which it was erected; thus there had been recognized a veritable dispossession because of private utility. The system of the party wall is a system of compulsory joint ownership whose details, as well as those relative to servitudes of light,⁴ are to be found in a number of the Customs, and especially in the Custom of Paris. The Customs also admit the party ownership of hedges and ditches.

§ 333. **The Same.** — (II) *Servitudes established by the act of man* are the result of judgments (on the occasion of a partition)⁵ and even, according to some opinions, of decrees,⁶ of contracts,⁷ of wills,

¹ "Gr. Cout.," p. 357; "Cout. Not.," nos. 173, 272.

² Compulsory enclosure: *Loysel*, 2, 35; *Michelet*, "Orig.," 87, 102; *Grimm*, "R. A.," 543; *P. de Fontaines*, 21, 66; "Jostice," p. 142; *Beaumanoir*, 30, 27; 43, 45; "Cout. d'Anjou," ed. *Beaumonts-Beaupré*, II, 184; "Et. de St. Louis," I, 136; *Boutaric*, p. 211, etc.; *De Ribbe*, "Soc. Provenç.," 1898, p. 185; *Loysel*, 255: "boundaries are set by authority of law."

³ *Beaumanoir*, 24, 22; "Gr. Cout.," 2, 38 (p. 355); "Cout. Not.," 8, 77, 156, 173, 272; "Const. du Chât.," § 49; "Paris," 192 *et seq.*; "Ass. de Jérus.," "C. des B.," ch. 150; *Loysel*, 283: "In towns every wall is a party wall unless the contrary is evident." "Anjou," ed. *Beaumonts-Beaupré*, IV, 11; *Britz*, p. 634; *Pertile*, § 144.

⁴ *Gresinger*, "De Servit. Luminum," 1819; *Britz*, p. 644; *Pertile*, § 144.

⁵ Cf. "adjudicatio" in Roman law.

⁶ A servitude comes into existence by means of a distraint upon land: the owner of the servient tenement offers no opposition; the judgment creditor has a right to exercise the servitude: *La Thaumassière*, on "Berry," 2, 1; *Camus*, on "Paris," 186. According to *Lamoignon*, "Arr., t. des Servit.," Art. 3, he only has a right to gain it by the prescription of ten or twenty years: *Ferrière*, on "Paris," 1, 8. A great number of juriconsults rejected both of these opinions: *Gouget*, "Tr. des Criées," 2, 4, 130.

⁷ As to the intervention of the lord and the Customs of public nams, cf. "Paris," 215; "Orléans," 227; "Gr. Cout.," 2, 38; *Desgodets*, on 215 "Paris." *Lamoignon*, "Arr.," *op. cit.*: it is useless to specify visible servitudes. Cf. Civil Code, 694. The compulsory decree cleared off all hidden servitudes, but not visible ones: *Edict of 1551*, Art. 12; *Gouget*, "Criées," p. 442.

of intention on the part of the father of the family, or of prescription. — **Intention on the part of the father of the family.**¹ The court practice of countries of written law did not, any more than did the Roman law,² admit on principle this method of creating servitudes.³ It was afraid of increasing them beyond measure; for this mode of creating servitudes it was sufficient if the owner of two pieces of land made use of one for the benefit of the other; the day when, following a sale or a partition, the two pieces of land had different owners, this state of affairs became transformed into a servitude by law. The Customary law, however, recognized them; doubtless from the very character of the ownership of real property it had difficulty in freeing itself from its collective forms. In the old Custom of Paris, Art. 91, "conferring and appointment by the father of the family are equal to a deed."⁴ Such is still the rule of many of the Customs;⁵ some of them restrict it to the case of partition.⁶ But at the time of the reformation of the Custom of Paris, Art. 216, it was specified that appointment by the father of the family would not be equivalent to a deed unless it should be proved in writing.⁷ This would have meant doing away with this method of the establishment of servitudes, if the texts had been strictly interpreted, as certain people wished them to be. Tradition was sufficiently strong to uphold this method; they limited it to the forbidding of proof by means of witnesses when one of the pieces of land had served for the benefit of the other where both had a common owner; a written proof was demanded (for example, the receipts of workmen who had constructed a sewer). Even with this interpretation the Customary law drew nearer the Roman law, and the appointment by the father of the family lost some of the extent of its application.⁸ — **Prescription.**⁹ The old law was very much split up upon the ques-

¹ *Lalauze*, 3, 9 and 10; *Guyot*, see "Serv.," 17 and 18; *Villequez*, "R. h. Dr.," V, 197; *Machelard*, "Examen critique des Distinctions admises en ce qui conc. les Serv. Prédiales," p. 122.

² *Machelard*, *op. cit.*; Dig., 8, 3, 31; 8, 4, 7, 10; 33, 3, 1.

³ *Serres*, "Inst.," II, 3 (p. 145); *contra: Julien*, "Elém.," p. 154.

⁴ "Cout. Not.," 80, 108, 174; "Gr. Cout.," p. 359.

⁵ "Etampes," 73; "Melun," 189; "Reims," 350, etc.

⁶ "Touraine," 212; "Norm.," 609.

⁷ "Paris," 215, 216; *Ferrière*, on "Paris," 216; *Pothier*, on "Orléans," 228; *Poullain-Duparc*, on "Bret.," III, 307; *Pasquier*, "Inst.," p. 268.

⁸ Indeed, it seems that in the old law the intention of the father of the family only applied to visible servitudes. And, moreover, there is not a very clear distinction made between their being visible and being continuous: *Lalauze*, I, 1, and II, 2; *Guyot*, see "Serv.," nos. 7 and 8 (visible and hidden).

⁹ *D'Argentré*, on "Bret.," 271; *Ferrière*, on "Paris," 186; *Pothier*, "Preser.,"

tion of the acquiring of servitudes by means of prescription. It seems that in early times this method was looked upon with favor because servitudes were like the residue of a system of collective ownership.¹ Reaction in the direction of individual ownership led to the principle of the Custom of Paris, Art. 186:² "no servitude can exist without a deed."³ However, there still had to be a struggle against immemorial possession, which resisted being proscribed, and which in certain Customs succeeded in being maintained.⁴ The new rule had great practical advantages: it cut short many suits based on the existence of servitudes. The Civil Code, adopting an intermediate system, the elements of which were furnished it by the court practice of the countries of written law,⁵ admits of prescription, but only for servitudes which are continuous and apparent.⁶ The extinction of servitudes by *non-user* of thirty days, which had been borrowed from the Roman law, was generally accepted.⁷

no. 286; *Guyot*, see "Serv.," 22. Full details in *Lalauze*, I, II, III. As to toleration, cf. the German proverb: "Friendship and good will do not create any right." *Chaisemartin*, p. 176; *Beaumanoir*, 24, 15.

¹ "Douai," 9, 2; "Gr. Perche," 216: immemorial possession. Elsewhere possession of ten or twenty years, of thirty or forty years, etc. "Artois," 72; "Auvergne," 17, 1; "Châlons," 144, etc. See: "Conférence de Guénois"; *D'Argentré*, on 271 "Bret.," see "Sans Titre," no. 10; *Dunod*, p. 3, ch. 6; *Pothier*, "Poss.," no. 90.

² It is already found to be formulated in the fourteenth century: "Cout. Not.," 8; *Desmares*, 387; "Gr. Cout.," II, 38 (p. 353). Cf. *Beaumanoir*, 24, 15, 31; "L. d. Droiz," no. 711; "Anjou," ed. *Beaumonts-Beaupré*, Table, see "Servit.," *Loysel*, 293; "Ord." of 1495, 5 (*Isambert*, XI, 156).

³ *Dumoulin*, on 230 "Blois"; *Coquille*, on "Niv.," 10, 2; *Ferrière*, on "Paris," 186. Cf. Civil Code, 242.

⁴ *Ante*, § 288; *Loysel*, 299.

⁵ *Serres*, "Inst.," II, 3.

⁶ Dig., 8, 2, 28 (*Paul*). Cf. *Machelard*, *op. cit.*

⁷ *Domat*, 1, 12, 6, 5; *Pothier*, on "Orl.," XIII.

TOPIC 8. RESTRICTIONS UPON THE FREEDOM OF ALIENATING
INTER VIVOS. — REPURCHASING

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| <p>§ 334. The Freedom of Grant "Inter Vivos."</p> <p>§ 335. Repurchase.</p> <p>§ 336. Disadvantages of Repurchases and Their Suppression.</p> <p>§ 337. The Repurchases of the Civil Code and Actions of Subrogation.</p> <p>§ 338. The Repurchasing by a Person of the Same Lineage.</p> <p>§ 339. The Consent of the Relatives.</p> <p>§ 340. Offer to the Next of Kin.</p> <p>§ 341. Repurchase.</p> | <p>§ 342. Conditions of the Repurchase. (I) Property Subject to the Repurchase.</p> <p>§ 343. The Same. — (II) Acts which give Rise to the Repurchase.</p> <p>§ 344. The Same. — (III) Who has the Right to the Repurchase?</p> <p>§ 345. The Same. — (IV) Against whom was the Repurchase allowed?</p> <p>§ 346. The Same. — (V) The Repurchase of "half funds."</p> <p>§ 347. Procedure.</p> <p>§ 348. Effects of the Repurchase.</p> |
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§ 334. **The Freedom of Grant "Inter Vivos"** of immovable possessions was subject in the old law to numerous restrictions: some of them rested on the inadequateness of the rights of the owner, like the theory of repurchasing; others, on the incapacity of the vendee; thus, the prohibition of making a grant for the benefit of people in mortmain* (which has been discussed elsewhere),¹ and especially for the benefit of the Church; "vendere cuilibet poterit præter ad Ecclesiam," this formula is often met with in the Middle Ages.

§ 335. **Repurchase.** — The rights of his lord, of his relatives, of his neighbors or fellow owners, are superimposed upon those of the owner of land over his possessions. Each one of these joint owners is qualified to have a part in the alienation of the property; his right is more or less strongly manifested according to the period, and ordinarily according to a decreasing progression along the lines of *authorization*, of *pre-emption*, and of *repurchase*. The normal way, in fine, — that which prevailed in our old legislation as constituting a compromise between the old system of ownership and the modern system of individual ownership, — is *repurchase*, or the right to take back to oneself, to repurchase the land sold by its owner to a third party, upon condition of indemnifying the latter; one is substituted for him or is subrogated to him, and takes the bargain upon oneself. This repurchasing scarcely

¹ Cf. as to the English legislation, *Pollock and Maitland*, I, 314. Details and texts for Italy in *Pertile*, § 146. See also *Pollock*, "Land Laws," p. 91.

makes its appearance in the legislation of the Lower Empire, excepting for the benefit of neighbors and fellow owners.¹ Our ancient law, on the contrary, contains a great number of repurchases:² 1st, *repurchasing by the neighbors* or by the citizens for their mutual benefit;³ 2d, *repurchasing by a community*, for con-

¹ Like the "adjectio" it is one of the measures taken for assuring a collection of taxes: "Cod. Just.," 4, 52, 3; "Epist." of Symmaque, IX, 21; of Sidoine Appolinaire, IV, 24; V, 3; "Cod. Théod.," 3, 1, 6 (in 391); (Valent., Théod. and Arc.); Godefroy, ed. Ritter, I, 286; "Cod. Just.," 4, 38, 14; cf. 11, 56, 1; 10, 19, 8, and "Cod. Théod.," 11, 24, 6, 1; "Nov. Just.," 120, 1. See especially the "Nov." of Romain Lecapène, 922, in Zach., "Jus. Græco-Rom.," III, 234; cf. "Nov.," 114 of Leo (order: relatives, joint-owners, neighbors). As to the Byzantine "protimesis," cf. Zachariæ de Lingenthal, "Gesch. de Griech. Röm. R.," 1877, § 50; Mortreuil, "Hist. du Dr. Byz.," 1844; Platon, "Le Socialisme en Grèce," 1895; "La Démocratie et le Rég. fiscal à Rome et à Athènes," 1899; Monnier, "N. R. H.," 1892, p. 654. The "Const. Sancinus," which is ordinarily attributed to Frederick II, and which is a private work according to others (Brünneck), is scarcely more than a translation of the "Novella" of Romain Lecapène. It is ordinarily found in the old editions of the "Libri Feudorum." Cf. Monnier, "N. R. H.," 1896, p. 651 (bibl.); A. del Vecchio, "Legisl. di Federico II.," p. 104. Sicilian Customs: see La Mantia, "Storia d. Legisl. Sic.," 1858, and especially "Consuet. e Leggi s. la Protimisi," 1895; Giuffrida, "Genesi d. Consuetud. di Sicilia," 1901. At Rome, the "pactum protimeseos" which was joined to a sale merely conferred a personal right; but the Byzantine "protimesis" seems already to give a real right: Tamassia, *op. cit.* (Italian Statutes); Lattes, p. 269. When an owner wished to sell his land a neighbor was preferred to another grantee (who paid the same price); this advantage was the just compensation for the charge of the "adjectio"; the State could, in fact, arbitrarily confer the "agri steriles et deserti" upon the neighboring owner, charging him with a tax. But, although the "protimesis" is thus connected with the financial system of the Lower Empire, it may have had its remote origin in the general ownership of the family or the village. The State would thus have only sanctioned a popular institution in its own interest.

² Twenty-five according to Merlin, "Rép.," 5th ed. Let us mention the repurchase of bequeathed silver plate (Declaration of 1689), of domestic animals (Labourg, VI, 1: for the benefit of the keeper of the animals when the owner sells one or several head), of retaking (for the benefit of the man who has the seisin, allowing him to take back his movables which have been given to a third party by a judgment). These three repurchases are contrary to the principle, "Movables are not affected by repurchase" ("Paris," 144), which is explained by what has been previously said on the subject of the ownership of movables; the repurchase of reconsolidation (for the benefit of the mere owner against a third party to whom the usufructuary has granted his right); the repurchase of rents or of quit-rents (for the benefit of the holder when the creditor grants his rent). Britz, p. 708, mentions a popular repurchase given to everybody against people in mortmain: "Liège," 16, 28. Dispossession for reasons of public utility is qualified as a *repurchase of public utility*: so Guyot, in Alsace, a repurchase against the Jews (from 1747) to prevent them from acquiring too great a number of houses (abolished Sept. 27—Nov. 13, 1791).

³ They also say *repurchase of habitation* or *premises*. Cf. in German law "Marklösung," a repurchase for the benefit of the inhabitants of the march; "Genossenlösung," a repurchase for the benefit of the inhabitants of the commune; "Fürnossenrecht," "Nachbarlösung," for the benefit of the neighbors: Heusler, II, 61; Chaisemartin, "Prov.," p. 213. Our old authors cling to the laws of the Lower Empire: the 1, 6, "Cod. Théod.," 3, 1 ("Dudum"), figures in the "Brev. d'Alaric," I, 19. From this passage we can

venience or of a joint possession for the benefit of joint owners;¹ 3d, *seigniorial repurchasing*, for the benefit of the lord (*feudal* for fiefs, *copyhold* for copyholds);² 4th, *repurchasing by a person of the same lineage*, for the benefit of the relatives or descendants;³ 5th, *repurchasing by agreement*, for the benefit of the vendor, who reserves it for himself by a clause of the deed of sale.⁴ Repurchas-

deduce that the repurchase by neighbors is rather connected with agrarian communities of old Germania, just as the repurchase by a person of the same lineage is connected with the formation of the German family. The "vicini" can oppose the setting up of a foreigner, according to the "L. Sal.," 45, "de miar.," they inherit from one another if they have no sons, before the time of Chilpéric. Cf. Geffcken, "L. Sal.," Table, see "Villa," "Vicinus"; post, "Inheritances"; Engleman, "De Retractu locali," 1776; Grimm, "R. A.," 531; bibl. in Stobbe, § 89; Schroeder, 204, 324 *et seq.* The neighbor of the South ("vezi," meaning a member of the "veziau" or the community; cf. Spain, "vecino") corresponds to the citizen of the North: Du Cange, see "Vicinus"; Cadier, "Etats de Béarn," p. 91. As to the "vicinatico" at Cannobio, cf. Lattes, "Dir. Consuet.," 1899, p. 153. Does the owner of a piece of land adjoining the one which is alienated have the right of the repurchase, assuming that he is not a fellow citizen of the man alienating it? It would seem not, the practice in this respect differing from that under the Lower Empire in Germany. — The repurchase of citizenship is sometimes applied to movable property and to provisions: "Bayonne," V, 43 (ships); Labourt, VI, 8; "Bergerac," 106. — Rights of "treizain" (Nîmes), "abzuc," emigration, florin of succession, etc., collected by the lords or the towns when the possessions of a citizen or a person domiciled therein passed to an alien through inheritance or otherwise. Law of July 19, 1790. — "Bayonne," V, 51: repurchase of a house sold to be demolished. — Italy: cf. Tamassia, p. 256, 260, etc.; Dambeza, "Thèse," 1886 (agrarian communities in Algeria).

¹ Formerly, joint owners were relatives or fellow citizens, and the repurchase by a person of the same lineage or the repurchase by neighbors were the only ones which should have been used. The repurchase of joint possession ended by becoming separated from the preceding ones and by acquiring an existence of its own in certain of the Customs, perhaps owing to the influence of the Roman laws. Originally, it was considered as being for the purpose of re-establishing the unity of the domain; later on it was regarded rather as a means of facilitating the termination of joint possession. Cf. the Roman laws cited in the preceding note: Loysel, 422 (bibl.). "Ass. de Jérus.," ed. B., II, 260; "Bayonne," 5, 20; "Dax," 10, 17; "Berghes," 9, 9, etc.; "Lille," 7, 1: "r. de frareuseté" (cf. Ragueau) identical with the repurchase of joint possession; repurchase of "esclèche" (disappearance or dismemberment), right for the coparcener to take back the divided share which has been separated from the common fund and alienated to a third party. In German law: "Theillossung," "Gespilderecht," "Getheilenzugrecht."

² Or retained: Loysel, 423; see Ragueau. The lord retains and restores to his tablets the fief which has been alienated. In countries of written law the seigniorial repurchase is called "preference" (Guyot, see "Rép.") and presents some peculiarities. — Ducal repurchase ("duchés-paries"), see Guyot. — Loysel, 432: the king has no right to the seigniorial repurchase; also it cannot be made use of against him. Ferrière, see "Retr. féod.": the king can repurchase fiefs held immediately of the crown, but not those held under a mesne lord; otherwise, he would end by having all the fiefs in the kingdom. — Cf. as to the seigniorial repurchase, treatises on fiefs and on feudal rights, Loysel, 424.

³ "Retractus gentilitius," "consanguinitatis," "Erblosung," etc.

⁴ Pothier, no. 532, distinctions: 1st. The redemption, a clause by means of which the seller reserves to himself the power of buying back the thing sold and the buyer binds himself to give it back to the seller. 2d. The repurchase by agreement, by virtue of which the seller and his successors have the right every

ing by a person of the same lineage, which is the most practical and the most widespread of these, will be examined below as a type to which the others are similar in their essential characteristics. In case of a conflict between the different kinds of repurchasing, in the later stages of the law, sometimes the repurchasing of the neighbors and of the community was given preference over the repurchasing by persons of the same lineage, and the repurchasing by persons of the same lineage was always given preference over the seigniorial repurchasing.¹ The repurchasing by agreement took precedence over all the others.

§ 336. **Disadvantages of Repurchases and Their Suppression.** — With the decadence of feudalism and the disintegration of the family and agrarian communities, these repurchases had lost their reason for existing.² There does not seem to have been any thought of making use of them in the interests of an advantageous cultivation of the land by reconstructing domains which were too much cut up for their development to be advantageously carried on. Certain of them ceased to be made use of; those which remained were made subject to conditions which became more and more severe. Only an impediment to the circulation of property came to be seen in them, beginning with the development of public wealth. The vendee who was liable to be evicted without any certainty of the morrow hesitated about concluding a bargain the whole benefit of which, if there were any, would be for others. Struck with these disadvantages, and desirous of strengthening

time the inheritance is sold, whether by the buyer or by his successors, to be preferred over all buyers and to be allowed to take their bargain off their hands. Cf. *Tiraqueau, op. cit.*, and *Merlin*, see "Faculté de Rachat."

¹ A curious trace, one might think, of the order in which the various forms of ownership had succeeded one another; but the fact is neither sufficiently old nor sufficiently general to allow of one's drawing this conclusion: "L. Feud.," II, 9, 1; *Loysel*, 425; *Beaumanoir*, 51, 20; "Olim," I, 666; "Ass. de Jérus.," *loc. cit.* (a relative preferred to a neighbor). *Chaisemartin*, "Prov.," p. 213: a coparcener is preferred to a person of the same lineage. *Heusler*, II, 63: relatives, fellow members of a community, "Hofleute"; or else at a more recent period: accusation and, in case of an action at the same time, drawing of lots. — Cf. *Tamassia, op. cit.*, p. 260, etc.; Code of Montenegro, Art. 49.

² *Boutaric*, I, 1 (p. 3): "hateful rights." *Tiraqueau* sets forth at length the advantages and disadvantages of the repurchase. *Domat* is unfavorable to it. *Auzanet* (preface to volume on the Repurchase, "Cout. de Paris") maintains that it gives rise to an infinite number of frauds, of perjuries and actions, without taking into account the fact that it is contrary to good faith and freedom of trade. Montesquieu is one of the few defenders of that which he calls "a mystery of the ancient law." Cf. also *Pothier*. In the repurchase by a person of the same lineage, the one most widely used, is seen one of the means of preserving the "splendor of the name." This would seem like one of those artificial proceedings made use of as a matter of policy to check the disintegration of the old families.

the ownership of the individual, the Revolution abolished these repurchases.¹ The seigniorial repurchase was the first to be affected, and it disappeared with the feudal system.² The others were then suppressed (June 13, 1790) because they were liable to hinder the sale of the national possessions.³ A short while after this, July 17, 1790, the Constituent Assembly completed its work by abolishing the repurchase by a person of the same lineage.⁴ A law of May 13, 1792, re-enacted in very general terms the proscription of every sort of repurchase.⁵

§ 337. **The Repurchases of the Civil Code and Actions of Subrogation.** — Repurchases, properly so called, were similar to, without being confused with, certain cases of personal subrogation, such as the subrogation of the acknowledged debtor to the assignee of a contested right.⁶ This was scarcely designated by the name of the repurchase; because of this circumstance and their Roman origin, they survived the proscription decreed by the Revolution. This accounts for the presence in the Civil Code of a certain number of repurchases, the *repurchase of a contested right*,⁷

¹ Rescission because of inquiry was done away with for the same reasons: *Fenet*, "Trav. prép.," I, 67.

² Law of March 15, 1790, art. 10 (February 24).

³ *Sagnac*, "Législ. Civ. de la Révol.," p. 202; *Viollot*, p. 560.

⁴ A few Customs had already done away with it: "Artois" (1741), 14; "Arras," 1; "Bapaume," 9; "Douai," 3, 4; "Cambrai," II, 13; "Moniteur" of June 14 and July 18, 1790.

⁵ "Code Civil interm.," Table, see "Retrait." Abolishing of the "suppression of the decree" practised in Languedoc against the judgment creditor following a forced sale of an immovable (August 25, 1792); see *Ferrière*, *Guyot*. Cf. "Norm.," 471. Abolition of the repurchase by the eldest sons in Normandy and of Art. 332 of the "Cout. de Norm." (Sept. 2 and 30, 1793). The repurchase by agreement is itself prohibited: *Fenet*, I, p. 25.

⁶ Repurchases properly so called are the manifestation of a latent right of ownership, whereas subrogation, which is here in question, deals rather with claims. The former are connected with the system of the ownership of land; subrogation is to be accounted for by entirely different reasons (the repression of speculation and the spirit of chicanery). In cases of the assignment of claims in litigation the old debt subsisted (with its guarantees), but it was reduced; if the man giving up the claim had been a repurchaser, the indemnity due from him to the person selling the claim (assignee) would be a new debt without guarantees.

⁷ Art. 1699 *et seq.*; *Merlin*, see "Droits litigieux"; *Alb. Desjardins*, "R. Prat.," 1868, 25, 138; 1870, 29, 451, and 30, 225 (bibl.). In this matter our old law merely applied or extended the Roman laws which were already well known: "Cod. Just.," 2, 13 ("ne liciat potentior"), 2; 8, 36 ("de litigios.") 3 and 5; "Nov.," 72, 5 (guardians, Civil Code, 450); "Cod. Just.," 4, 35 ("Mandati"), 22 and 23 (celebrated Constitutions "Per Diversas," and "Ab Anastasio"). No doubt, they had never entirely ceased to be in force; as to the first of these propositions, it follows at least from the following texts: "Edict. Theodor.," 43, 44; "L. Rom. Visig.," "Cod. Théod.," 2, 14; *Papien*, 43; "Burg.," 22, 55; "L. Visig. Reccesv.," 2, 3, 8; cf. 5, 4, 20, and "Cod. Eur.," 312; "Petrus," IV, 20. — (A) The Ordinances of 1356 and 1585. Prohibition of assigning debts to persons who were more powerful, for fear that

the repurchase of an inheritance,¹ the repurchase of a joint posses-

they might dictate the sentence of the judge, or to privileged persons (for example, scholars) in order that pleaders should not be deprived of their natural judges, and this under penalty of an annulment of the assignment, of a forfeiture by the assignor, and of an arbitrary fine imposed upon the assignee besides damages: *Le Prestre*, "Q. Not.," I, 93, 37. — (B) Ordinance of 1521, 23: Prohibition for judges to acquire any property with respect to which an action was pending within their jurisdiction, and Ordinance of January, 1560, 54, forbidding advocates or solicitors from acquiring causes of action which they are conducting. — (C) *Michaud*, 94: for judges, advocates, etc., to acquire any debt in litigation (this was not registered by some of the Parliaments). Regulating Order of the Parliament of Paris, July 10, 1665, Art. 13. These two prohibitions are confounded, Civil Code, 1597. Cf. "Pact de Quota Litis," see *Ferrière* (bibl.). — (D) From the Laws "Per Diversas" and "Ab Anastasio," which were enacted out of hatred of speculators who have claims assigned to them with a fraudulent object, our old jurisprudence drew an institution which *Pothier* ("Vente," 588) is about the only one to call "a kind of repurchase." The Parliaments of Toulouse and Grenoble applied these laws to the assignment of claims in litigation and other claims. Cf. "retrait debita" in Flanders. See *Guyot*. Elsewhere, *Dumoulin's* interpretation, which restricted their bearing to claims in litigation, prevailed: "Usur," q. 62, no. 413; "Arr. de la Ch. del' Edit" May 9, 1605; *Brillon*, "Dict. des Arrêts," see "Litige"; *Brodeau*, on *Louet*, "Cession de Dr. litig.," *Pothier*, no. 591. The assignment of real rights in litigation was treated similarly to that of claims, Order of 1578, 1615, no doubt owing to the influence of the ordinances cited above (A and B); they did not distinguish between real rights and claims; moreover, when only the litigious character of the right was taken into account, the likening of them was natural. This would lead to the idea of subrogation: in Rome the claim which had been assigned was cut down to the price of the assignment; now, a real right, an ownership, or the usufruct of a piece of land, could not be cut down in this way; the saying that the assignor should be subrogated to the assignee and, a curious thing, against himself, was invented: *Charondas*, "Pand.," II, 29. There was always a discussion as to the conditions required to make the right one in litigation, — being contested in a suit, merely a demand (Auth. "litigiosa"), or merely an apprehension of litigation? Civil Code, 1700. The exceptions to the rule admitted by Anastasius are to be found in *Pothier*, 594, and in the Civil Code, 1701. It was necessary first of all for the man who had given up a claim to have letters of subrogation in order to be substituted for the buyer on paying him the price of the assignment (which was ordinarily less than the amount of the claim): *Charondas*, "Pand.," II, 29. They were no longer demanded in the eighteenth century: *R. de Lacombe*, see "Transport." According to some authors at the end of the eighteenth century, such as *Boucher d'Argis*, the litigious repurchase must have been no longer in use; this is not at all likely because *Pothier* speaks of it and it is found once more under the Revolution; perhaps what they meant to say, as *Imbert*, see "Enchir.," was that the Roman laws are abrogated in this sense, that the transfer of litigious rights alone (and not the assignment of any sort of claim) is subject to the repurchase. The Court of Appeal, 8 Prim., year XII, declares that this has nothing in common with repurchases: Cf. *Sirey*, 1828-30, I, 20 and 59.

¹ Art. 841. — Under the name of repurchase by a co-heir or a repurchase pertaining to succession, *Merlin* provides for two cases: 1st. A co-heir acquires some right relative to the succession; before the partition of the latter another co-heir may demand that this acquisition be united to the mass of the inheritance: "Dig. fam. etc.," 19; "de leg.," I, 89, 4. — 2d. A co-heir gives up his rights of inheritance to a stranger to the succession: every co-heir can substitute himself for the latter. Cf. "Droits Successifs." Art. 841 of the Civil Code has sanctioned this right, which was already generally received in our old jurisprudence. Cf. especially *Alb. Desjardins*, "R. Prat.," 1870, 497. It is only dealt with in a small number of Customs ("Alost," 20, 5;

sion.¹ The framers of the Code, moreover, avoided those expressions which showed the effects of the old system, and repurchases only had a place in their work incognito. It remained for the School to revive this archaic nomenclature at a time when it no longer had anything suspicious about it. In the matter of legislation the

"Bruges," 20, 3; "Namur," 69, 70; *Britz*, p. 700). But the Parliament of Paris admitted of it by means of its Orders of 1521, 1578, 1595, and especially 1613 (upon the speech of the Advocate-General Servin: "Actions," I, III, no. 114, ed. 1639, p. 880). Our old authors connected it with the litigious repurchase, although rights of inheritance are not necessarily contested; or else it is justified because of a desire to prevent strangers from thrusting themselves into the secrets of the family and increasing the difficulties of partition: *Charondas*, "Pand.," c. 29, *Servin*, *loc. cit.*; *Lebrun*, "Successions," 4, 2, 3, 66. As we look upon it, the repurchase pertaining to succession was created instinctively by practice as an extension of the repurchase by a person of the same lineage and of the repurchase by joint possession; co-heirs who were not of the same lineage benefited by it, and it was not applied to any special piece of immovable property, but to a collection of rights. Although it is called a *repurchase* by *Denisart* and *Merlin*, we see in it rather a subrogation, and formerly letters from the chancery were required in order to obtain it, "Nouv." *Denisart*, see "Cession de Dr. success." By this means it was found not to be affected by the general prohibition against repurchases pronounced by the Revolutionary laws. The Convention, it is true, annulled on the 19th Flor., year II, a judgment of the Tribunal of Breteuil which authorized heirs to exercise the repurchase pertaining to succession; but this decision was not promulgated as law, and the Court of Appeal recognized the fact that this repurchase was not abolished (25th Vend., year V; 11th Germ., year X; 8th Frim., year XII).

¹ Art. 1408: the husband acquires partly or wholly an immovable of which his wife is jointly with him a part owner; when the community is dissolved she has a choice between giving up the property to the community or *withdrawing* it. When she chooses the latter course it is said that she exercises the *repurchase of joint possession*; but this expression, which is used by *Toullier* (wrongly or rightly?) was not made use of with respect to this case in our old law; as to the hypothesis provided for by Art. 1408, our old authors are not very explicit. — In countries of written law the "l," 78, 4, D., "de J. dot.," 23, 3, was applied, which attributed to the wife the undivided portion of the land acquired by the husband by way of marriage portion (because this is an exercise of the marriage portion). *Roussilhe*, "Dot.," § 554 *et seq.*, seems to say that she has the power, but is not compelled to choose this course: "she can compel the heirs of the husband to give up to her all of the land, . . . the wife or her heirs *having a right to withhold* the aforesaid acquisitions" Cf. to the contrary, *Rouss. de Lacombe*, "Rec. de Jurispr. Civile," see "Dot.," p. 234. In countries of Customs the Roman rule was too much in harmony with the institution of the repurchase by a person of the same lineage, and of the repurchase of half-funds and the repurchase of community, not to be adapted to the community system; it would have been created if it had been necessary. But some decided that the wife could not refuse the acquisition, even if it is made under disadvantageous conditions: *Lebrun*, "Communauté," I, 5, 2, 3, 12; *Ferrière*, on "Paris," 220 (III, 1, 13). *Cochin*, "Œuvres," V, 231 (ed. 1765), who is cited for this proposition, assuming that the wife is the only judgment creditor. Others authorized her to leave the property in the hands of the community, "quia marito non licet onerare propria uxoris"; *Bourjon*, "Dr. Commun.," III, 10, 2, 10, 2, 2 (I, 537, ed. 1770), when she renounces; *Valin*, on "La Rochelle," I, p. 493, or when she accepts. Cf. *Pothier*, "Comm.," no. 151. These latter authors no doubt set forth the solution which was received in practice, and the framers of the Civil Code merely sanctioned it, as is said by *Tronchet*: *Fenet* XIII, 495, 560, 607. The partisans of the contrary opinion followed the letter of the Roman laws too slavishly.

merit of these new kinds of repurchase has been very much discussed. However, they are of very little importance. They cannot be compared with the repurchases of the old system. They would not even furnish any connecting link with a system of the reconstitution of landed property such as exists in Germany in our time, and such as existed in the past, for example, in Italy ("ingrossazioni").¹

§ 338. **The Repurchasing by a Person of the Same Lineage**² is related to the family joint ownership of the old Germanic law.³ In a number of the old legislations, where the family is organized upon the same foundations, there may be noticed a tendency to make the house and the lands which are the seat of a group of relatives inalienable; these possessions belong rather to the family

¹ Where it seems to be connected with the "adjectivo" of the Lower Empire. It is not only sought, as it was formerly, to compel owners of neighboring lands to cultivate abandoned lands in the interests of the Treasurer, because they were unproductive; but, in the interests of agriculture, "justa prædia" are formed out of little parcels, and it is sought to "drizare terras ac fossata"; or even that attraction which the large domain exercises over adjoining parcels is legally sanctioned, and the large landowner is given a right to increase his possessions. This system was devised in order to remedy the evil often pointed out by the economists of the excessive parceling of lands, but it already had as its adversaries the partisans of concentrated cultivation: "laudato ingentia rura, exiguum colito." Statutes since the end of the twelfth century. Customs of Northern and Central Italy. Terminology: "retrato coattivo," "jus congrui": *Tamassia, op. cit. (bibl.)*; *Blondel, "Popul. rur. d. l'Allem.,"* p. 332; *Roscher, p. 307.*

² Other names for the "retractus gentilitius": "proismeté," proximity; "premesse," etc., — that is to say, a right of the nearest relative; "rescousse" (taking back), buying back, retaining; "torn" ("F. de Béarn"), that is to say, return; "chalonge" ("calumnia"), reclaiming. Cf. *Ragueau*, Spanish law: "tanteo" (that is to say, "tanto por tanto," the relative is preferred). German law: "Naherrecht," "Erblosung," "Zugrecht."

³ Other systems (to-day abandoned). — 1st. *Hebraic origin*, "Levit.," xxv, "Ruth," xxvii; "Jeremiah," xxxii, 15; *Daresté, "Etudes,"* p. 32; *Salvador, "Inst. de Moïse,"* I, 220; *Rabbinowicz, "Législ. Civ. du Talmud,"* IV and V. The Jubilee, which recurred every fifty years, dissolved of absolute right all sales of lands and caused them to return to their former owners, without its being necessary to pay any indemnity to the man who had held them. — 2d. *Celtic origin*, *Pithou*, on "Troyes," 114; *La Ferrière, "Hist. du Dr. Fr.,"* II, 100. — 3d. *Roman origin*, "L.," 14, "Cod. Just.," "de contr. emt.," 4, 38; *ibid.*, 4, 66, 3. Cf. "L.," 14, D., "de reb. auct. jud.," *Grimaudet, p. 3*; *Pasquier, "Inst.," loc. cit.* — 4th, *Feudal origin*. The feudal grants were often made to X and his heirs; in case of a sale to strangers the heir had a right to bring back the fief into the family: *Laurière*, on "Paris," II; *Montesquieu, "Esp. des Lois,"* 5, 9. Cf. *Jobbé Duval, p. 100.* — But, "a priori," one is bound to admit that the feudal system must have been hostile to the repurchase by a person of the same lineage, for it was created in the interest of the lord and not in that of the relatives of the vassal. Having become inheritable, fiefs were made subject to the repurchase by a person of the same lineage, just as freeholds were. Moreover, we must notice that the repurchase by a person of the same lineage exists among peoples where the feudal system did not take root (Slavs, Kabyles), and that, conversely, it has met with resistance in countries of written law in the very midst of feudalism: *Houard, "Anc. Lois des Fr.,"* I, 256.

than to its head, and the latter could not freely dispose of them.¹ It is in this same spirit that the law of the barbarian period and the Customary law place the power of alienating immovables, or, at least, *personal belongings*,² under a number of restrictions. We will deal elsewhere with freedom of alienating by will and freedom of giving "inter vivos"; for the time being we will only deal with alienations for a consideration. They seem to be less prejudicial to the family, because in inheriting the alienor's estate the family gets, if not the property itself, at least its value. But, according to the old ideas, appropriation of the property for the benefit of the family was opposed even to alienations of this kind; it was destined to pass from one relative to another, and no one could be allowed to disturb the legal sequence of inheritance. An alienation ran the risk of disorganizing the family, of bringing in a stranger, — that is to say, an enemy — into the very heart of its domain, and (putting things in their best light) causing it a serious injury; the price is soon dissipated, without taking into account the fact that it may be fictitious and merely serve to disguise a gift. Though less injurious than sale, even an exchange is sus-

¹ The history of Naboth, a victim of his affection for the family property, is very significant. He had a vine near the palace of King Ahab; the latter said to him, "Give me thy vine, so that I may make of it a garden of herbs"; and he offered to pay him in money, or else to give him a better one. "May the Lord keep me from giving thee the heritage of my fathers," replies Naboth: "1 Kings," xxi, 1; cf. "Genesis," xxiii. — As to the old legislation, cf. *Dareste*, "Etudes," pp. 30, 60, 132, 139, 190, etc.; *Post*, "Grundr. d. Ethnolog. Jurispr.," I, 201; *Hanoteau* and *Letourneux*, "Kabyl.," II, 401 ("chefaï"); *Hamilton*, "The Hedaya," 1870, p. 548; *Louchitzky*, "Propriété commune en Petite Russie," 1895; *Jobbé-Duval*, p. 66; *Bogisic*, "Code Civil du Montenegro," etc.; *Beauchet*, p. 620.

² The provisions of certain of the barbarian laws might have led us to believe that freedom to dispose "inter vivos" was admitted on principle in the old Germanic law. For example, "Burg.," 84; "Bai.," 15, 16, 17; "Wisig.," V, 4. But these laws have felt the effect of the Roman legislation. As to the law of the Thuringians, 54, "Libero homini liceat hereditatem suam cui voluerit tradere," cf. *Richtofen*, "M. G. H., L. L.," V, 138. This text recalls the "L. Sax.," 61, the "Cap.," 817, 6 (I, 121, cf. 111), certain formulæ, for example, "F. Andec.," 58. At one time the Roman ideas seem to set to one side the Germanic law (cf. "L. Wisig.," Formulæ, Statutes; cf. especially "Cart. de Beaulieu," "de Savigny," "d'Ainey"); the Capitularies attempted to establish a freedom of disposing, especially, it would seem, in the interests of the Church. But the tenacity of the resistance offered by the family rights can be measured by the care with which the framers of statutes threatened the heirs with the spiritual and temporal penalties of excommunication and disinheritance, in case they did not respect the will of the man making the disposal. In the majority of the Cartularies we soon see the heirs intervening and giving their consent: "Formules," ed. *Rozière*, nos. 267 *et seq.*; "Cart. de Cluny," no. 8 (several vendors); no. 434 (in 935: relatives), etc.; "St. Victor de Marseille," nos. 47, 65, 116, etc.; "St.-Bertin," no. 11 (in 685); "St.-Père de Chartres," I, p. 132, 164 (CCXX); "Redon," etc.

picious, because it is very rare for it to be carried out to the equal advantage of both parties. These considerations explain how it is that almost as much repugnance has been expressed for alienations for a consideration as for those which are merely gratuitous.¹ At first they were not authorized excepting with the consent of the relatives, and the latter were free to refuse their consent even although they had no reason to do so. The owner, who could not possibly sell the land because of their opposition, was compelled in case of need to impose upon them the alternative of either providing him with the cost of sustenance or allowing him to solicit this kind office at the hands of a stranger. This was imperative, to avoid condemning to death those whom age, illness, or many other accidents prevented from providing for their needs by means of their own work. It is true that a first blow was dealt by this means to the rights of the relatives; the offer which was made them, and the right of pre-emption which they enjoyed by this means, were not equivalent to the power of giving their consent to an alienation, because the exercise of this latter power did not subject them to any outlay, whereas they could not practise pre-emption if they had not the necessary sum wherewith to pay the merchantable value of the property. From this restriction developed others. In order to simplify matters, the preliminary of an offer to the relatives was done away with; it merely bothered the parties, resulted in delays, and might be the cause of losing an advantageous sale. It was thought that there would not be any great disadvantage in leaving the owner free to alienate his real property, on condition that he should acknowledge the rights of his relatives to take back this property within a specified time. The heirs thus found themselves face to face with an accomplished fact. They would scarcely resolve to assail it without serious motives, — for example, because the sale has been made at a very low figure. Consent, offer, repurchase, — such are the successive stages through which the right of the relatives passed as it became more and more restricted.

§ 339. **The Consent of the Relatives** (or of the next heir) was required originally for the validity of the alienation.² Also, it is

¹ The right of the family is manifested, even over possessions held by lease; cf. in Hainaut the custom of *bad will*: *Debouvy*, "Thèse," 1899. As to burgage in Picardy there was a combination of the repurchase by a person of the same lineage and the repurchase by a fellow citizen (*Buthors*, "Sources du Dr. rural," p. 385; "Cout. d'Amiens," II, 588); in Normandy, *Génestal*, "Thèse," p. 80. *Post*, "Reserve," "Gifts 'inter vivos,'" etc.

² Cf. *Lewis*, *Fipper*, *Tamassia*, *Ficker*, etc., *op. cit.*; *Zimmerle*, "Deutsch

found mentioned in many deeds from the time of the eighth century;¹ the sale takes place "paupertate cogente, præsente et concedente uxore, annuentibus etiam filio et filiabus, præsentibus etiam et assentientibus amicis." And, if only there were a large number of relatives, the proceeding was not a difficult one to undertake; this alone is sufficient to account for the fact that they were content with the intervention of the next heir. The principle of the necessity of the consent of the relatives, which was already laid down in the law of the Saxons in an implicit manner,² was long afterwards formulated by the "Sachsenspiegel" in the following terms: "without the consent of the heirs, and outside of the public assembly, no one can alienate his inheritance nor his people."³

Stammgutssystem," 1857; *Brunner*, "Grundz. d. d. Rechtsg.," § 57 (bibl.); *Verdelot*, "Le Bien de Famille en Allemagne," "Thèse," 1899.

¹ Act of 796 in *Lacomblet*, "Urk. d. Niedder.," I, no. 6; cf. no. 129 (in 996). Deeds in which the grantor declares that he has no heirs, or in which he threatens his heirs with spiritual or temporal punishment should they attack the gifts made to the Church: "Capit.," 803, c. 6; 817, c. 6; "Cart. de St.-Bertin," pp. 66, 69, 113; "de Cluny," I, 32, etc.; "de Notre-Dame-de-Paris," I, 288. *Miræus*, "Op. Dipl.," I, 665: a donor declares that her heirs, — that is to say, her sons and her son-in-law, her daughter, and their children, — approve of the gift ("consentientibus et laudantibus"). *Lamprecht*, "Etat économique de la France pend. la première partie du M. A.," treatise 1889, p. 249; "Polypt. d'Irminon," p. 340 (ed. G.): annulment of the gift of a villa to the Abbot of Corbeil in 986, because of lack of consent on the part of the relatives. "Cart. de Beaulieu," 35, 15. They even allow an intervention of children at the breast: "Cart. de St.-Père de Chartres," Intr., p. cxxii. In order to obtain this consent it is not a rare thing for the purchaser to make gifts to the heirs in money or in kind.

² "Sax.," 61, 62; cf. notes by *Richthofen*, "M. G. G., L. L.," V, 79. The law of the Saxons merely formulates a still older custom; it does not sanction a new rule, as Bescler and Lewis have pretended. — The Anglo-Saxon laws forbade the relative to alienate the inheritable lands "extra cognationam suam"; "Ælfr.," 41; "L. Henrici I.," 70, 21; 88, 14; cf. "Cnut," II, 79. — Other barbarian laws, cf. "Burg.," 1, 1; 24, 5; 84; 99; "Bai.," 1, 1; 15; 16 and 17; "Rib.," 59; 60; "Roth.," 159 *et seq.*; 290, 173. Cf. "Fribourg en B.," 1120, art. 6; "Sole.," 17; "Labourt.," 5.

³ "Sachsensp.," I, 52, 1. There is no rational motive for limiting, as does Fipper, the right of giving their consent to a certain class of heirs, — for example, to the degree of consanguinity of the grandfather. Perhaps, according to the very early law, all the male relatives who had attained majority had to be consulted; but it was deemed sufficient, although it might have been only for practical seasons, to bring in the nearest ones (a deed of the twelfth century: the son during the lifetime of the father has no right, etc.). It is not a rare thing, moreover, for distant relatives to give their consent "ad majorem cautelam," without its being strictly necessary. In spite of the custom of strongly favoring the minor and the posthumous child, it is not certain that they had the right to attack a deed: *Heusler*, II, 57. The intervention of the relatives is required for every alienation, gift, sale, exchange, etc. (at the same time the law of "Scanie," III, 2, allows of exchange "invis consanguineis"). The heir whose consent has not been sought has a right to take the immovable, as though the inheritance of the one disposing of it had opened ("velut jure hereditario"): "Sachsensp.," I, 52, 1. To put it better, his right of ownership springs into existence from the very fact of an irregular alienation. Thus he does not have to pay any indemnity to the purchaser (*Ficker, contra*); this takes

Though not sanctioned by all the barbarian laws, it was none the less a part of the foundation of the old Germanic law;¹ it was so firmly rooted in the Customs that neither the Roman law nor the Capitularies which were put forth in the interests of the Church² succeeded in making it disappear.³ In the case of irregular alienation, the heir who was next under the owner stepped into the place of the actual owner who had abandoned his rights and took back the property from the hands of the vendee without paying him any indemnity.⁴

§ 340. **Offer to the Next of Kin.** — At an early period there were many derogations of the primitive rule; alienation was authorized in spite of the relatives in exceptional cases, — for example, when the Church or the king was the grantee (law of the Saxons), or, again, in case of necessity,⁵ for the purpose of obtain-

place of its own accord in cases of gifts; it is the same in the case of sales; it is the natural sanction of the prescriptions which require the intervention of the relatives (or offer to the nearest of them). — The effects of this system were sometimes deplorable; thus, at Nambourg, where it lasted until 1307, the owners who had become incapable of cultivating their lands and could not sell them for lack of the consent of their relatives, found themselves under the necessity of allowing them to go to waste: *Zimmerle*, p. 234.

¹ An argument based upon the comparative jurisprudence of the constitution of the family, traces of the old idea even in the legislations which no longer accept it (for example, "Burg," *loc. cit.*: if a partition of the family possessions takes place between the father and his children, each one of them is free to dispose of his share; in case they live in joint possession the right of so disposing does not exist). Cf. "L. Sal.," XLVI.

² "Capit.," I, pp. 113, 151, 182, 379 (disposals "pro salute animæ vel propinquo vel cuilibet"; the heir cannot attack a transfer "legitime facta"); "Cart. de St.-Père de Chartres," I, 40 and 88; "Capit.," V, 235.

³ Customs were stronger than the law; in the tenth century, at least, the consent of the heirs is necessary in Saxony, even in the case of gifts to the churches; the son of Witikind only makes a disposition upon obtaining the consent of his own son: *Flodoard*, "Hist. de Reims," I, p. 280 (ed. *Lég.*): in 670; *Beauchet*, "N. R. H.," 1901, 14. — If one wishes to get some idea of the annoyance resulting from this rule, let him consider that sometimes one meets with as many as eight deeds of confirmation accompanying one single deed of sale and coming from the relatives or the lord.

⁴ *Heusler*, II, 59. More often the right of way is accounted for by the idea of an anticipated opening of the succession; but these ideas are almost confused in the old law.

⁵ "Legitima necessitas," "echte Noth," understood at first in a very strict manner, and afterwards with less strictness (Henry IV sells the estate of Oisy in order to pay his debts). — "Famine," "Sax.," 62; "Roth.," 173; *Ragueau*, see "Paupreté jurée" (Charter of the Bassée, eleventh century: "quod nullus nisi paupertate vendere poterit"); *Desmares*, 283; "Béarn," 1552, *contr.* 6; "Artois, N. C.," XXIII: alienation is permitted in three cases: consent of the heir, poverty, reinvestment. *Boularic*, 2, 7; "Schwabenspiegel," c. 375; *Grimm*, p. 461; *Demelic*, "Dr. Cout. des Slav. Mérid.," I, 34. Spanish "Fueros," for example, "Najera," in 1076; "Amalfi," c. 11; "Ferrette" V, 23. — Sometimes proof given by the oath of the grantor, sworn poverty: intervention of the law: "F. de Béarn," *loc. cit.*; *Guyot*, see "Nécessité jurée." — Cf. "Barège," 4, 5; *Ricaume*, "Thèse," 1897.

ing sustenance in time of destitution and avoiding slavery for debt, or of ransoming oneself from captivity. **Sworn poverty** is the most general cause of and excuse for alienation; in the thirteenth century the "Livre de Jostice," p. 169, still says, "Man can sell his inheritance for his need, but not for his profit." In such a case as this he should begin by offering the land to his nearest heir, to the next of kin, or even to his relatives in general, to the friends of the flesh. It is only upon their refusal to take over the property for their own account that he is permitted to sell it to strangers.¹ Thus the relatives have a right to preference over strangers (pre-emption, preference "in re non vendita").² If he omits to offer they are permitted to take back the property from the stranger who has bought it, without paying him any indemnity and without restoring to him the price of the sale.³ — There came a time when the condition of necessity was no longer required; it was implied,⁴ and the offer to the next of kin took place even in his absence. Better still, when the owner had neglected to make the offer, the Customs no longer authorized the relatives to take back the property excepting upon condition of indemnifying the vendee (preference "in re vendita").⁵

¹ "L. Sax.," 62; "Roth.," 173; "Stat. fam. S. Pietri Worm.," in 1024, 2 and 6; *Martène*, "Ampliss. Coll.," I, 381 (about 1020, "Arras"); "Petrus," I, 19; "L. Feud.," 2, 3; *Jobbé-Duval*, p. 83, 87, 90 (Denmark, Sweden, etc.); Scotland: "Leges Burg.," 45; "Stat. de Gothland," 31, 1; "Cart. de St.-Bertin," p. 158 (sales among relatives); *Desmares*, "Et. sur la Propr. Fonc. dans les Villes du M. A.," 1898, p. 247. Cf. the notification of individuals in Breton public investiture. *Beaumanoir*, 44, 27, 28, condemns a system introduced by practice and which consisted in offering a property to the relatives, so that they might declare themselves before the expiration of the year and a day of the repurchase. This system, rejected in Beauvaisis, was very common in Flanders, Artois and Picardy: *Bouthors*, "Cout. d'Amiens," 1853; "Roisin," p. 64; *Beauchet*, p. 22.

² Various proceedings for the fixing of a price to be paid by the relatives when their right was presented under the form of the pre-emption, when there has been no previous sale to a third party (appraisal by experts, legal price): *Beauchet*, "N. R. H.," 1901, 26.

³ Ficker has contested this; but this seems to us to result impliedly from the provisions as to the intervention of the relatives and offer to the next of kin. The Swedish text cited by *Amira*, "Nordg. Obl.," I, 578, seems to us to be very categorical according to our interpretation. He also shows that the idea of punishing the person alienating who did not conform to the custom of first making an offer to the relatives was not unknown to the legislator. The Anglo-Saxon law forbids one to alienate to anybody except one's relatives; this implies that alienation, although made with consent, if to strangers is void. One might conceive, it is true, of making the property a part of the inheritance of the seller; but, if we find a few examples of this solution, it was too little practiced to be adopted in a general manner: "Cart. de St.-Père de Chartres," p. 126; "Ponthieu," 19; "Tailliar," "Rec. d'Actes," p. 341.

⁴ "Charte d'Amiens," 1190, Art. 25. Cf. *La Thaumassière*, "A. C., Berry," p. 610 (in 1171); *Marnier*, "A. C., Picardie," p. 148.

⁵ Transition to the system of the repurchase: "Cout. de Mons., Bourdot de

§ 341. **Repurchase.** — In a last stage the offer to the next of kin has fallen into disuse. Alienation is absolutely free. The relatives who have not been consulted preserve the repurchase or power of taking back the land during a year and a day, on condition of indemnifying the buyer therefor.¹ Under this last form, which is the most recent and by far the most widespread, in the Customary legislations of the whole of Western Europe, the right of the family survives, very much weakened, like a sort of counterpart of the hereditary reservation.² It serves, first of all, to re-establish the domain of the house, to assure the transmission of everything to the legal representatives of the family. The hereditary interest, or, so to speak, the dynastic interest, is especially brought into play. In time a political thought is mingled with these very much weakened traditional foundations. The repurchase, "that mystery of the ancient law," as Montesquieu rather pompously calls it, makes its appearance as one of the means used by the State to retard the decadence of old families; it is a protection against the lack of skill of a mediocre head, or against the evil fortune which leads him to sell the family patrimony for an insignificant sum; if the price is fair, it is well worth while to reserve for a relative the advantage of this proceeding. This conception was not without its influence upon the persistence of the repurchase throughout the whole of the ancient law. But it did not prevent practice from overthrowing it at an early time, with the assistance of various wiles. The "Grand Coutumier de France" already shows this; Beaumanoir complains of the frauds and ruses by means of which it is sought to hinder its application.³ Jurisprudence was compelled to restrain this "hateful right," which was contrary to Roman legislation,⁴ and progress was thus made

Rich.," II, 182: offer to the next of kin; if this is not done, repurchase within a year and a day. Cf. "Bayonne," V; "Farrette" (Alsace), 1592, c. 23; *Beauchet*, "N. R. H.," 1901, 29.

¹ "Beauvais," 1182 ("Ord.," VII, 624), and other municipal charters in the North of France, twelfth century; "T. A. C., Norm.," 90; "Olim," I, 444 (in 1257), etc. — Spain, "Fuero Real," 3, 10; "Siete Part.," 5, 5, 55 (and notes). — Italy: Dig. X., 1, 41, 9 (Decree of Gregory IX); *Lattes*, "Dir. Consuet. Lomb.," p. 269; "Milan," 1216, VIII ("de re paterna luenda"); cf. Statutes of 1396 (adjoining property). See especially the Sicilian Customs in *Brünneck*, "la Mantia," "Sic. Villanueva" ("Docum. p. s. Stor. d. Sicilia," 2).

² Ficker does not believe that these two institutions are parts of the same system, pp. 182-196: "Ass. de Jérus.," "C. des B.," 30 (II, 35, ed. B.); "Gr. Cout.," p. 338 (Champagne): "I pray you, make me your heir to that which you have bought from such and such a person, my cousin."

³ *Beaumanoir*, 44, 1 *et seq.*; "Gr. Cout.," p. 346; "Olim," I, 496.

⁴ Henry III, by means of an Edict of November, 1581, in vain attempted to make it the general law of the kingdom; his edict was not applied: "Code

towards Revolutionary law, which abolished it.¹ Of course, the precise lines of historical change were not always as set forth in this systematic recital which we have just made; sometimes evolution was very slow, sometimes very rapid, and degrees were passed by certain Customs.² But the general ideas which we have just set forth seem to us alone to account for the principal characteristics of the old law as far as it concerns the power of alienation "inter vivos,"³ and, at the same time, the local variations of these which are to be met with.⁴

Henri," 6, 16; see *Guyot*. In countries of written law the repurchase only exists as an exception by virtue of local Customs. It is, nevertheless, fairly widespread: "Bord.," 85 *et seq.*: 128; "Agen," 38; "Bergerac," 39; "Acs.," 10; "Saint-Sever," 5, etc.; *Serres*, "Inst.," 3, 24, 2; "Quercy" and "Rouergue"; *Despeisses*, "Œuvres," I, 74; *Henrys*, I, 2, 19; II, 19 and 3, 4 (not practised in the Lyonnais, Beaujolais, and Forez); *Cambolas*, III, 35; *Acquests*. Cf. Statute of Provence of 1472 (one month); "B. de R.," II, 1212; "Mont-de-Marsan," 7; see *Montesquieu*, "Esprit des Lois," 5, 8 and 9 (to perpetuate the greatness of families, this is the aim of the monarchic system): *Lamoignon*, "Arr., h. t.," 4.

¹ Was there a recrudescence of this institution in the sixteenth century under the influence of the spirit of the nobility? This is ordinarily admitted (cf. Edict of 1581), without, as it seems to us, being very well established.

² Thus the repurchase is lacking in the English common law, which admits of the freedom to dispose "inter vivos" as well as by will: *Pollock and Maitland*, I, 632; II, 252-328; *Jobbé-Duval*, p. 101. At Gand it was abolished as early as 1191: "Cambrai," II, 13; "Tournay," 25, 5; "Arras," 69; *Desmares*, *op. cit.*, p. 247. — In the law of the Burgundians, if the father partitions his possessions with his sons, he is free to dispose of his share; the right of the relatives only exists so long as they live in a state of joint possession; *Pappenheim*, "Launegild," p. 60. But during the Middle Ages the right of repurchase was allowed even for the benefit of distant relatives who no longer lived in a state of joint ownership. Cf. *post*, "Inheritance"; *Huber*, "Hist. Grundl. ehel. Güt.," 1884, p. 19. As to the Swedish law, cf. *Jobbé-Duval*, p. 87. Conflict between the "L. Sax." and the law of the South of Germany: *Verdelot*, *op. cit.*

³ The other explanations suggested in order to account for the restrictions upon the right of alienation "inter vivos" can be reduced to the one which we have given (for example, *Gerber*, "Meditationes ad Spec. Saxon.," p. 10, insists upon the necessity of preserving for the family the political rights which are connected with the possession of land). Or else they start with the principle of the freedom of disposal: a reaction against this right must have taken place at first in Customs, and later in the laws (an attachment for hereditary possessions, an affection for relatives, a desire to leave them sustenance, cf. at Rome, "querela inoff. test."); but not one of these ideas can account for the repurchase with regard to a sale, — that is to say, an act which can be advantageous to the family. One might also maintain that the restrictions upon the freedom of disposing date from a period when the family was disintegrating, and that they were established with the very object of checking this movement; this opinion would be plausible if these restrictions had been recent, and if the texts which mention them presented them in the form of legislative innovations. Cf. *Zimmerle*, *Fipper*, *op. cit.* According to *Ficker*, p. 292, the consent of the heirs would have nothing in common with the repurchase; by taking part in the deed the heirs would have barred themselves from contesting its existence or its irregularity. But, if this had been so, their intervention could not have been as important as it actually is.

⁴ *J. Ficker*, "Untersuch. zur Erbenfolge der Ostgerman. Rechte," vol. V, 1st part, p. 244, accounts for the repurchase by means of the principle of the absolute liberty of disposing "inter vivos," which must have existed according to him

§ 342. **Conditions of the Repurchase.** — (I) *Property Subject to the Repurchase.* Inherited personal belongings alone are the subject of repurchase in the final theory, for they constitute, as it were, a deposit which each generation should hand over intact to the generation which succeeds it.¹ The rule is otherwise with regard to acquests, the result of individual labor, the free disposition of which was left to each one as soon as it was possible, so as to encourage the spirit of enterprise and economy;² neither

in the old Germanic law. One must have noticed that a piece of land can have more value for neighbors, for adjoining owners, than for owners of land at a distance, and that there is often an advantage in uniting adjoining parcels in the interest of good cultivation, and that the choice of a neighbor is not a matter of indifference. These needs of an economic and social order were satisfied by giving to a neighbor the power of repurchasing; the right of the owner freely to dispose of his land was not affected by this, for it was always easy for him to obtain the market value, and it mattered little to him whether this price were paid by the repurchaser or by the grantee. The repurchase was given by preference to near relatives. As soon as it came to be a matter of a favor it was perfectly natural that it should go to those people whose mutual relations called upon them to render one another continual services. Furthermore, the reconstitution of the family domain offers in a quite special manner those advantages which are sought for by means of the repurchase. Thus would be accounted for the predominance in the old law of the repurchase by a person of the same lineage. It is understood in this system that the repurchase does not apply to acquests, but only to personal belongings (hereditary property, "abolengo," "Aehnigut"), nor to deeds such as gifts (this would have been to prohibit them); it is also understood that it meant the restoration of the price of sale, whatever it may have been. The theory of the repurchase by a person of the same lineage would thenceforth be connected neither with the institution of the hereditary reservation nor with the necessity of the participation of the parents in the alienation of the family possessions. — Outside of the criticisms of details to which this ingenious solution seems to us to lay itself open (for example, why forbid the repurchase in case of an exchange? why do certain customs admit of the repurchase of acquests? how does it happen that the repurchases of joint possessions and of neighborhood are not so widespread as the repurchases by a person of the same lineage, etc.?) we object to it because it accounts for a very old fact by means of existing causes; and, though these causes still exist, the fact has disappeared. The evolution of the theory of the repurchase becomes difficult to follow. It is not true that the owner of a piece of property subject to the repurchase will always obtain the actual price of this property; on the contrary, the risk of the repurchase will prevent him from finding buyers or will only make it possible for him to obtain a lower price; the repurchase is a serious check on the owner's power of disposal. As to thinking that the old Germanic law admitted the principle of the freedom of disposal "inter vivos" of immovable property, this is an idea which it is hard to reconcile with the constitution of the family and the system of landed property; in other legislations having the same foundations, liberty of disposing does not seem to have been recognized; this is a right which dates from the period when the family is disintegrating and when ownership is becoming individualized.

¹ Sometimes, even, only the immovables which have been in the family for three generations are subject to the repurchase; these are the family possessions "stricto sensu," ancestral, the "eredité de abolengo," true "Stammgüter" or possessions of the stock. For example, "F. de Béarn," 1552, "R. de Contr.," 5; "Cout. de Barèges," 1768, 3, 4; *Ficker*, p. 260 *et seq.* (details); "L. Rib.," 50, "hereditas aviatica."

² In the very old law personal belongings and acquests are subject to

acquests¹ nor movables² "are subject to repurchase." Some immovables, also, escaped therefrom because of their special character: offices, constituted rents, tithes which are invested, and usufruct.³

§ 343. **The Same.** — (II) *Acts which give Rise to the Repurchase.* In order to make the repurchase possible there had to be "transfer of ownership" and "purse untied." Grants for a consideration were thus the only ones which could give rise to it. If there was not a complete alienation, but, for example, merely the establishment of a servitude, the property did not go out of the family.⁴ If there is not a purse untied, that is to say, if the alienation is gratuitous, the repurchase is not allowed; the interests of the relatives are protected by other methods.⁵ To a sale (voluntary or forced),⁶ or equivalent acts, such as giving in payment a lease for a long term, an exchange,⁷ an investment in

the same system: *Verdelot*, "Thèse," 1899. In the eleventh century a distinction is made categorically in deeds: "Cart. de St.-Père de Châtres, p. 494: "Quod pater propria pecunia emerat liceat ei, etiam nolentibus filiis, cuilibet dare posse." The evolution of the distinction did not take place without some difficulty and hesitation. In the time of *Beaumanoir*, 44, 2, they disputed as to whether the acquests of the father became the personal belonging of the child; *Laurière* on "Paris," 133, still maintains that the personal belonging brought by a person of the lineage does not become an acquest: *Beaumanoir*, 44, 1; "A. C., Picardie," p. 148, ed. *Marnier*; *Beauchet*, p. 609.

¹ *Beaumanoir*, 44, 2; *Loysel*, 429. To the contrary a few Customs, such as "Norm.," 451 ("Gr. Cout. Norm.," 116); "Olim," II, 843, 293; "Lille," 7, 9, which *Dumoulin* qualifies as odious and iniquitous (on "Maine," 376), but which are found merely to have adhered to the point of view of the very old law until a rather late period. In the South the idea of perpetuating the greatness of families caused the repurchase to be extended to include acquests: sometimes both lines participated and sometimes the paternal relatives were preferred.

² Exceptions: *Loysel*, 444, 219; "Ord. s. Marine," 10, 1; *Labourt*, 6, 1, 2.

³ As to rights over immovables, cf. "Olim," I, 897; 233, 19; "Gr. Cout.," pp. 328, 347; "Cout. Not.," 89; *Desmares*, 284; "Actes du Parl.," nos. 1267, 1443; *J. Faber*, "Inst.," 2, 13, 8; "Paris, N. C.," 129, 147; "Orléans," 191, 399; *Pothier*, no. 39; *Loysel*, 434, 444.

⁴ As to the leasing of lands, cf. *Desmares*, 197; "Orléans, A. C.," 304; "Norm.," 465, 478; *Giard*, "Thèse," p. 182. As to pledging, *Beauchet*, "N. R. H.," 1901, 12.

⁵ "Olim," II, 173 (in 1281); *Beaumanoir*, 12, 38; *Pothier*, no. 104. Cf. *Heusler*, II, 64; *Beauchet*, loc. cit.

⁶ The old law required a sale and a transfer of ownership; only then could the inheritance go out of the family. In the sixteenth century there are many who maintain that the repurchase can take place simply because a bargain has been made. See as to this, "The Beginning of the Delay of a Year and a Day," "Transfer of Ownership"; see *Guyot*, s. 6. — *Loysel*, 453; "T. A. C., Bourg.," 73; *Masuer*, XXX; "L. d. Droiz," 577; "Orléans," 400; *Bretonnier*, "Quest.," see "Retrait lingager."

⁷ The family does not suffer on account of this transaction, because if an immovable is alienated a piece of property of the same nature and the same value takes its place and is subrogated to it: "Et. de St. Louis," I, 53; "Actes du Parl.," I, no. 645; *Desmares*, 145, 197, 298; "Gr. Cout.," pp. 341, 346;

a partnership,¹ were not likened; and this was a fresh proof of the weakening of the family right.

§ 344. **The Same.** — (III) *Who has the Right to the Repurchase?* It is not all the relatives of the vendor, but only those who are of the same lineage from which the property comes,² that have this right; those of the paternal lineage, if paternal property is concerned; those of the maternal lineage if a piece of maternal property is concerned: "paterna paternis, materna maternis." In giving a maternal relative the right of withdrawing a personal belonging coming from the father's side, this property would no longer be preserved in the family; it would pass to strangers.³ The repurchase is in a certain sense only the exercise by way of anticipation of the right of inheritance; also, the lineal relative cannot avail himself of it excepting if he be capable of inheriting.⁴ It is to so great an extent modeled after the right of inheritance that, in order to determine who are the lineal relatives who have the right to the repurchase, the Customs are divided into several groups, just as when it is a question of the inheritance of personal belongings; a distinction is made between *Customs of the stock*, of *the side and line*, of *the side alone*.⁵ Nevertheless, they are not

"L. d. Droiz," 124, 572; *Loysel*, 225, 445, 447. The repurchase is allowed in cases of fraud or injury to the people of the lineage (*Beaumanoir*, 54, 1; *Loysel*, *loc. cit.*), or if the exchange takes place with a settlement, excepting that it is sometimes distinguished according to the importance of the settlement: *Beaumanoir*, 44, 4; "Gr. Cout.," p. 337; "Paris," 145; *Beauchet*, "N. R. H.," 1901, 16.

¹ *Loysel*, 446, 448; "T. A. C., Bret.," 221: no repurchase with deed of feoffment; *contra*, "Hainaut" (gifts, partnership, etc.).

² *Loysel*, 428; *Galland*, "Fr. Alleu," p. 21.

³ The repurchase by a person of the same lineage cannot be assigned (excepting to a person of the lineage), whereas the lord can assign the feudal repurchase: "Tours," 281; "Bourb.," 457; "Marche," 280; "Auvergne," 21, 20.

⁴ *Loysel*, 439, 440; "Paris, N. C.," 148. Bastards, aliens and people civilly dead have no right to the repurchase. But this is not so with regard to the person who has been disinherited, the heir who renounces, or the ascendant who can have opposed to him the rule, "Personal belongings do not ascend." Disinheritance and renunciation must have been first of all presented under the archaic forms of exclusion from the family, and then they meant a loss of the right to the repurchase; they have been less efficacious under their modern forms, all the more so as they were not irrevocable. With regard to ascendants, *cf. post*, "Inheritances." The son can repurchase during the lifetime of the father the inheritance which has been sold by the latter: *Loysel*, 441. As to representation, *cf.* "Troyes," 145; "Norm.," 475.

⁵ *Cf. Guyot. — Customs of the stock*: "Nivernais," 26, 13; "Orléans," 363, etc. *Customs of the side and line* (this is the common law, in the same way that it is in matters of inheritance): "Paris," 129; *Loysel*, 439; "Olim.," III, 276; "Gr. Cout.," p. 346. — *Customs of the side alone*: "Sédan," 246. *Cf.* "Reims," 191; "Lille," 7, 5. The relatives of the seller on the *side* from which the inheritance comes (for example, on the paternal side) may exercise the repurchase, although they do not belong to the *line* of the person who was

absolutely uniform. Such and such a Custom is one "of the stock" as far as inheritance is concerned, and not as far as repurchasing is concerned, etc.¹ There is another analogy: lineal relatives of the degree furthest removed have a right to the repurchase as well as to the inheritance; should they be of the twentieth degree, says Dumoulin, they would not be excluded from the repurchase.² But resemblances become less striking in case of competition between several lineal relatives: (a) *if they are of the same degree*, the most expeditious one prevails, unless they act together, and in this case each one takes back his share of the property;³ (b) *if they are of different degrees*, the rule of the old law is that the nearest prevails;⁴ in more recent law it is the most expeditious one.⁵ This last explanation is an indication of the decadence of the institution; the interest of the family, the only thing taken into consideration formerly, was to secure the property for the nearest relative, because the latter represented the family as far as repurchase was concerned, just as he also represented it as far as inheritance was concerned; by allowing a distant relative to take possession of it to the detriment of the nearer relative, it was demonstrated that the reconstruction of the unity of the family domain

the first one to acquire the property (for example, they are not relatives of the paternal grandfather who acquired the property, but they are connected with the paternal grandmother). These Customs no longer logically form a part of this system; still more is this true with regard to the *Customs of relationship alone* ("Bourg.," 10, 4; "Franche Comté," 13, 1), according to which the paternal relatives can withdraw the paternal personal belongings and vice versa; this solution can only be included within the Customs which allow of the repurchase of acquets. — As to the *Customs of the main line*, "Besançon," for example, cf. *Dunod*, c. 4.

¹ Examples in *Guyot*, *loc. cit.*

² Divergent Customs: the repurchase only belongs to lineal relatives to the seventh degree, *Beaumanoir*, 44, 7 (according to the canon rules in matters of the impediments to marriage); to the sixth or the ninth, according to the Customs of Nivernais and Normandy. — If there are no relatives in a certain line there will not be any devolution to the other line: *Pothier*, no. 138.

³ "Et. de St. Louis," I, 156; "T. A. C., Bourg.," 73; "Gr. Cout.," p. 339; "Norm.," 476; *Beaumanoir*, 44, 25. — Indivisibility of the repurchase in the interest of the purchaser: *Loysel*, 456; see *Guyot*, s. 5.

⁴ *Loysel*, 430 (bibl.); "L. Feud.," 4, 14; "Et. de St. Louis," I, 161; "Olim," III, 302, 44; *Beaumanoir*, 44, 10; "L. d. Droiz," 80, 125; "Norm.," 475; "T. A. C., Bret.," 46; "Troyes," 145, etc.; *Jobbé-Duval*, pp. 120, 150. *Idem.*, Customs of the Pyrenees and Customs of the North of France.

⁵ *Loysel*, 431; "Paris, A. C.," 178; "N. C.," 141. It is its simplicity which has been responsible for the success of this system; but none the less an attempt has been made to give it a juridical basis by saying that the right of preference is accorded to the family "in globo"; the first one who comes forward and appropriates it for himself "jure quodam occupationis" (prevention). — Cf. as to this, the other repurchases. In German law the rule is sometimes found that if several inhabitants of one village wish to exercise the repurchase, the one to whom the land is the nearest is preferred; the distance is measured with a "perche" (measuring rod).

was less thought of than favoring the greatness of some branch of the house in a political interest. Thus was the repurchase turned aside from its original object.

§ 345. **The Same.** — (IV) *Against whom was the Repurchase allowed?* From the period when it was intended to prevent the personal belonging from going out of the family, the repurchase should be exercisable against anyone who is a stranger to the family¹ (that is to say, to the lineage from whence the personal belonging comes). It is directed against anyone who would not have the right to it himself.² But, as we have observed, certain Customs granted it also to the nearest relative against one more distant, although the latter was not without his right to the repurchase;³ in the system which prevailed “a lineal relative has not a right of withholding from a lineal relative,”⁴ which was a more practical solution, but one less justified, from the point of view of the very old law, by the idea that a piece of property does not go out of the family when it is acquired by a lineal relative.

§ 346. **The Same.** — (V) *The Repurchase of “half funds”* allows the spouse of the lineage to withhold from the community the personal belonging of his lineage which has been bought during the marriage, upon condition of paying the *half fund*, that is to say, half of the price which it has cost; the year and a day allowed to exercise this right only begin to run from the time of the dissolution of the community;⁵ thus it is a repurchase by a person of the same lineage put off until the dissolution of the community.

§ 347. **Procedure.**⁶ — (I) *Period.* One can only carry out a repurchase within the *year and a day*⁷ dating from the time of the seisin being given to the purchaser;⁸ at the end of this time the

¹ The repurchase by a person of the same lineage is exercised even against the lord from whom the property was received, and even against the king: *Loysel*, 425, 432; “*Stil. Parl.*,” 7, 80; *Pothier*, no. 194. — Against the Church: *Loysel*, 433 *et seq.*; “*Olim*,” I, 689, 28 (in 1267).

² *Loysel*, 450: “Marriage preserves Lineage.”

³ *Beaumanoir*, 44, 25; “*T. A. C., Bret.*,” 46; “*Touraine*,” 163, etc.

⁴ *Loysel*, 430; “*Gr. Cout.*,” p. 328; “*Marche*,” 271.

⁵ *Beaumanoir*, 44, 48, 49; “*Anc. Us. d'Anjou*,” ed. *Marnier*, § 28; “*Paris*,” 155-157; *Jobbe-Duval*, p. 143. — As to the various kinds of half-funds, cf. *Guyot*. The repurchase in a case of joint possession of the Civil Code, 148, applies to acquets as well as to personal belongings.

⁶ Cf. details as to the Customs of the North in *Giard*, “*Thèse*,” p. 257.

⁷ See *supra*, “*Prescription*”; *Beaumanoir*, 44, 9; “*Jostice*,” p. 128 (proof); *Desmares*, 207; “*Gr. Cout.*,” p. 329; “*Paris*,” 130.

⁸ *Desmares*, 207; “*Cout. Not.*,” 145; *Loysel*, 462; “*Paris*,” 129, 132. — Fealty and homage in the case of fiefs, seisin in the case of copyholds, publication by means of a judgment and registration of the contract at the nearest seat of the royal government in the case of freeholds. The beginning of the period allowed for the exercise of the repurchase is thus found to be sufficiently

property goes out of the family, for the vendee enjoys the benefit of the Germanic prescription as against the family of the vendor, as, according to the general rule, he can against every other person.¹ The duration of the seigniorial repurchase is even shorter; it can only be exercised during the old Frankish term of forty days (after the producing of the contract); for Byzantine "Protimesis," one had only thirty days.² According to the "Grand Coutumier," it was sufficient if the summons had been served within the year and a day; but Beaumanoir, who is more strict, demanded that the period which was granted to the purchaser for presenting himself in court should be included within the year and a day, and the Custom of Paris is to the same effect.³ The period of a year and a day did not originally begin to run against people who were absent or against minors until the time of their return or their coming of age; in the new law the disfavor with which repurchase is looked upon causes this period to run against them.⁴ (II) *Action at Law*. The repurchase is a true action for recovery by the lineal relative; the selling of family property to a stranger brings into existence this right, which did not exist until that time excepting in a latent condition. If this is so, it is hard to perceive why the purchaser should not yield to the repurchase without dispute;

public to give notice to the people of the lineage and allow them to act. In Normandy, 452 *et seq.*, reading and publication of the sale; *cf.* Beaumanoir, 44, 28, and the Flemish Customs cited in Guyot, s. 6, § 2. With the passing away of the feudal formalities variations of these were introduced into the Customs: (a) The beginning of the delay is the real taking of possession by the purchaser: "Dunois," 79; "Châtres," 67; "Marche," 263. Incomplete publicity, but one which may suffice, strictly speaking. (b) It is the date of contract of sale itself: "Sens," 32; "Auxerre," 154; "Orléans," 363. This is a system which allows of the hidden transfer of ownership, but which may very often deprive the lineal descendants of their right because they are not aware of the alienation's having taken place. The Edict of 1704 remedied this evil by deciding that the period could not begin to run before the registration of the contract, as was the usage in certain Customs: "F. de Béarn," "R. de Contractes," Arts. 8 and 18; "Poitou," 329; "La Rochelle," 33. — See "Freeholds." — The prescription of thirty years if the delay of a year and a day had not run, — for example, for lack of registration: *Pothier*, no. 484.

¹ In the eighteenth century all recollection of the old tenure of a year and a day has been lost and it is sought to account for this period (which is an exceptional one in the general system of prescription) by means of rational considerations; it has been made very short in order to restrain the exercise of a power which is abnormal. It is undoubtedly, in fact, for this very reason that the dower of a year and a day has been kept up in this particular application of it.

² *Loysel*, 427, 463; "Paris," 40; "Auvergne," 23, 3: three months, etc.; "Ass. de Jérus.," "C. des B.," c. 33 (II, 260): seven days. Provence, Edict 1472 (30 days). Normandy, possessions held in burgage: "Summa," 125 (one day); "Cout." of 1583, 454 (40 days); *Genestal*, "Thèse," pp. 34, 80.

³ "Gr. Cout.," p. 329; Beaumanoir, 44, 31; "Paris," 130.

⁴ *Absent persons*: "Et. de St. Louis," II, 303; "Justice," 8, 9; Beaumanoir,

but the fear of frauds no doubt led jurisprudence to demand a formal proceeding at law; the voluntary repurchase was looked upon as a sale made by the purchaser to the lineal relative.¹ The tribunal which had jurisdiction in matters of repurchase was that of the locality where the immovable was situated, because the action was real. But in the last stages of the law there is seen in it rather a mixed action, real against the third party in possession, and personal against the purchaser upon whom the Custom imposes the obligation of making restitution; from whence comes the application of the rule "*Actor sequitur forum rei.*"² The tribunal decrees the repurchase after having assured itself of the existence of the required conditions.³ (III) The *strictness of the procedure* relating to repurchase was, to begin with, nothing more than a consequence of formalism; but practice thought that it was a good thing to preserve that which Ferrière calls "superstitious formalities," with the object of hindering the exercise of an institution which was looked upon with disfavor. Thus it is that if the petitioner fails in any one particular, not only does he lose his suit, but he also loses the right to the repurchase.⁴ (IV.) *Indemnity due by the person repurchasing* to the original vendee. The very same day that the repurchase is decreed,⁵ the repurchaser himself, under penalty of forfeiture, pays the vendee the *actual* price paid out by

16, 5; "*L. d. Droiz*," 588. Crusaders: *P. de Fontaines*, c. 17; "*Et. de St. Louis*," I, 156. Minors: (a) *P. de Fontaines*, c. 14; *Beaumanoir*, 44, 48; "*Actes du Parl.*," I, no. 2225, 756; *L. Delisle*, "*Echiq. de Norm.*," 122, 517. — (b) *Grimaudet*, 9, 17: public interest. — Delay of the redemption: "*Auvergne*," 23, 13; "*Berry*," 13, 9. *Contra*, "*Ord.*," 366; *Loysel*, 464; "*Paris*," 130.

¹ *Loysel*, 443. Results: the property acquired was not a personal belonging included in the inheritance of the lineal descendants; two transfer taxes had to be paid. *Contra*, *Beaumanoir*, 44, 11, 22, 39, 40.

² *Beaumanoir*, 44, 17: jurisdiction of the lord from whom the inheritance is derived (and not of the lord of the locality in which the purchaser is domiciled, for "agreement depends upon the inheritance"); *ib.*, 44, 38 (indivisibility); "*Olim*," I, 897. — Tribunal of the locality in which the immovable is situated: *Desmares*, 257; "*Cout. Not.*," 144; "*Gr. Cout.*," p. 335; *Loysel*, 435 *et seq.*; "*Ass. de Jérus.*," II, 260, ed. B. — *Pothier*, no. 265; "*Reims*," 198. — This recent solution was favorable to the purchaser, but less logically a consequence of the repurchase.

³ *Giard*, "*Thèse*," p. 279: registration of repurchases.

⁴ *Loysel*, 437, 438; *Desmares*, 83; "*Paris*," 136, 140; *Ferrière*, on "*Paris*," 141; *Pothier*, no. 273; *Beaumanoir*, 44, 22, 33, 35, p. 5, 41; "*Olim*," III, 1437, 71. — Even forfeiture if the adjournment is not drawn up in a formal manner, if one does not tender in the proper terms a purse, funds, and a performance; if the sergent in giving notice has not an open purse in his hand, which at first contains the sum offered and later on a single piece of money, and if the tenders have not been renewed each day of the proceedings.

⁵ Formerly one had until sunset; in the sixteenth century one has twenty-four hours after the judgment: *Loysel*, 468, 471; *Desmares*, 82 *et seq.*, 208; "*Gr. Cout.*," p. 340. Other delays: three, seven, fifteen days. Various times for the beginning of this delay.

him,¹ the *true costs*,² and the *necessary disbursements*, so as to indemnify him as completely as possible, in so far as there has been no fraud.³ For his part, the vendee relinquishes the land when reimbursement has been carried out and restores therewith the profits collected since the action of repurchasing was begun,⁴ together with an indemnity for deteriorations, if there is any occasion for it; he must not, in fact, forget that during the year and a day he is not the "indefeasible lord."⁵

§ 348. **Effects of the Repurchase.** — The repurchaser steps into the place of the purchaser, and there is no cancelling of the sale, for now the sale is null. Nor is there any resale to the repurchaser by assent of the original buyer, for they are held bound to pay for only one right of transfer, and the rights created by act of the original buyer (servitudes, mortgages) cannot be set up against the repurchaser; at the most, the latter is held bound to respect acts of administration because they are indispensable.⁶ The repurchaser is not the assignee of the original buyer; he is looked upon as having negotiated with the vendor; also, the original vendor owes him the warranty, and the repurchaser can proceed against him upon payment of the price by means of a direct action. The original buyer seemed thenceforth to disappear entirely from the operation. But, not satisfied with taking away from him the advantages of a transaction which had perhaps been lucrative, jurisprudence made of him a sort of compulsory surety for the man who had despoiled him; the original vendor was always authorized to claim as against him the payment of the price of the sale; this responsibility of the original buyer is

¹ The price of the first sale, if there have been several successive sales: *Tiraquellus*, I, 12, 1, 15 (he cites *Bartole* and *Balde*); *Labbé*, "R. crit.," p. 154. If the price was made too high with the object of preventing the repurchase, it was the judge's duty to reduce it: *Beaumanoir*, 44, 36; "L. d. Droiz," II, 124, 571; "Paris," 136. — In the sixteenth century the person exercising the repurchase pays back to the buyer the lord's due and the tax on the sale; but not in the fourteenth century. The near relatives were often released from the payment of these dues.

² *Desmares*, 213; "Gr. Cout.," 333. Proof: "Et. de St. Louis," I, 159.

³ *Desmares*, 113, 213; "Gr. Cout.," 333; "Jostice," 8; "Et. de St. Louis," I, 154; "Paris," 146; "Orléans," 373; *Pothier*, no. 331. By compelling the restitution of needful expenses frauds were facilitated.

⁴ That is to say, since the adjournment and offer of payment: "Paris," 134; *Beaumanoir*, 44, 30, 41-44. The purchaser thus gets the benefit of the issues of the land until the time when the offer of payment is made to him.

⁵ *Beaumanoir*, 44, 30, 34, 41; *Desmares*, 214; *Loysel*, 470; "Gr. Cout.," p. 334; "Paris," 146.

⁶ Valid leases in case of good faith according to some (*Balde*, *Tiraqueau*, *Pothier*), and which were always void with regard to the person exercising the repurchase according to others (*Brodeau*, *Duplessis*).

especially important in the case of sales for a term, for example, a sale in consideration of a rent for life; as the payment of the price was greatly delayed, the repurchaser had much more chance of becoming solvent.¹ In sales for cash at a fixed price, the buyer ran absolutely no risk, because he only gave up possession of the land after having been indemnified.

The property which was taken back, having been acquired for a consideration, should have formed a part of the acquests of the repurchaser; but it was classed among his personal belongings, as though it had come through an inheritance, so as better to assure its preservation in the family.²

¹ *Dumoulin*, on "Paris," I, 20, 8, 7 and 8; *Pothier*, no. 300; cf. "Paris," 137; "Reims," 225, etc. The motive given in order to justify this solution, of knowing that, just as every creditor, the vendor cannot be bound in spite of himself to pay debtors, is already found in *Beaumanoir*, 44, 37 ("The vendor shall not change his pledge or his debts if he does not wish to"); this jurisconsult allows the repurchaser to have the same time as is granted to the purchaser, upon condition of giving surety, and *Dumoulin* is of the same opinion. *Tiraqueau*, I, 18, 32, decided, on the other hand, that the purchaser was liberated as a consequence of the repurchase because he was looked upon as not having been a party to the deed: cf. "Troyes," 161; "Bourbon," 470; *Labbé*, "R. Crit.," 1855, p. 145. According to the old system of the offer to the next of kin, the purchaser also disappeared completely; but it does not seem that *Tiraqueau* and the partisans of his ideas drew their inspiration from this system.

² "Paris," 139; "Orléans," 382; *Loysel* 454. Cf. "Paris," 133 (*Laurière* on this article) and *Beaumanoir*, 44, 11. — By way of a recompense to be paid by the heir of the personal belonging to the heir of the acquest, at least in the more recent law.

CHAPTER THREE

OBLIGATIONS

TOPIC 1. GENERAL IDEAS.

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TOPIC 1. GENERAL IDEAS

§349. Number and Importance of Contractual Obligations in Modern Law.	of § 350. Characteristics of the Obligation in the Old Law.
	§ 351. The Obligation in Modern Law.

§ 349. **Number and Importance of Contractual Obligations in Modern Law.** — In early times obligations were not often met with, and especially contractual obligations. Reasons of a political and economic nature were opposed to their becoming very numerous. (A) The majority of social relations were regulated in advance, and invariably by the Custom; thus the services which to-day free farmer tenants and agricultural laborers render to the owner of land were formerly received by him from serfs, from cultivators or from slaves. Public order being better assured, the tendency to respect the rights of others having been emphasized, and knowledge of the law being more widespread or more easy to acquire, it has been possible to-day to allow individuals a latitude which they would not have used to their advantage in the old times, even had it been granted them. This is one of the advantages of the System of the State under which we live, as compared with the family system of the past. Contracts have produced beneficial alterations in the general rules of the law,

have accommodated them to every sort of circumstances, and have removed them when needful in order to substitute better ones in their place.¹ (B) With the free play of individual will, contracts became so numerous that they formed, if one may say so, the course of our daily life. The economic conditions of other times, when each household produced almost everything which was necessary for it to have, did not contribute towards making contracts very frequent. In our day division of labor and the more active life constrain us to engage ourselves on every subject in the meshes of a mass of obligations. The conception of the obligation has felt the effects of this change; the law has had to become more flexible and to lend itself to the satisfying of these new needs.

§ 350. **Characteristics of the Obligation in the Old Law.** — The very old law only recognizes obligations "ex delicto."² Even the obligation which does not spring out of an offense presents the same characteristics as a delictual obligation; thus, when it arises from a contract, the debtor who does not carry out his engagement is considered guilty; the failure to carry out the obligation is looked upon as an offense.³ In a similar case, the sum of money paid to the creditor constitutes a pecuniary penalty. Ordinarily, it is a higher sum than mere damages would be. The contract, assuming it to be the cause which gives rise to the obligation, could not do without solemnities; it assumes that two heads of families face one another; it recalls the treaties between States, in which, even at this day, form is of so much importance. Moreover, the ceremonies, the gesture which is added to the word, which emphasizes it and explains it to the eyes, corresponded to the mental condition of other times; a right without formalities would have been no better understood than a religion without worship.⁴ These solemnities had the advantage of eliminating the questions of intention; their meaning was fixed, known by everybody, and beyond discussion. Also, the letter of an agreement could be adhered to just as the brutal fact of a crime could be avenged

¹ Cf. *Sumner Maine*, "Ancient Law," French trans., 1874, on this passage from the system of *status* to the system of agreements.

² Or, if one prefers a formula which in the last analysis means the same thing: the offense gives rise to acts of violence, which little by little have become changed into due course of law: *Wodon*, "Forme et Garantie," p. 9, 173.

³ *Loening*, "Vertragsbruch u. s. Rechtsfolgen," 1876; *W. Sickel*, "Bestrafung d. Vertragsbruchs," 1876. "The Mishna" deals with marriage, and then brings all the rest of the civil law under the heading of damages, cf. *Dareste*, "Etudes," pp. 27, 79.

⁴ *Heusler*, I, 65; *Zullinger*, "Wesen u. Urspr. d. Formalismus," 1898; see *Cuzzi*, "Le Obbligazioni n. Diritto Milan. antico," 1903.

without looking into the question as to whether it had been committed by reason of some indiscretion or intentionally. The responsibility of the debtor was involved, for the sole reason that the obligation had not been carried out; he was just as responsible if this were due to accident as he was if it were due to his own fault.¹ A last feature of the obligation was its personal character;² it consisted almost in an ownership by the creditor over the person of his debtor. Execution upon the body itself, under its most harsh forms, — for example, that of slavery for debt, — was a natural consequence thereof; on the other hand, the possessions, or, at least, the immovables of the debtor, escaped the creditor, because in the last analysis they belonged rather to his relatives or his lord. Thus looked upon as a personal relation, the obligation constituted the most frail of bonds; its value depended upon the wealth and strength of the debtor; should he die, it died with him; sometimes, even the death of the creditor wiped it out. In order to give some consistency to a right which was so hazardous, it was fortified by the surety and the pledge; if one had several debtors one had a better chance of being paid, and the pledge was a payment in advance.

§ 351. **The Obligation in Modern Law.** — Let us reverse the terms, and we shall have the obligation of modern law. Whether it result from a contract or an offense, its object is damages. The contract from whence it is derived is formed without any solemnities and always “*solo consensu*.” The obligation, from being personal, as it was, has become inheritable.³ Execution has been shifted from the person of the debtor to his possessions: “he who obligates himself obligates what is his.” The responsibility of a

¹ Proverbs having this meaning: *Chaisemartin*, pp. 277, 284, 223, *cf.* p. 261; “*Wis.*,” 5, 64; “*Sachsensp.*,” 3, 5, 4.

² *Cf.* Roman law, “sponsor,” “fidepromissor,” obligation “*ex delicto*,” actions “*vindictam spirantes*,” no assignment of claims, and no man can make stipulations or promises to be carried out after his death. — It seems hard to reconcile the personal character of the obligation with family solidarity. These two ideas ought to correspond to two different phases of the evolution of the law. It became more and more distasteful to bring into play the solidarity of the lineage, when the family lost its cohesion. The penalty then became personal and, as far as contracts were concerned, formalism also had a tendency to restrict the obligation to the debtor alone.

³ It was customary for the relatives of the debtor to become sureties for him. By this means the debt passed to the heirs, or, to put it better, they were already held bound during the lifetime of the debtor. Also it must often have happened that a man bound himself “for himself and his heirs.” *Cf.* English law. The promise at law to pay or to exonerate oneself (which cannot be done without sureties) is inheritable: “*Rib.*,” 61, 1 (*cf.* “*litiscontestatio*” at Rome: *Dig.*, 50, 17, 139).

debtor varies according as there has been fraud, fault, or accident, and according to the interest which he has in the contract. The impersonal character which the obligation has assumed causes it to lend itself to combinations which were formerly unknown, — for example, composition, assignment, subrogation, and representation. The principles of the old Germanic and Customary law are thus found to have almost entirely given way to the Roman theories. No other portion of legislation has been Romanized to this extent. Is this a sufficient reason for believing that this evolution has taken place merely under the influence of Roman law? No, indeed! No more here than anywhere else has Roman law been a direct cause of juridical changes. It has not been imitated in the same way as a pupil copies his master, in a spirit of servile respect. Its action, which has been great, has only been exercised where the ground was prepared for it, where evolution took place spontaneously and independently. The Roman influence was not responsible for the evolution, which would have taken place without it. But the evolution was peculiarly facilitated by Roman influence, gaining therefrom a concisely defined object, precise formulæ, and a fixed plan; from an obscure growth, slow, uncertain, and groping, it became a conscious work. The real cause of the change which led the old law back to the Roman theories, as far as obligations were concerned, was the substitution (which we have just explained) of a contractual system for the system of strict custom; the one accords with a social state as simple as that of the late Middle Ages; the other accords with societies which, like ours, are more complex. And, in order that this should be realized, what changes have been necessary! The disintegration of the family, the independence and the ownership of the individual, the employment of coinage, which has become more and more widespread and facilitates the obtaining of services, — do away with one of these new facts, and the law of obligations is turned topsy-turvy.¹

¹ In modern law the obligation has a tendency to consist of something of value which circulates in the same way as coinage (consequences of trade).

TOPIC 2. OFFENSES

§ 352. Public and Private Offenses.	§ 357. Pecuniary Composition.
§ 353. Offenses committed by One Family against Another.	§ 358. Family Solidarity.
§ 354. Characteristics of the Offense.	§ 359. Damages.
§ 355. Criminal Intent.	§ 360. Putting Outside the Law, and its Varieties.
§ 356. Responsibility for the Act of Another. Damage caused by Animals or Inanimate Things.	§ 361. Concerning Special Kinds of Offenses.

§ 352. **Public and Private Offenses.**¹ — The primitive law knew scarcely any public offenses, that is to say, offenses which directly involved the State and called for a repression on its behalf.² Unlawful acts were curbed by the disciplinary power of the head of the family when they were committed within the family by one of its members against another;³ where they took place between the members of two families, repression was exercised by one family upon another by way of vengeance or private warfare.⁴ Thus the old penal law consisted in a system of private offenses and private penalties and was not distinguishable from private law. But little by little public penalties were substituted for private penalties; the State, stepping into the place of the family, took upon itself the rôle of redressing wrongs which had not belonged to it in olden times;⁵ and, although we still speak to-

¹ Cf. especially the Roman law, where the distinction is so clearly drawn. *Blackstone*, IV, also contrasts private torts with public torts. Cf. *Pollock*, "Torts," 1187.

² *Tacitus*, "Germ.," 12: "proditores," "transfugæ" (hanged) "ignavi," "imbelles corpore infames" (drowned in mud). The coward is as injurious to the community as the traitor, and bravery is not very often the dominating characteristic of the "corpore infamis": *Brunner*, § 146.

³ *Kovalewsky*, p. 311.

⁴ Religious character of vengeance, publicity, ceremonies in case of a pardon: *Kovalewsky*, p. 234 *et seq.*

⁵ Maintaining of retaliation as a public penalty for a long time: *Loysel*, 821. — Influence of the Church on the changing of the penal law: *Huc*, "R. de Lég.," 1858; *Brunner*, II, 548 and § 135 (bibl.). It goes into the question of criminal intent (although the Germanic point of view lasted for a long while in the "Penitentials," *Wasserschleben*, pp. 391, 550), favors a substitution of composition for physical punishment ("Alf.," 49, 7: the Church has a horror of blood; penances for anybody who executes a condemned criminal and for anybody who kills in lawful warfare; cf. *Viollet*, "Et. de St. Louis," I, 249; *Esmein*, "Mélanges," p. 369). It moderates the penalties by means of the right of sanctuary (*Brunner*, *loc. cit.*; *Loysel*, 828), and introduces the idea of correcting and reforming the guilty man alongside of the ideas of vengeance and example as a deterrent. The Court of the King, which judges in equity, was inspired by these ideas at a very early time. Cf. *Pollock* and

day of the public vengeance, it is none the less true that it does not act as an avenger, but with the object of maintaining order and repairing the damage which has been caused.

§ 353. **Offenses committed by One Family against Another.**¹ — Their repression has passed through various stages: private vengeance, voluntary composition, legal composition, and, finally, public penalties inflicted by the State. The starting point of the system of repression for this class of offenses was private vengeance, or the "faida"; the person who had suffered damage had the right to inflict upon the one causing it another damage, just as in our day there still take place reprisals between nations. In this, in the beginning, there was less of a juridical institution than of a natural reaction of the injured party against the one who had injured him, of the one who suffers an injury against the one who has caused it. It is only with the assistance of this primitive conception that we can properly understand the peculiarities of the system of compositions during the barbarian period or of the Roman system of private offenses (for example, the distinction between a flagrant offense and an offense which is not flagrant, in case of theft, adultery, etc.). We have seen above how they passed from the system of the "faida" to that of composition; we are here only concerned with the setting forth of the essential characteristics of the obligation "ex delicto."

§ 354. **Characteristics of the Offense.**² — There is scarcely any need of saying that the old law is very far, in its conception of the offense, from the refined psychology of our day. In the period when this law is based upon a mere reaction against the injury suffered, something which is practically nothing but a reflex action, it considers only the existence of the external deed;³ "The act judges the man,"⁴ questions of intention are not gone

Mailland, II, 460; *Pertile*, V, 29, 598; "Burg.," 52, 5; "Capit. Worms," 829, 1. — As to the influence of the Roman law, cf. *Pertile*, V, 39; *Beaumanoir*, 30, 1, 61, etc.; "Anc. Cout. d'Anjou," IV, 308; *Boutaric*, I, 29.

¹ *Frauenstädt*, "Blutrache," 1881; *Wodon*, "Le Dr. de Vengeance dans le C. de Namur," 1890; *Cattier*, p. 127 (private warfare, assurance, forswearing); p. 53 (retaliation); *Dubois*, "Thèse," 1900 (assurances). — On the Corsican "vendetta," cf. *Glasson*, "Inst. de l'Anglet.," I, 305; Switzerland (sixteenth century); *Günther*, I, 207; *Guyot*, "Un Exemple d'Urfehde," 1892; *Glasson*, "Bull. Comité trav. hist.," 1892; *Ducoudray*, "Origines du Parl.," p. 325; "Unters.," by *Gierke*, XXIX.

² Terminology: "culpa," "scelus," etc., "malum factum" (misdeed), "forefactum" (crime); "malus homo," "tortum" (tort), "gravamen" (injury); later on "vilenie," "vilain cas": *Loysel*, 803.

³ "Roth.," 248, 324; 342, 348, 387; "Wis.," 6, 5, 2; "Burg.," 6, 2; "Bai.," 9, 10; "Thur.," 51. Cf., however, "Alam.," 71.

⁴ *Loysel*, 824.

into.¹ The vengeance of the barbarian is as blind as that of the child; it is exercised upon people who are as irresponsible as minors and madmen, and even upon families and inanimate beings.² Homicide caused by carelessness gives rise to the same composition as murder and assassination;³ "Qui inscienter peccat scienter emendat," says the old adage.⁴ Lawful defense is not an absolute excuse; the "Sachsenspiegel" still imposes penal responsibility upon the man who kills in self-defense.⁵ On the contrary an attempt, and the offense which has miscarried, should not be punished, however criminal may have been the intention of their perpetrator.⁶ Though the fellow perpetrators and abettors (for example, receivers of stolen goods) are responsible for having taken a part in the act or having protected the malefactor, it is otherwise with accomplices properly so called, that is to say, with those

¹ Bibl. in *Brunner*, § 125, 138; *Amira*, "O. R.," I, 373, 706; "Recht," p. 192; *Holmes*, "Common Law" (1881), I, p. 17; *Wigmore*, "Harv. Law Rev.," VII, 315 *et seq.*; *Kowalewsky*, "Coutume Contemp.," p. 301; "Unters.," by *Gierke*, IV, 61.

² The various kinds of offenses give rise to various kinds of solutions, which it is difficult to reduce to a logical system. Cf. *post*, "Fellow Perpetrators." As to recidivity, see *Cattier*, p. 50. — Sometimes several offenses are distinguished from one another in one act; thus the man who kills a woman who is enceinte commits a double murder; a man who kills his enemy after having sworn to keep the peace has to pay the "Wergeld" for murder, loses his right hand for perjury and undergoes the ban of the king for disobedience: "Sal.," 24, 3; "Roth.," 75; "Alf.," 9; *Sunesen* (in *Schlyter*, "Corp. juris Sueo. Got.," IX), 68; "Capit.," 805, 6 (I, 123). On other occasions only one offense is seen in these acts, but the penalty has increased; this is what happens in the case of an offense carrying with it violation of domicile or of some other place over which a special peace has been declared: "Liut.," 131, 42; "Roth.," 143. Compositions are accumulated, sometimes up to a certain price, sometimes without limit: "Sal.," 17, 3, 6; "Rib.," 1, 68; "Fris.," 22, 75; also, 3, 49, 58; "Roth.," 46, 61, 78, 103; *Pertile*, § 172.

³ "Thuring.," 51; "Capit.," 819, c. 15; "L. Henr.," I, 70, 12, 25; "Liut.," 136; cf. *Du Boys*, I, 250; *Pertile*, § 170. — Among the Hebrews places of sanctuary are open to involuntary homicides: "Exodus," xxxi, 13; "Numbers," xxxv, 22; "Deuter.," xix, 3.

⁴ *Frank*, "Casuelle Tötung," 1800. In the same way: "A sin committed in drunkenness is atoned for by fasting": *Chaisemartin*, "Prov.," p. 489. And by way of reaction: "The man who has no knowledge of what he is doing does not sin"; *Loysel*, 791, note, "Larceny is not committed without an intent to steal," 793, "He intends to strike who kills," 791, "The will is taken for the deed" (in cases like the crime of high-treason). In the old law one might have said the contrary, — "The deed is taken for the will"; "T. A. C., Norm.," p. 30: "He who kills his lord is hanged; he who causes his lord's death by carelessness is merely punished with death." *Brunner*, "Forsch.," p. 491, cites a Sicilian law of the twelfth century according to which anybody who kills another by jumping down from a rock or by throwing the branch of a tree is punished with death. Cf. *Esmein*, "Hist. de la Procéd. Crim.," p. 255 (charter of pardon); *Pollock and Mailland*, II, 478.

⁵ *Beaumanoir*, 30, 65; "L. d. Droiz," 500, 997; Ordinance of 1368; *Isambert*, V, 320; *Pollock and Mailland*, II, 480; *Pertile*, § 174.

⁶ *Brunner*, § 127 (bibl.); *Cattier*, p. 40; *Pertile*, § 171. — Cf., however, "Sal.," 17, 28.

who, without taking an active part in the act, have given advice to the agent or have lent him assistance (for example, by keeping a lookout).¹ This crude system was not merely in harmony with the old conception of the offense,² and with the stage of morality;³ it had the advantage of simplicity and relieved the judges from the necessity of investigations for which they had neither the intelligence nor the impartiality required.⁴

§ 355. **Criminal Intent.**⁵ — During the barbarian period there comes to light the tendency to take into account intention in the estimating of an offense. Mere negligence is sometimes likened to a positive fact: "He who can and does not prevent, offends," Loysel will say later on. The offense committed through carelessness⁶ makes liable to a lesser composition, sometimes even to mere damages; it does not involve any breaking of the peace; it does not authorize private vengeance. At the same time that the principle that the external deed is the only one for which a man can be punished is retained, exceptions are made to it. Certain offenses are presumed not to have been intentional (death occasioned by

¹ *Brunner*, §§ 128 and 129 (bibl.). "The receiver of stolen property is the same as the thief": "Sachsensp.," II, 13, 6; *Chaisemartin*, p. 491. Cf. the proverbs: "To steal and to hold the sack are the same thing"; "One may be hanged through the company he keeps"; *Pertile*, § 172.

² These ideas have led to a minute casuistry, for example, peculiar distinctions between different kinds of wounds. In the Customs of the Middle Ages it was still customary to measure the length of cuts in order to determine the degree of responsibility of the guilty man. Thus in the South the simple cut is contrasted with the "plaga leyau" or cut of greater law (giving rise to the payment of a greater fine). The dimension of the latter is 1 "once" in length or depth ("F. de Béarn"); the "once" is the fifth part of an "empan de canne"; a "canne" is equal to 1.856 m. The "Cout. de Soule" of 1520, 35, 15, reproduces the official standard of the Court of Lixarre, which is equal to 14 $\frac{3}{8}$ in. The fine for the legal cut was, in this Custom, 66 "sols morlaas." The "Fors de Béarn" of 1554, "R. de homicidis," still give curious details which would not have been out of place in a barbarian law; after having defined a "plaga leyau" they add: "alep es dit membre podal: caxau (a molar) es membre"; if several molars are torn out by one blow there is only one "alep"; one finger of the hand, or even one joint of the finger, is a member; but one tooth is not a member. It is not difficult to see how these mathematical valuations carry us far from our system of imputability: *Montesquieu*, "Esprit des Loix," 14, 14; *Desmaze*, "Hist. de la Médecine Légale," 1880; *Lespy*, "Dict. Béarn."

³ At a period when one lived in the midst of perpetual snares, or when each day one had to fear an ambush, one could not fail to suspect a criminal intent behind something which might have the appearance of an accident.

⁴ *Beaumanoir*, 31, 12; *Boutaric*, II, 40; "L. d. Droiz," II, 463.

⁵ Criminal intent is designated in the texts by the words, "Per malum ingenium," "per invidiam," "irato animo," "de asto" ("Liut.," 146; "Roth.," 277; "L. Alam.," 9); on the other hand they say, "nolens," "casu," "negligentia" ("Sal.," 24, 5; *Régimont*, II, 17, 29); "infortunium." *Beaumanoir*, 69: case of chance and mischance.

⁶ A culpable omission, which was equivalent to a commission: "Rib.," 70, 3, 4; "Bai.," 14; "Burg.," 18, 2; "Alfr.," 36. — *Loysel*, 792.

the falling of a tree, the deed of a minor);¹ in the case of other offenses, malice stands out as an essential element of the act (for example, the incendiary sets fire or stirs it up,² the murderer conceals the body of his victim);³ even in these cases, as it might happen that the presumption was false, the oath that he had not acted with criminal intent was demanded from the perpetrator of the deed.⁴ Thus progress was made little by little towards a state of law where this intention is just as indispensable as the material fact: "reum non facit nisi mens rea."⁵ "Necessity knows no law," says a proverb⁶ which is inspired by this idea, and which at the same time contemplates lawful defense and the offense committed in case of necessity, — for example, by some one who was dying of hunger and who took provender from the field of another. The transition to the new law is sometimes marked with as much "naïveté" as humor: thus in the case where one man kills another by falling out of a tree, the "Lex Henrici I," 90, 7, only authorizes the relative who persists in claiming the "Wergeld" to do the same thing to the involuntary murderer: "si placet, ascendat et illum similiter obtruat."⁷ It came about that the attempt and the offense which had miscarried were punished, because there were seen in certain applications of them special offenses distinct from that which there had been an attempt to carry out. This is what was done at all times in the case of blows and wounds,

¹ *Pertile*, § 174 (bibl.).

² *Osenbrüggen*, "Brandstiftung," 1854; *Brunner*, § 141.

³ "Murdram" ("clam factum") as contrasted with mere homicide, causes "palam": "T. A. C., Norm.," p. 64; *Glanville*, 8; *Pollock and Maitland*, II, 485.

⁴ Edict of Chilperic 5 (cf. "Sal.," 35, 36): an abandonment of the thing causing the injury to the injured person with an oath on the part of its owner "quod pura sit consciencia." Cf. the Lombard oath "de asto"; Exp. on "Roth.," 202; purifying oath: "Form. Turon.," 30.

⁵ "L. Henr.," 5, 28; 90, 11. Decree of Gratian, c. 3, c., 22, q. 2, taken from *Saint Augustine*, "Sermones," no. 180, c. 2 (*Migne*, "Patr. Lat.," 38, 974), on the subject of perjury. Roman ideas as to fraud and fault. *Bracton*, f. 120 b, reproduces a passage from *Bernard de Pavie*.

⁶ *Loysel*, 870. "Nothwehr," "Nothstand" of the German law: *Pollock and Maitland*, II, 477; *Bracton*, fo. 134, 104 b, 120 b, 126 b. According to *Bracton* the man who has committed a homicide through carelessness, or who has killed in lawful defense, must obtain pardon: *id.*, *Boutaric*, II, 40. Cf. *Beaumanoir*, 69, 17.

⁷ Cf. "Alam., Pactus," V, 11: "If a man is killed by the dog of another man the owner of the dog should pay half of the composition. If the heir demands the entire composition, his doors shall be closed in such a way that he can only go in and come out by a single one. Then they shall hang the dog 9 feet above the threshold and leave him there until he falls from decay; and the heir shall not come out or go in by any door, under penalty of paying back half of the composition." *Günther*, I, 13 (*Abyssinia*); *Esmein*, "Hist. de la Proc. Crim.," p. 255.

when the perpetrator of the offense had had the intention of killing. Murder which had miscarried was treated as a threat to kill and punished in the Salic Law by a composition of 62 sous ("seolandefa").¹ There was also a special composition for the thief who was caught in the house of another, because there had been a violation of domicile on his part.² Fellow perpetrators were equally exposed to private vengeance, and, consequently, jointly and severally responsible.³ As to the accomplices who lent assistance, they do not seem to have been punished at first, excepting in the case where offenses committed by a band of malefactors were concerned.⁴ The Salic Law, t. 42, provides for the case of murder committed in this way with the aggravating circumstance that the victim was taken unawares in his house; to the murder is added the violation of domicile, and this gives rise to a payment of triple "Wergeld"; three members of the group are responsible as principals; each one of them has to pay this triple "Wergeld"; it deems that three blows were sufficient to cause death, and that the full responsibility can only be laid upon three persons, even if the body has more than three wounds; but from three others there is demanded a composition of 90 sous, and of still another three a composition of 45 sous; they are accomplices, their responsibility is not so great. From this particular case the same rule was extended to other hypothetical cases.⁵ "He wounds enough who

¹ "Seolan-defa" means "animæ oppressia": "Sal.," 28, 2; *Hessels*, see Table.

² *Osenbrüggen*, "Hausfrieden," 1857; *Weinhold*, "Deutsch. Fried. und Freist.," 1864; *Chaisemartin*, p. 527: "ma maison," "mon château;" *Brünner*, §§ 130 and 140; *Loening*, "De Pace Domestica," 1865; *Pollock*, "The King's Peace," Oxford Lectures (French trans.); "Introd. a l'Et. de la Science Polit.," 1898; *Pertile*, V, 606, 155.

³ But they only had to pay one composition in a case where there was only one offense: "L. Henrici," I, 49, 7; "Sal.," 43; "Alam.," 44; "Fris.," 14; "Roth.," 12, 263; "Alfr.," 31. It is true that under this system of public penalties each one of the fellow perpetrators is punished as though he alone had been guilty. Private vengeance also takes place individually against each one of those who have taken part in the offense. See, for example, in the Saga of Njal the vengeance of Kari. On the other hand, the relatives who claim a composition, — for example, the "Wergeld" in case of a murder, — could be bought off by a single payment, whether there had been one or several murderers. But from the public law the responsibility for the whole offense which bore upon each fellow perpetrator passed into private law and into the matter of compositions: "Rib.," 18 (read: "restituant," for the "capitale" should not be restored several times): "L. Henrici," I, 59, 25; 49, 7.

⁴ Cf. details in *Brunner*, § 128; "Contubernium" (*Végèce*, "De Re Mil.," 2, 8); "Trustis": "Sal.," 13, 14, 105; "Rib.," 34, 64; "Alam.," 34; "Bai.," 2, 3; 4, 22; "Alfr.," 29; "Ina," 13; "Thuring.," 57; "Roth.," 19, 379.

⁵ "Sal.," 71; "Cap.," 873, 7; "Bai.," 4, 25; "Pact. Alam.," 3, 24; "Alf.," 19; "Æthelb.," 17, 20; "Roth.," 307. — Cf. *Loysel*, 794; "Jostice," p. 307; *Baumanoir*, 31, 7 et seq.; 30, 92; *Boutaric*, I, 29; II, 40.

holds a foot," says Loysel, or, again, "A man gets hung because of his companions." During the Frankish period, moreover, it is only upon accomplices in acts of magic and practices of sorcery that the same penalty is inflicted as upon the principal perpetrator, so greatly were they feared. At first, accomplices, because of the advice they gave, were only punished in certain special cases (for example, in case of murder committed for the payment of a price).¹ It is rather difficult to account for the fact that whereas the old law leaves the accomplices unpunished, it punishes the abettors of the crime with extreme harshness; the guilty man being subject to the vengeance which springs up between him and the avenger, lays himself open to being treated in the same manner as the latter ("qui illum suspicit similis est illi"). "He is a thief who robs a thief,"² will be said later on.

§ 356. **Responsibility for the Act of Another. Damage caused by Animals or Inanimate Things.** — According to the old conception, responsibility for an offense can be attributed to all those whom the perpetrator is dependent upon. Thus, the hundred and the community are responsible for the deeds of their members; the owner of a domain is responsible for those who live there, the head of the family is responsible for his children, for his wife, and for his slaves, and in a general manner for the people of his household;³ the master is responsible for his animals, or even the inanimate things which belong to him.⁴ But this is a responsibility "sui generis,"—like to that of the modern State because of the acts which one of its members might undertake against another State.

¹ "Fris.," 2; "Æthelr.," 8, 23; "L. Henr.," I, 85, 3; "Sal.," 28, 41; 11, 31, 1 ("Her."); 57, 6 ("emend"). Cf. "Roth.," 202, 166; "Liut.," 63, 72. Offenses of a slave committed at the command of his master or of a third party: "Sal.," 10, 2; "Wis.," 7, 2, 6; "Bai.," 9, 6; "Sax.," 18, 50; "Roth.," 322.

² He is likened to the principal perpetrator in a case where he is put outside of the law. Anglo-Saxon "Edmund II," 1, 2; "Æthelr.," I, 4, 2; III, 13. The Frankish laws merely decreed a composition: "Sal.," 55, 56, 70, 106; "Rib.," 87; "Capit." (ed. B.), I, 148, 156, 70. However, they sometimes also pronounce the same penalty: "Sal.," 32; "Dec. Child.," 7; "Capit.," I, 171. Cases of theft: "Rib.," 73, 78; "Cham.," 30; "Roth.," 200, 266; "Burg.," 71; "Bai.," 9, 15 *et seq.*; "Wis.," 7, 2, 7. Loysel, 806.

³ The people of the household did not always have possessions of their own; formerly everything which they acquired belonged to the family; also they found it impossible to provide themselves an indemnity for the damages which they caused. The responsibility of the head of the family had some support in this practical consideration. It was not admitted that he could justify himself by establishing the fact that there was no fault with which he could be reproached. Cf. examples in Huber, IV, 495, 807; *P. de la Janès*, II, 400.

⁴ Cf. responsibility of the master who employs a workman when the latter loses his life in the service of the former: "Roth.," 144 *et seq.*, 152; "L. Henrici," I, 90, 11; *Wassersch.*, "Büssordn.," p. 549.

It suffices, in order to relieve oneself of this responsibility, to turn over the guilty person to the victim of the offense or to his relatives, for they will then be able to wreak the vengeance which they demand upon him;¹ thus in the case of a murder, during the pagan period, the murderer was sacrificed to the manes of the victim, and the same treatment would be inflicted upon the animal who had killed a man, and upon the object — a sword, a spear, or anything else — which had struck him. If anyone refuses to make this surrender of the thing causing the injury, he places himself in the same situation as the perpetrator of the offense; one puts an obstacle in the way of the exercising of vengeance, and thereby exposes oneself to it;² the only means of avoiding this is to pay the composition as though one had been the perpetrator of the deed oneself,³ although one may have had absolutely no part in it. The abandonment of the thing causing the injury to the injured person⁴ is thus the primary obligation of the master of a slave who has committed an offense, of the owner of an animal or an inanimate thing which may have caused damage. Assuming that the owner did not do this, it was asked whether it was not going too far to treat the master like the direct cause of the offense; at the most, all one could see in this was an analogy to an offense committed by reason of carelessness. Also, it was admitted that he was not subject to a "faida,"⁵ and that he was always authorized to pay a pecuniary composition; sometimes the ordinary composition was demanded from him, sometimes a portion of the latter (one-half, two-thirds).⁶ In the end, corporal punishment (the whip, the scourge) came to be inflicted in the majority of instances upon slaves because of their offenses. In the case of animals or inanimate objects vengeance was practised in primitive times, first of all, because he who took vengeance followed a heedless impulse, and did not stop to question whether the one whom he struck were responsible, any more than a child asks him-

¹ "Bal.," 8, 9; "Roth.," 142; "Sax.," 18, 53; "Ina.," 74; "Burg.," 20, etc.; "Wis.," 6, 5, 10 *et seq.* Prohibition of unilateral abandonment: "Cap.," 803, c. 5 (I, 117); "Sal.," 35, 5; Edict of Chilperic, 5; *Grimm*, "R. A.," 664.

² *Fribourg*, in "Uechtland," ed. *Lehr*, c. 36 (in 1249). Apropos of the rule, "Noxa capa sequitur"; cf. "Rib.," 70, 1.

³ "Fris.," 1, 22; 9, 17; "Roth.," 249, 254, 371; Exp. on "Roth.," 256; "Thur.," 59: "Omne damnum quod servus fecerit dominus emendet." Limitation of the master's responsibility: *Grimm*, 3; "Capit.," 803, 13 (I, 143).

⁴ *Girard*, "N. R. H.," 1887, 1888; "Man de Dr. R.," p. 671; *Esmein*, *ibid.*, 1900; *Kovalevsky*, p. 303.

⁵ "Roth.," 326; "Rib.," 46; "Sachsensp.," II, 40, 3. Consequently, no "fredus": "Vieh verbricht kein Gewette"; "Sal.," 36.

⁶ "Roth.," 142, 249; "Liut.," 21; "Bal.," 8, 2; "Fris.," 1, 13.

self when he breaks the branch which he has run against if it deserves or does not deserve to be punished; religious ideas were not long in becoming mingled with this instinctive procedure; the animal which has killed is sacrificed, the object which has caused death is appropriated to sacred uses. The public penalties against animals, which lasted for a long time in our old law, have no other origin; and the biblical recollections from which they are often derived only contributed towards their being kept up. Beaumanoir, while blaming it, makes mention of the custom of putting animals to death (69, 6): "If a sow kills a child, they (the lords justices) hang it or drag it . . . but this should not be done, for dumb brutes have no understanding of what is right and what is wrong, and for this reason is justice thrown away."¹ This reasoning did not have very much effect upon the judges of his time; in the fourteenth or fifteenth century it was not a rare thing to see these criminals of a particular kind burned or hung in effigy.² In England they still admitted in theory, in 1846, that every animal or every inanimate thing which caused the death of a man should be devoted to pious uses, so as to appease the anger of God ("deodand"). — But, as a general rule, these old customs disappeared; the owner of an animal³ or of an inanimate object⁴ which caused damage (collapse of a house, etc.), was held liable to make a pecuniary reparation, without being able to escape from it by means of giving it up.⁵

§ 357. **Pecuniary Composition** originally was only the buying

¹ *Beaumanoir*, 69, 6; "Et. de St. Louis," I, 125 (ed. V., p. 233); *Boutaric*, I, 38; *Tanon*, "Reg. Crim. de St. Martin-des-Champs," p. 554; *Michellet*, "Orig.," p. 354; *Kovalevsky*, p. 302. — "Deodand" ("dentur pro Deo"), cf. *Bracton*, f. 122; "Fleta," p. 37; *Pollock and Maitland*, II, 471 (bibl.).

² "Genesis," ix, 5; "Exodus," xxi, 28-32; "Lois de Platon," 12, 936; *Demosthenes*, "in Aristoc.," 18; *Agrault*, "Ordre judic.," 1, IV; *Sorel*, "Procès c. les Animaux en Picardie," 1877; *Menabrea*, "Jug. rendus c. les Animaux," 1846; *Berriat-St.-Prix*, "Rech. s. les Procès faits aux Animaux" (from 1120 to 1741); *Du Boys*, *op. cit.* V, 56; *Glasson*, VI, 650. Cf. especially: *Amira*, *op. cit.* Cf. "Pénitentiels," I; *Addosio*, "Bestie Delinquenti," 1892; *D'Arbois de Jubainville*, "R. Q. H.," V, 275 (Excommunication of Animals); *Esmein*, "N. R. H.," 1900, 5 ("Abandon noxal").

³ Cf. the German proverb, "Kein Vieh verbüsst Gewette"; that is to say, no fine is to be paid for damage caused by an animal; it is sufficient if the owner give an indemnity to the victim. The word "Gewette" or "Wedde" contemplates the pledge that the accused had to give the judge to provide for the possibility of his being convicted: "Pactus Alam.," 3, 16 (dog suspended over the door); *Gui Pape*, IX, 238 ("De pœna bruta"). As to damages caused to the crops by animals and the "pignoratio," cf. *post*, "Execution."

⁴ "Sax.," 58 ("fossa," "laqueus"); "Thur.," 61; "Rib.," 70; "L. Henrici I," 87, 2; "Alfr.," 19.

⁵ "A. C., d'Anjou," I, 163; "L. d. Droiz," nos. 119, 228; *Glasson*, VI, 653. — Cf. *Ferrière*, see "Dommage"; *Argou*, III, 39; *Pothier*, "Oblig.," 121; Civil Code, 1382 *et seq.*; *Josserand*, "Respons. des Choses inanimées," 1891; "R. crit.," XX, 182.

off of vengeance, the ransom of the guilty man, the price of the peace which the victim and his family allowed the perpetrator of the offense and his relatives.¹ Hence it must contain two elements: damages, and a penalty, for it would have been very difficult for people to be content with a mere indemnity exactly equal to the damage caused; in many cases, moreover, the reckoning of the damage is not easy.² When composition was put in the form of a tariff by custom and became obligatory, it did not change in its nature. It sometimes happened, however, that the "pœna" and the damage-money were to be distinguished; thus, in the Frankish law the thief is held liable for a composition which is entirely penal, independent of the "capitale," that is to say, of the restitution of the thing stolen or its value, and from the "dilatura" or "wirdira," that is to say, the interest accrued by delay. The "fredus," and the composition properly so called, only correspond in a certain measure with the "pœna" and the "res" of the Roman law; the distinction had already been made in Tacitus, "Germ.," 12: "pars multæ regi vel civitati, pars ipsi qui vindicatur vel propinquis ejus exsolvitur."³

§ 358. **Family Solidarity.** — An offense brought into play family solidarity; the relatives of the victim helped the latter to take vengeance upon the guilty person, or acted by themselves, if necessary; conversely, vengeance could be lawfully exercised, not only against the guilty party, but against his relatives; the two families were in a state of warfare. "Suscipere tam inimicitias seu patris seu propinqui quam amicitias necesse est," says Tacitus, 12. Hence it was logical to allow to the relatives of the victim a portion of the composition, or, at least, of the "Wergeld" ("recipit satisfactionem universa domus," *ib.*), and on their side the relatives of the "faidit" were liable to pay a part of this sum.⁴ If

¹ Thus, if vengeance were carried out there was no occasion for the composition. Cf. the old proverbs: "By death one is acquitted ('wettet') by the judge and one indemnifies ('busset') the complainant"; "For a crime one can neither seize body nor goods"; *Loysel*, 81; *Chaisemartin*, p. 495.

² The damage caused was taken into account; for example, the finger which releases the arrow, the single eye of a one-eyed man, the hand of the harp player, all have a higher price. The social status of the victim of the offense is another element which is taken into account. Often the composition is so high that it is difficult for many people to pay it. "Roth.," 74 (higher prices than formerly with the object of checking the "faida"). The indemnity substituted for retaliation according to the Mosaic law includes several headings: damage, pain, doctor's expenses, prevention of work, shame.

³ "Fredus" has given in French the word "frais," which is used in legal language; for example, "frais et depens" (expenses and disbursements). Cf. "bannus" (to the State).

⁴ The law of the Thuringians shows that there was a connection between

they found this responsibility too heavy, it was absolutely necessary that they should break the bond of relationship. This took place by means of symbolical ceremonies similar to those which the Salic Law describes in Title 60, "De eo qui se de parentilla tollere vult,"¹ by breaking four rods of alder over the head before the whole "mallus" and declaring at the same time that thenceforth there would be nothing in common between them, neither "hereditas" nor oath.² On its side, the family had no doubt the right to repudiate those of its members who compromised it too much.³ With the disintegration of the primitive family and the extension of the part played by the State, responsibility for offenses became individual:⁴ "All offenses are personal, and one has no guarantor in criminal matters"; they also say, "The plea of a dead man is dead" (Loysel, 797).⁵ Its legal effects gone,

the right to the "Wergeld" and the obligation to contribute to the payment of this sort of composition. Cf. "Bal.," 8, 20; "Sax.," 2, 6; "Sal.," 62; "Rib.," 12, 67; "Roth.," 2. As to the celebrated title of the Salic Law, 58, "de chrene-cruda," see *Geffcken*; abolition of the "chrene-cruda" by the "Dec. Childeb.," 5. — See "Olim.," II, 428, in 1278; *Chaisemartin*, p. 480; *Cattier*, p. 183.

¹ "L. Henrici I.," 88, 13.

² This formality has been accounted for in various ways. Thus, according to *Thévenin*, "N. R. H.," 1880, 88, by breaking three rods one destroyed one after the other the triple community of oath, inheritance and interests established by the relationship. But all the Mss. of the Salic Law excepting one speak of four rods, and not of three, and the number four corresponds to the four "anguli" of the "mallus" into which one should throw the remains of the "fustis." To break four rods and throw each one to one side is to renounce relationship in an absolute manner in every sense. Cf. especially *Möller*, "Z. S. S., G. A.," 1900, 28. One will find in this article the principal cases in which was applied this breaking of the rod. In a case of putting outside of the law and condemnation to death this custom symbolizes the breaking of every legal tie and of every legal community. It is the same thing in the case of the degradation of an ecclesiastic. At the death of the king there is a breaking of the rod by certain officers of the household (to break the rod of the house, to break the house, — that is to say, to dismiss the people). To break straw with somebody means to disengage oneself from the feudal tie and even from every contractual tie: *Molière*, "Dépit Amoureux," 4, 4. From this comes the expression, "Rompre avec quelqu'un" (to break with some one), which means to cease all relations with him. In feudal investiture they sometimes broke a rod or a knife. Cf. *Isidore*, "Orig.," V, 24.

³ "Fourjur" in Hainaut: *Kovalevsky*, p. 311: "The head of the clan banishes anyone who disturbs the peace of the clan"; from this comes the formation of a class of men without family ("Abreks"): *Ragueau*, see "Forjurer."

⁴ "Dec. Childeb.," II, c. 5; "Roth.," 25; "Exodus.," xx, 5: "... God, visiting the iniquity of the father upon the sons unto the third and fourth generation"; *Greg. Tours*, VII, 21; "Deuter.," xxiv, 16: "The fathers shall not be put to death for the sons, nor the sons for the fathers."

⁵ Exception in the case of the more serious crimes, such as that of high treason; the sentence was pronounced and executed even upon the corpse. Cf. *Ayraud*, "Ordre Judic.," book IV. In a more general way, depriving a man of burial, annulling his will, and a few other penalties only took effect after death. On the contrary, civil trials continued after the death of the parties, at least since the Ordinance of 1359: *Pertile*, § 176; *Brégeault*, "N. R. H.," III, 619.

the solidarity of the family was thus reduced to a moral stigma, at the most.¹

§ 359. **Damages.**² — Little by little, the majority of offenses gave rise to corporal or disgracing penalties which were inflicted by the State. But, such was the force of old customs that the buying off which was made use of in the case of private penalties was applied even to public penalties; Loysel was able to say, 836: "He is not flogged who does not wish to be, for he who can pay in money does not pay with his body."³ On the other hand, prosecution, having a tendency towards public repression inflicted by the State, was for a long while left to individual initiative.⁴ To bring the accusation is a right and a duty for the nearest relative;⁵ if there is no accusation, there is no judgment and no penalty, just as though the State only took upon itself the task of helping the individual and carrying out the vengeance which the latter was not strong enough to realize, by himself or even with the assistance of his relatives; this is the salient characteristic of the so-called system of procedure by way of accusation. At the same time, the victim of the offense had the right to demand the reparation of the injury which he had received; instead of a fixed sum like the composition, he received an indemnity in proportion to the damage sustained; the claim "ex delicto" which he had for this purpose was distinguished from the right of punishing which was reserved to society in prohibiting acts of violence. Also, we read in Loysel, 832: "Messire Pierre de Fontaines⁶ writes that penal actions cannot be brought; merely the things must be given back, with a fine to the lord. This is what is meant by: 'To every misdeed there befalls but a fine.'"

¹ In Germany, until 1732, the trade corporations refused to admit the children of those who had undergone any disgraceful sentence: *Marnier*, "Etabl. de Norm.," p. 44. After the outrage committed by Damiens his relatives were ordered to change their name.

² *Du Cange*, see "mendum," "emenda"; *Heusler*, I, 62.

³ Example in *Brunner*, II, 599, 616 ("manum perdat aut redimat"). Again, in the time of St. Louis it is not a rare thing for procedure on the occasion of an offense to terminate by a compromise between the parties; the transaction is ratified by the officers of the king: "Vie de St. Louis par le Confesseur de la Reine Marguerite," c. 18; *Loysel*, 360, 795.

⁴ *Chaisemartin*, p. 508: the outcry is the beginning of the complaint.

⁵ The "tair" among the Arabs, the "goel" among the Hebrews: *Kovalevsky*, p. 240.

⁶ *P. de Fontaines*, 15, 52; cf. *Beaumanoir*, 30 et seq.; "Jostice," p. 275 et seq.: *Boutaric*, I, 28, 29, 35; "Gr. Cout. Norm.," 67. Cf. England: *Pollock and Maitland*, II, 457, 510 (trespass, meaning "transgressio," but it is a "transgressio" which does not amount to a felony). The action of trespass originally was based on a damage caused to the complainant in his body, his possessions or his land, by force and arms and against the peace of the king.

§ 360. **Putting Outside of the Law, and its Varieties.** — Offenses against the State were only punished in the old Germanic law with one penalty, the putting outside of the law, which affected both body and possessions at the same time.¹ Everybody ought to attack the guilty man, who was looked upon as a public enemy, or as a wild beast; he only escaped death by wandering into the woods or fleeing abroad.² His house was burned, his land ravaged or confiscated,³ according to the period, — ravaged, in the epoch when the land was divided up every year, and confiscated at the epoch when individual ownership came into existence. In the case of a flagrant offense the putting outside of the law was incurred as matter of law; if the malefactor was not taken in the act, it was necessary for the public authority (the Frankish king during the first two dynasties) to proclaim this fact.⁴ This fearful penalty be-

¹ Cf. in the German Middle Ages, the placing under the ban of the Empire.

² If the penalty of death was not first of all a religious act it became so: "L. Fris.," XII (penalty for sacrilege). Also they sometimes limited themselves to exposing the guilty man to death, by leaving to the gods the responsibility of pronouncing themselves as to his fate; he was abandoned upon the sea in a boat without oars and without rudder (*Grimm*, "R. A.," 701); they hanged him, but in such a way that death did not take place immediately (cf. the expression, "hanged until death takes place"): "Sal.," 68; "Capit.," 808, 2 (I, 139). He whom the execution has failed to kill should be pardoned, because the gods have not accepted the sacrifice, — "Nobody is hanged twice"; *Chaisemartin*, p. 204. On the other hand, who does not know the virtues of the rope that has hanged a man, of the hand of glory? that is, the hand of a man who has been hanged that has been salted and dried, — corruption of the word into "mandragore": *Cosquin*, "Contes popul. de Lorr.," I, 184; *G. de Nerval*, "La Main enchantée"; "A. C., Bord.," 46. The body of a suicide or of a man who died a natural death had absolutely no properties of this kind. The refusal of an honorable burial is still connected with pagan ideas (*post*, "Execution"). The oldest executioner was the pagan priest. Absolutely no dishonor was connected with this office. Perhaps this must be accounted for by the proverb, "That which the executioner can get belongs to him"; *Chaisemartin*, p. 204. Moreover, death might be inflicted by the community (for example, stoning; in Norway, after having shaved and tarred and feathered the head of the guilty man, who fled under a hail of stones) or by a relative ("Sal.," 70; *Grimm*, "R. A.," 674): *Brunner*, § 114; *Claeys*, "Le Bourreau de Gand," 1891; *Pagart d'Hermansart*, "— de St.-Omer," 1892; *Ludwig*, "Arch. f. Kath. Kirch.," 1893 ("Sacrilege").

³ Burning and leveling, during the feudal period, are a survival of the old penalty; they destroy the house of the guilty man by fire or by demolishing it: "Olim," I, 538, etc.; *Viollet*, "Et. de St. Louis," II, 36; III, p. 291: the Convention commanded the demolishing of the house of the Girondist Burzot, and the Commune that of M. Thiers. These are remarkable instances of an instinctive return to barbarism, and they would suffice, if there were not many other proofs, to show us that we are less far removed from it than we are in the habit of thinking: *Pertile*, § 186; *Cattier*, p. 83; *Beuneecke*, "Strafverf" (Flanders, twelfth and thirteenth centuries), 1886.

⁴ "Extra sermonem regis ponere." The placing outside of the law resulted from a solemn and judicial act; the usual formalities consisted in the extinguishing of a torch and the act of breaking to pieces a rod, etc.: *Brunner*, II, 466 (bibl.); *Schroeder*, p. 77.

came milder and was split up, giving birth in the course of its disintegration to a series of important institutions. It became milder among the Scandinavians, where the guilty man was granted time in which to take flight;¹ among the Franks, where it degenerated into a temporary measure, the "foris bannitio," pronounced against the absconder, who very often only absconded because he had a guilty conscience, "He who flees judgment condemns himself." In various respects the condition of the man who is banished resembles that of the outlaw; in other respects it differs very much from it; anybody can take him with the object of arraigning him before the judge; it is forbidden to shelter him or to give him nourishment;² he is temporarily deprived of his possessions; but nobody has a right to put him to death. From the end of the ninth century "forbannitio" is no longer applied, excepting in cases of absconding after the commission of a crime. And even in this case it finally ceases to have the same effect which it had formerly; witness the maxim of Loysel, 871: "According to the old law of France, the absconder lost his cause, were it good or bad, civil or criminal. To-day one must justify one's demand."³ From this placing outside of the law there were evolved, so as to constitute special penalties, all the more easily as the Roman law here furnished precedents: (A) death,⁴ exile under its various

¹ "Induciae libertatis": *Gragas*, I, p. 83; "Saga de Nial" ("Hist. de Gunar"); *Sunesen*, 132; "Sal." 55, 2; "Stadtr." of Vienna in 1221, c. 1.

² The "forisbannitio," pronounced by the count and not by the king, which is the placing outside of the law, carried with it the "meziban" and the "interdictio cibi": "Cap." 809, c. 3; 801-13, c. 13 (I, 148, 172); *Keirse*, 873, c. 1. During the feudal period the "forbanni" is no longer allowed to plead and reply in court; nor can he appear in court nor give testimony; his goods are confiscated: *P. de Fontaines*, 13, 6-22; "Jostice," III, 6; XIX, 37; *Beaumanoir*, 34, 32; 30, 36; 61, 23; "Olim," I, 1016; "Et. de St. Louis," I, 28 (cf. ed. *Viollot*, I, 47); "T. A. C., Norm.," p. 98 (ed. *T.*); *Marnier*, "Etabl. de Norm.," pp. 123, 182, 195; see *Ragueau*. — Custom of banishing on the "hart"; that is to say, they will hang anybody who is found breaking the ban: *Beaumanoir*, 61, 19; "Art.," 44, 2. Cf. *Tardif*, "Procéd.," pp. 149, 156; "B. Ch.," II, 99 (*Jamin*). — Outlawry in England also became a form of procedure against the defaulter. *Pollock and Maitland*, II, 457; *Pertile*, § 185.

³ *Chaisemartin*, p. 522; cf. p. 513 (safe conduct).

⁴ *Brunner*, §§ 131, 132 et seq. (detailed bibl.); *D'Olivecrona*, "La Peine de Mort," 1868. Penalty of death: hanging ("bargus," "furca," "patibulum") for men; drowning ("necare"), especially for women (thirteenth and fourteenth centuries, burying for reasons of decency, *Tardif*, "Procéd.," 155), stoning, beheading, burning to death, the wheel, etc. *Brunner*, II, 601. The corporal punishments are horrible and quite varied: "detruncatio" or "semalio," running the gauntlet (*Tacitus*, "Germ.," 19; "Liut.," 141; "Wis.," 6, 2, 3) scourge or the lash, scalping (sometimes the head is shaved in such a way that the guilty man resembles a slave, sometimes he is scalped or his hair is torn out with the skin of his head), branding with a red-hot iron, etc.: *Desmazes*, "Les Pénalités anciennes," 1861; "R. hist.," I, 84. Observe that penalties

forms,¹ penal slavery, and imprisonment;² (B) the confiscation of property, "missio in bannum regis," which had a permanent effect only if the year and a day passed without the removal of the ban;³ the tenure of a year and a day, the distraining on immovables, and certain forms of obligation have no other origin. One may liken the putting outside of the law to **civil death**, which will be discussed later on.⁴ With the Roman ideas which prevail in penal law, and especially with the absolute authority of the sovereign, is connected the principle, which was still in force in the eighteenth century, by virtue of which the judge, the delegate of the sovereign, can pronounce arbitrary penalties when the statutes are silent.⁵ Moreover, Frankish legislation already tended in that direction by virtue of a spontaneous evolution. The authority of the Frankish king in penal matters has this arbitrary character; to fail in the duty of loyalty towards him, to which one is bound, lays one open: 1st, to the putting outside of the law in the most serious cases; 2d, to banishment with confiscation of possessions, if the deed is of less importance; 3d, or, at least, to a fine. In the case of offenses involving the placing outside of the law, and those which were punished by a capital penalty, there was seen a disloyalty to the king; the thief is qualified as "infidelis." Thus it is that in England the offense of felony became the basis of penal law.⁶ The king in a case of disloyalty had the right to pardon the guilty man or to pronounce arbitrary penalties against him;⁷ the vary according to the status of the persons (for example, slaves, etc.): *Pertile*, §§ 192, 181.

¹ Exile is understood to apply to expulsion from the country, sending into the interior of the country, and sometimes even to imprisonment itself. There is often added to it confiscation of goods: "Rib.," 69, 2; "Capit.," I, 186, 282, 318. Part played by those judged to be banished at Metz, thirteenth century: "N. R. H.," 1880, 371; *Pertile*, § 184.

² "Capit.," 754-5, c. 1: "mittatur in carcere usque ad satisfactionem"; *Pertile*, § 183; *Glasson*, VI, 698 (imprisonment is more a means of compulsion than a penalty).

³ *Loysel*, 839: "He who confiscates the body confiscates the goods," 843. As to the confiscation of fiefs, cf. "Ass. de Jérus.," I, 506 (bibl.); *P. de Fontaines*, pp. 292 and 483; *Marnier*, "Et. de Norm.," p. 77; *Pertile*, § 180.

⁴ As to the "Rechtlosigkeit" of the feudal period, cf. *Brunner*, II, 597; *post*, "Persons;" *Pertile*, §§ 185, 187.

⁵ *Pertile*, § 190 *et seq.*; *Glasson*, VI, 694.

⁶ "Summa Norm.," 74; *Bracton*, fo. 138, 144 *et seq.*; *Glanville*, I, 2; *Pollock and Maitland*, II, 460 (bibl., p. 446, on the "Pleas of the Crown"). Cf. *Glasson*, VI, 647.

⁷ "Harmiscara" (French: "haschière"), cf. *Grimm*, *Du Cange*, see *Diez*; this word means penalty in general; but it has been understood to apply to an arbitrary penalty inflicted by the Carolingians in the ninth century ("Cap. Kiersey," 857, c. 9: "talem harmiscaram qualem nobis visum fuerit," cf. Table, see ed. *B.*) and especially of a disgraceful penalty, like the carrying of the saddle, which was added to the composition: "Capit.," 866, c. 9, II, 96. Other disgraceful penalties of this kind: carrying of a wheel or of a dog. From

latter found himself at the mercy of the king ("in misericordiam regis").¹

§ 361. **Concerning Special Kinds of Offenses.** — We shall limit ourselves to a mere enumeration of them, and only as far as the barbarian period is concerned, that is to say, the period during which penal law still plays a part in private law, at least up to a certain point. — 1st. Offenses against persons include murder,² homicide, blows and wounds which can be divided into three classes: (a) mutilation, "mahamium" or "mehain" ("membrum sideratum," "manecum"); (b) "sanguinis effusio"; (c) "colpus," "ictus," from which results a "tumor" or a "livor."³ — 2d. Offenses against property, consisting almost entirely of theft ("furtum," "latrocinium"),⁴ which are distinguished because of their clandestine character from plundering or pillage,⁵ and in the case of which the "effractura" may be an aggravating circumstance.⁶ The old law contrasts flagrant theft with theft which is not flagrant,⁷ the latter being energetically checked because the resentment of the man robbed has had time to be appeased.⁸ It also

whence comes the proverb, "l'affaire aura le chien": *Chaisemartin*, p. 501; *Cattier*, p. 66 (carrying a stone); *Michelet*, p. 379 *et seq.*; *Pertile*, § 186. At a very early time popular fancy is here given free sway. Witness the two provisions of the "L. Burg.," 97: (he who steals a dog) "ut coram omni populo posteriorem canis osculetur," or he must pay 5 sous to the person robbed and 2 sous as a fine; 98: "He who steals a goshawk shall allow the goshawk to eat 6 ounces of flesh from his chest or shall pay 5 sous to the man robbed and 2 sous fine": *Gierke*, "Humor i. d. R.," p. 65; *Grimm*, "R. A.," 711.

¹ Anglo-Norman law: "amerciamenta," fines to be paid to the king by the man who is at his mercy. *Pollock and Mailland*, II, 511. Cf. "Pleas of the Crown," *ibid.*, II, 453 (bibl., p. 446).

² *Beaumanoir*, 69, 22; *Boutaric*, II, 40; "Jostice," p. 288. — "Encis" (murder of a woman who is enceinte), "Et. de St. Louis," I, 27; "Jostice," p. 279; *Boutaric*, II, 40. — As to infanticide and its connection with the paternal power, cf. *Viollet*, "Et. de St. Louis," I, 250; "Summa Norm.," 35. — The Customs of the Southwest (thirteenth, fourteenth centuries) decide that the homicide should be buried alive under the corpse of his victim: "Bord.," 21; "Agen," 16; "Belvès" (ed. *Vigîé*), etc.

³ See *Du Cange*.

⁴ *Pollock and Mailland*, II, 492; *Pertile*, V, § 203 (bibl.); *Glasson*, VI, 672; *Demarsy*, "Du Vol," 1869 ("R. h. Dr.," 13 and 15); *Molinier*, "R. Acad. lég. Toulouse," 1868, 69; *Bouthors*, "Cout. d'Amiens," p. 160; *Wöringen*, "Beitr. z. Gesch. d. d. Strafr.," 1882.

⁵ "Rauba," "schachum," "charcena": *Geffcken*, "L. Sal.," p. 229.

⁶ "Sal.," 11, etc.; "Sereuna," "eseregne," meaning subterranean chamber.

⁷ *Beaumanoir*, 30, 84, 90, 102; 39, 10; 61, 2; "Ass. de Jér.," "C. des B.," 203, 208, 251, etc.

⁸ As to the interpretation of Title 37 of the Salic Law, "de vestigio minando," cf. *Zycha*, "Z. S. S., G. A.," 1901, p. 155. This article, which was not published until the second chapter of this work had been printed, brings to bear on this obscure text new ideas which are difficult to accept. They are that it is the defendant (and not the "vestigium minans," "ille" for "illi") who should "agramire per tercia manu," when the object has been found in three nights; after three nights he may "agramire," but he is not compelled to,

draws a distinction between larceny which is of little importance and larceny which is of more than a certain sum, — five sous, for example.¹ The breaking into a house is distinguished from theft, of which it is often an aggravating circumstance.² Arson is a particularly serious offense in the eyes of the barbarians.³ — 3d. Offenses against morals, in the primitive conception, are offenses against decency, — such as adultery, abduction, rape, certain cases of fornication, — rather than special offenses.⁴ — 4th. It is otherwise in the case of insults, like those which consist in calling a man a hare or a fox, according to the Salic Law, or a woman a sorceress, “striga,” “masca,” according to the law of the Lombards; these are attacks upon honor which sometimes give rise to terrible vengeance.⁵ — 5th. Some offenses, such as sorcery and poisoning, which are rather like magic, the carrying away of a dead body, perjury and forgery, have a different aspect. — 6th. Finally, high treason is especially a crime against the State. — Many of the provisions of the Customs of the feudal period recall the Frankish penal law.⁶ But it should be noticed that certain of these offenses came within the jurisdiction of the ecclesiastical tribunals, with a few others with which the old law was not concerned:⁷ fornication, incest, adultery, bigamy,⁸ crimes against nature, suicide,⁹ sorcery,¹⁰ heresy,¹¹ and usury.¹²

assuming that the complainant limits himself to a mere requisition (“revocare absque intertatio”). Within the three nights a lost object is sought for; when the three nights are passed an offense arises. The “Spurfolge” or following of the trail is not a necessary act of procedure (tit. 37, § 2; 47; “Rib.,” 33, 72). “Z. S. S., G. A.,” 1901, p. 401.

¹ *Boutaric*, II, 39. Cf. “Et. de St. Louis,” I, 32 (recidivity).

² *Assultura*, etc.: “Sal.,” 14, etc.; *Pollock and Maitland*, II, 491.

³ *Pollock and Maitland*, II, 490; *Pertile*, V, 631.

⁴ *Pertile*, V, 513.

⁵ “Sal.,” 30; “Roht.,” 197, 198; *Pollock and Maitland*, II, 535; *Pertile*, V, 615; *Glasson*, VI, 668; *Dareau*, “Tr. des Injures,” ed. 1785.

⁶ *Glasson*, III, 554; VI, 658.

⁷ *Pollock and Maitland*, II, 542; *Pertile*, V, 434. — See “Manuels de Dr. Canon” (*Lancelot*, *Héricourt*, etc.). — *Beaumanoir*, c. 11, etc. — *Kahn*, “Le Délit et la Peine en Dr. Canon,” 1898.

⁸ “Capit.,” 793, c. 34 (concubine).

⁹ *Glasson*, VI, 693; “B. Ch.,” I, III, 539; *Bouthors*, “Cout. d’Amiens,” p. 102; *Cattier*, p. 96.

¹⁰ *Post*, II, 395; *Brunner*, II, 678; *Pollock and Maitland*, II, 550; *Pertile*, V, 434 (bibl.); *Soldan*, “Gesch. d. Hexenprocesse,” 1843; *Pollock*, *id.* 1886; *Mühlbrecht*, “Wegw.,” I, 92; II, 91; *Gansen*, “Zauberwahn,” 1900; “Quellen u. Unters. z. Gesch. d. Hexenwahns,” 1901; *Reizler*, “Gesch. d. Hexenproz.” (Bavaria), 1894. Details in the well-known books of *Bodin*, *De Lancre*, *Del Rio*, *Sprenger* (“*Malleus Maleficarum*”), *Boquet*, *Remy de Nancy*, etc. Cf. out of curiosity, the “Demonology” of *Walter Scott*, the “Sorcière” of *Michelet*; “Procès de Jeanne d’Arc,” by *Quicherat*. — “Scopélisme,” cf. *Fournel*, “Voisinage,” II, 478.

¹¹ *Pollock and Maitland*, II, 543; *Pertile*, V, 440; *Glasson*, VI, 683.

¹² See *Glasson*, VI, 689.

TOPIC 3. CONTRACTS. FRANKISH PERIOD

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| <p>§ 362. Mere Consent does not bind.</p> <p>§ 363. Real Contracts.</p> <p>§ 364. Formal Contract. "Fides Facta," "Arramitio," "Wadiatio."</p> <p>§ 365. Forms and Cases in which the "Fides Facta" was applied.</p> | <p>§ 366. The "Festuca."</p> <p>§ 367. The "Wadium."</p> <p>§ 368. Security.</p> <p>§ 369. Consequences of Formalism.</p> <p>§ 370. Formation of Contracts by Means of Writings.</p> |
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§ 362. **Mere Consent does not bind.** — Several of the old formulæ formerly led one to believe that the Germans had revealed to the modern world fidelity to a man's given word;¹ this is an error of the same kind as that at one time so widespread according to which political liberty was to be found in the forests and marshes beyond the Rhine. No more in Germany than in ancient Rome were obligations formed "solo consensu."² The well-known gibe, "A man of honor has but his word," "Ein Mann, ein Wort," did not at first have the meaning which is given it to-day.³ As far as

¹ *Tacitus*, "Germ.," 24, with regard to gambling debts and the slavery to which the loser submitted of his own free will, says "ipsi fidem vocant": cf. "Ann.," 13, 54. — But the cult of "Fides" in Rome did not prevent the Romans from demanding a stipulation in order to render the consent binding, cf. *Carpzov*, "Defin. for.," 2, 19, 17, 8; *Glück*, "Pand.," IV, 282; "Sachsensp.," I, 7; "Schwabensp.," 11. Cf. *Eichhorn* and *Zoepl*, who make distinctions. — *Laurent*, "Principes du Dr. Civ.," I, 24, and XV, 428, makes himself the interpreter of the prejudice which was formerly current by saying, "The Customary law ignores the superstition of the formulæ; it has freed itself from the Roman subtleties in order to reclothe itself with a character of equity which is more in conformity with the Germanic spirit." As to formalism in the old Germanic law, cf. *Heusler* and *Zellinger*; as to procedure, *Brunner*, "Entstehung d. Schwurgerichte," 1872; "Wort und Form im Altfranz. Prozess," 1868 ("Forsch.," p. 260), French trans., "Rev. crit.," 1871.

² This rule has been generally accepted since the time of the writings of *Sohm*, 1876. There are still, however, some divergencies from it. Cf., as to these various divergencies: *Siegel*, "D. R. G.," 388; *Loening* and *Thévenin*, *op. cit.* *Pertile*, IV, 466, maintains that consent alone was obligatory. The only old text which he cites which carries with it any proof, "Ratchis," I, is not decisive. *Heusler*, I, 70. See also "Liut.," 15, 78. According to this learned man the formalities that were made use of, the presence of the judges or of witnesses, the drawing up of a writing, — in fact, everything could be accounted for by practical reasons whose effect is still felt in the law of our own times; the parties had recourse thereto with the single object of insuring proof of their contract; if these formalities or conditions were lacking the contract ran the risk, not of being annulled, but of not being proved: "Bai.," 15, 12: "charta aut testes ut postea non sit contentio." These reasons had their influence over the past, we admit; but the part played by them is secondary in the very old law; they are powerless to explain the essential characteristics of the system of contracts.

³ *Chaisemartin*, p. 252. — *Heusler*, II, 227: observe the remarkable number of precautions taken in the old deeds to prevent the violation of

primitive times are concerned, the only formula which is applicable is the following: "To promise and to keep that promise are two different things."¹ And such is, even still, only too often the ethics of the man of the people; a verbal engagement has little weight in his eyes, he does not show any very great scruple as regards violating it when he knows that there are no means of holding him to it; he only feels himself bound by the obligation of an oath, by the giving of a pledge, or by the intervention of a notary. Let us carry back this state of mind into the past and generalize it, and then we shall be able to understand the old theory of contracts. The majority of transactions took place in ready money. In those cases, which were at first exceptional and then became more and more numerous, in which contracts did not call for immediate performance, the obligation had to be supported, in order to be valid, by a material element or a formal element; in other words, there were two sorts of contracts, — **real contracts** and **formal contracts**.² The former are only an image of the transaction for cash, an imitation of the exchange. As to the others, they have been likened to the Roman stipulation, but with the difference that the latter, under this classical form, was reduced to the pronouncing of the "verba," to the interrogation and the reply, whereas they admitted of the gesture and the word at one and the same time ("Hand und Mund"); the will of the parties is shown to the eye and the ear, in conformity with the rough habits of that time. The old Germanic law is thus formalistic in the theory of contracts as well as in that of the transfer of ownership.³ It is also formalistic in procedure, which is only the putting in motion of real rights and obligations; until the thirteenth century we see the application of the maxim, "Qui cadit a syllaba cadit a tota causa"; more than this, a mistake in a single letter can produce this effect; if we are to believe Bracton, who was here improving upon the strictness of the old law of the Quirites, the simple fact of incorrectly writing one's name in a writ, — for example, adding

one's given word; to what end, if one could have counted on the "deutsche Manneswort"?

¹ *Loysel*, 660; *Bugado*, "Prov.," p. 16. This was also said of the Normans. Cf. formulæ and symbols used in children's games: "Mélusine," 1, 29 *et seq.*

² A distinction brought out first of all by *R. Sohm*, "Zf. Privatr.," 1874, 246; "Recht der Ehescht.," 1876, p. 24. Cf. *Heusler*, II, 228. To the contrary, *Loening* and *Thévenin*, *op. cit.* Cf. views held by *Kowalewsky*, p. 110, on the Russian "Pravda."

³ *Amira*, "Recht," p. 136; *Schroeder*, p. 59. Saxon customs: "curvatis digitis."

an "h" (Bracthon), would carry with it the loss of the action.¹ They never went to this extreme as far as contracts were concerned.² But it is none the less interesting to observe therein the action of this tendency, whose effects are noticeable in every branch of the law, and whose strength increases and decreases according to its surroundings and the hindrances offered to it. It relates, as we have said, to the habits of mind and the importance which juridical acts had in former times, because entire families, and not individuals, found themselves bound thereby.³

This explanation, which is due to R. Sohm (1876), has been corrected and perfected in these last few years.⁴ It has been pointed out that the category of *real contracts* was a rather later creation; the obligations arising from this category of acts were at first nothing but obligations "ex delicto," because in the failure to restore the object which was lent or the object which was deposited there was seen an offense. In the case of *formal contracts*, which would be more ancient ones, there has been an attempt to account for their formation by means of a system wherein conjecture plays a rather important part, but which has the merit of connecting the contractual obligation with the obligation "ex delicto" and of giving some reason for the importance of the old practices of the pledge and the giving of surety in the formation of contracts. The idea that the old Germanic law only knew transactions in cash is started with. As to a contract giving rise to an obligation in the future, no trace is presented of it, and this is easily understood, for the public powers were not invested with the necessary authority to compel the carrying out of engagements entered into by individuals. The first obligation "ex contractu" was that of pay-

¹ *Bracton*, fo. 188b. This excess of formalism is especially to be observed in the Anglo-Norman procedure.

² According to *Heusler*, I, 69, formalism and symbolism were consciously created by the priestly class with the object of giving the people a higher idea of the law as well as of religion. At any rate, symbols and formalities harmonized with the popular instinct and with the customs; nobody saw an annoyance in them, as one is tempted to believe to-day.

³ *Korolewsky*, pp. 96, 108, clearly brings out the influence of the family community over the law of contracts. In the last analysis the father, in his position as head of the family, is the only one who has a right to make agreements. (Cf. p. 117 (law of Ireland: The obligation which is not ratified by the relatives is not binding).)

⁴ On this point see: *Heusler*, I, 79, 85; II, 228, 250; *Amira*, "O. R.," I, 22; II, 45; "Recht," 131; *Puntschart*, "Schuldvertrag," p. 73. — Cf. *Brunner*, "D. R. G.," § 102; "Grundz." *loc. cit.*; *Siegel*, "Versprechen," 1873. — *Amira and Puntschart* (p. 114) contrast the debt with the responsibility: he who is responsible for a debt is not always a debtor; he who is a debtor is not always held responsible.

ing the composition due by reason of an offense; the man who had been judged guilty had not always at his disposal, in the midst of the "mallus," the necessary amount to pay the thing off entirely; he had to go into his house, gather together his resources, and even have recourse to his relatives. He was allowed to gain time upon condition of furnishing his creditor with a pledge or a hostage (which amounts to the same thing, for the hostage is only a living pledge). It was really rather paying the creditor than entering into an obligation.¹ Thus, having in his possession a thing or a person over which he had a true right of ownership, the creditor ran scarcely any risk; if he were not paid when the payment fell due, he was free to satisfy his vengeance upon the hostage that had been placed in his hands. The debtor would have been dishonored if he had not made every effort to set free the relative or the friend who was held in the house of the creditor on his behalf. Also, very often the pledge was of such a nature that it was made a point of honor to redeem it (a ring, etc.). In this way the conception of the binding contract was arrived at, and also that of the contractual obligation, which differed from the primitive obligation "ex delicto," which latter was carried out by means of vengeance or composition. The real pledge becomes no longer indispensable, and people are content with an apparent pledge on the day when public power can be counted upon to bring about the carrying out of the promise. The hostage degenerates into a surety and becomes less necessary; the debtor serves as his own surety; if he does not carry out the obligation he must give his body to the creditor as a hostage, and his property as a pledge. The *judicial contract*,² the only one which was known at first, is propagated and developed as a consequence of the arbitral character of the old jurisdictions; it depended upon the parties whether they should submit their differences to the judges, accept their sentences, and carry out the measures which they might prescribe. Hence the part played by procedure was essential only in the case of contracts of this nature. And on the same type, and with the same force and the same effects, *extrajudicial contracts* entered

¹ "Roth," 346; "Burg.," 19, 5; 107, 7. As a general rule, one had to provide a surety, with a fictitious pledge, rather than a real pledge, for he who was sufficiently wealthy to furnish a pledge equivalent to the object due would have found it simpler to pay his debt.

² Brunner, II, 340, 366: existence at a very early date of an extrajudicial contract intended to begin the proceedings, "Streitgeding." Cf. "vadimonium" at Rome: Wodon, p. 58; "Cap.," 818-19, 15 (I, 284); "Cartæ Sen.," 10; "Form. Tur.," 6.

more and more into common usage. The formalism of the "wadiatio," the frequency of pledges and guaranties, are the persistent survivals of this primitive system. The word "engagement" itself, in the sense of an obligation, has no other origin.

§ 363. **Real Contracts.** — The typical one of these contracts is lending; an object, "res," is furnished, "præstita," by one person to another; the "accipiens" is held bound to restore the thing which has been received, and one can say: "re contrahitur obligatio."¹ But the fact of not restoring is an offense which gives rise to the "faida," or to the payment of a composition. The same idea is applied to the deposit, which the barbarian language does not distinguish from the lending of something to be used or the lending of something to be consumed; it is still applied to the granting of lands by way of benefice or tenure at will ("commendatio").² The bringing together of facts which are as different as these is understood without difficulty, on the theory which we are setting forth; in all these cases the offense is the same; it consists in withholding the property of another.³ As a very natural consequence of this idea, the "accipiens" will only restore that which he has received;⁴ he will give back nothing more. The loan for interest appears in such a system like something abnormal; except, however, in one case, i. e. where it relates to the domestic animal; the increase of a flock is a natural kind of interest, whose restitution is imposed in the same way as is that of the flock itself.⁵ As to date of maturity,

¹ "Sal.," 52; "Rib.," 54; "Bai.," 1; "Wis.," 10, 1; 13, 14; "Roth.," 227; "Liut.," 137. Cf. *Kovalevsky*, p. 129: loan in grain, in domestic animals.

² *Kovalevsky*, p. 130 (Swedish law). Cf. Roman tenure at will.

³ "Qui negligit censum perdat agrum"; there is no question of compelling the "accipiens" to pay the rent. He is accused of possessing "malo ordine," *Heusler*, I, 395. He is treated rather like a thief. — Cf. the Roman expression, "æs alienum."

⁴ The natural composition in a case of this sort would consist in giving back the thing which had been lent; being allowed to restore something else would be a favor to the debtor. With the "ex delicto" obligation it was understood that the borrower should be held responsible for accidents. Cf. the Swedish maxim, "That which is borrowed cannot be destroyed, either by fire or by water." But this severity was quickly departed from: cf. *Kovalevsky*, p. 133, 141. Debtor's oath of innocence: *Heusler*, II, 262. The distinction between fault and accident was introduced first of all for special cases (the natural death of an animal, robbery by an armed man, etc.); in the end the theories of the Roman law on fraud, fault, and accident came to be borrowed: "Roth.," 138, 152, 178 ("exceptio inevitabile causa"); "Wis.," 55, 1 *et seq.*; "Bai.," 15; "Liut.," 131; "Sachsensp.," 3, 5, 3 *et seq.*; 4, 42, 18; "Schwabensp.," 185, 212.

⁵ Cf. the Roman law. The "L. Sal.," 52, does not speak of interest. *Kovalevsky*, pp. 133, 136 *et seq.*, points out that the system of interest came into existence as a consequence of the lending of animals. From thence arose the

they gave little concern to that. It arrives when it pleases the lender to reclaim his property.¹ In a similar case the Salic Law, under title of "De rem pristita," provides against the recalcitrant debtor a procedure tending to inflict upon him pecuniary penalties; his resistance is finally overcome either by means of a private distraint or a judicial distraint upon his movables, as in the case of "fides facta."²

Moreover, if the conception of the real contract did not appear at all at first, it was substituted for that of the offense by the time of the barbarian period. The example of the Roman laws, the necessity of taking into account the will of the parties, economic changes, — everything contributed towards this result; but this law, which was of the second stage, had difficulty in freeing itself from the primitive rules.³

Sale took place most of the time for cash; it degenerated into barter, and, consequently, there was no reason to ask if it were a contract by consent or a real contract; an obligation in warranty might result therefrom, but one which was rather of a delictual nature.⁴ When immediate performance is not possible on both sides, and only one of the parties performs, certain texts say that sale has only just begun.⁵ It seems that they went further

following calculations among the Ossetes: he who lends a cow has a right at the end of the year to a cow and a calf; at the end of two years, to two cows and one calf (for the first calf may have turned out to be a heifer) and so on. On this basis the amount of interest increases very rapidly, the capital is doubled in two years. Also the question of debts among old societies becomes an extremely serious one. Cf. the Celts: *Cæsar*, "De B. G.," VI, 15; Romans, Greeks, etc.

¹ The Ossetes have been known to keep an object which had been lent them for 64 years: *Kovalevsky*, p. 139. There is no prescription in their law. Time does not wipe out injuries.

² "Sal.," 52: following three summonses (with "solem collocari") made by the creditor at intervals of seven days, and each one carrying with it in case it be disregarded a fine of 3 "sol.," the debtor who will neither restore the thing nor "fidem facere reddendi" is condemned to pay 15 "sol." over and above the amount of his debt. Cf. "Sal.," 45, 2 and 50, 2; 56, 1 (putting outside of the law). On this text, cf. *Geffcken*, "L. Sal.," p. 202 (bibl.); *Sohm*, "Procéd. de la L. Sal.," French trans., p. 34; *Wodon*, p. 43. According to *Geffcken*, *loc. cit.*, the expression, "culpabilis judicetur," shows us that the law intervened; after the sentence of condemnation had been pronounced there was obviously no further use for the procedure of execution, that is to say, for distraint: *Heusler*, II, 234 (discussion and bibl.); *Keure de Saffeläre* (in *Warnkoenig*, "Flandr. Staats. u. Rechtsg.," III, p. 43). Cf. *Immerwahr*, "Kündigung," 1896.

³ *Thévenin*, see "Textes," "Prêt," "Dépôt." *Heusler*, II, 247, maintains that the "mutuum" is the only one which has become a real contract; the idea of a tort has persisted in the case of the deposit, the pledge, and lending; and sale has constituted a separate contract (earnest money).

⁴ "Sal.," 37, 47; Cf. at Rome the action "auctoritatis": *Girard*, "N. R. H.," 1882-4.

⁵ *Beyer*, "Mittelrh., U. B.," no. 6 (in 636); "vendere ceperam." The sale is

and saw in unilateral performance, whether total or even partial,¹ the source of an obligation; the vendor who had delivered the thing sold could demand the price, and, conversely, it was necessary that the buyer should have paid the price before he could demand delivery of the object. A part performance, or even an accessory performance, — for example, earnest money, — was likened to an absolute taking.² An analogous evolution took place in the case of a contract which is scarcely related to sale, that is to say, betrothal.³ Another analogy is to be found in the Lombard gift by means of "Launegild," which is a pretended sale.⁴ Thus sale at one time became a veritable real contract, before regaining the form, in which it depended upon consent, of the classical Roman law.⁵

§ 364. **Formal Contract.**⁶ "**Fides Facta**," "**Arramitio**," "**Wadiatio**." — The Salic Law, in t. 50, is concerned with this under the name of "fides facta"; it is the "fealty" or "sworn faith" of the feudal period.⁷ Elsewhere it is qualified as "arramitio"⁸ and as

made for cash *Schroeder*, p. 294 (*contra: Sohm, op. cit.*). *Id.* in "Rib.," 59, 60. We find in the formulæ and deeds that the statement of the payment is insisted upon: *Thévenin*, "Textes," Table; *Rozière*, "Form.," I (sales); *Pardessus*, "Dipl.," II, 393, 460, 805, etc. Exchange: *Pardessus, ibid.*, II, 440; *Loersch and Schr.*, 2, no. 22.

¹ "Wis.," 5, 4, 5 ("pars precii"); 5, 4, 3; "Bai.," 16, 2. Cf. "Burg.," 52, 3; 107, 8; "Roth.," 215. However, the payment of the whole price might be necessary in order to obtain the delivery of the thing sold: *Sohm*, "Eheschl.," p. 26, n. 9. *Schroeder*, p. 294, departs from this idea and denies that during the barbarian period sale had become a real contract.

² Discussion as to the nature of earnest money *infra*. Is it a reduction of the contractual prestation, a payment on account, or a symbol giving the legal force to consent? "Wis.," 5, 4, 4; "Bai.," 16, 10; *Papien*, 35. Cf. *Dig.*, 18, 1, 35.

³ "Wis.," 3, 1, 3; *Papien*, 27; "Cod. Just.," 5, 1.

⁴ Cf. *post*, "Gifts." *Pappenheim*, "Launegild und Garethinx," 1882 ("Unters.," by *Gierke*); *Val de Lièvre*, "Z. S. S., G. A.," 1883, 15; *Schroeder*, p. 295; *Heusler*, I, 84.

⁵ *Contra, Heusler*, II, 247, according to whom sale had become an "arrhal" contract, or one concluded by a special means, — namely, the giving of earnest money ("arrhes"), which was distinct from both the "res" and the "wadiatio." Cf. *Amira*, "O. R.," II, 342.

⁶ This expression has a double meaning: (a) a formal contract, that is to say, one entered into by means of certain formalities; (b) a valid deed, without any settled consideration and merely valid because of the fact that the formalities had been carried out (for example, the stipulation at Rome): *Kowalewsky*, p. 110. *Thévenin*, "N. R. H.," 1880, 77 *et seq.*, denies the existence of the formal contract and believes that only real contracts existed in the old times. See especially *Esmein* and *Heusler, op. cit.* The latter interprets the passage from *Tacitus*, "Germ.," 24; cf. II, 234, 7.

⁷ Cf. *post*, "Oath." See the German, "Triuwa," meaning "fides" ("treva," "treuga"), "Treugelöbniss" ("promissio fidei") or "Wette," designating the "fides facta," the old "wadiatio." In the "Sachsensp.," I, 7, "loven" would mean to contract the "fides facta," and consequently this passage would not make any allusion to the new principle of the formation of contracts "solo consensu." *Post*, "Feudal Period"; *Heusler*, I, 67.

⁸ "Adamire," "afframire," etc., which means to strengthen, to guarantee,

"wadiatio."¹ It is by this means that the old law progressed from cash dealings in order often to substitute for them transactions on credit and for a term. The "fides facta" consisted in a unilateral promise whose performance was assured by means of a special procedure,² which is thus described in Salic Law. Should the debtor refuse to pay, he shall be liable to a fine of fifteen sous; if he persists in his refusal, the creditor carries the matter before the "mallus" and there calls upon the "thunginus" to pronounce the executory formula against him, "qui fidem fecit et debitum debet"; at the same time he makes known the object which is due him. Thus summoned, the "thunginus," without any examination, without any discussion,³ pronounces the compulsion, — "nexthe canti-

to promise (for example, to furnish a proof or an oath). Cf. the Gothic "hramjan affigere"; *Schroeder* likens it to "stipulam affigere," to throw the "festuca" into the clothing. *Thévenin* wrongly translates "adramire" by drawing to oneself, invoking (a proof), "N. R. H.," 1879, 331; *Wodon*, p. 53; *Esmein*, *op. cit.*; "Sal.," 50, 56, 57, 2; "Ed. Chilp.," 7; "Rib.," 30, 65, 58, 21; 67, 2; "Alam.," 36, 3; "Capit.," 809, 14; 818-819, 15; *D. Vaisselle*, no. 5; "L. Pap. Kar.," 28. The literary documents of the feudal Middle Ages and the legal texts of the thirteenth century use the word "arramir" with the same meanings: *Godefroy*, "Dict.," see *Renart*, 14515; *Chevalier de la Charrette*, p. 731. Battle, "arramie," meaning duel pledged: "Ass. de Jérus.," ed. B., Table, see "Duel," "Bataille;" *Beaumanoir*, 39, 19 and 74; *P. de Fontaines*, 22, 105, 25; "Et. de St. Louis," II, 26; "Ord. des Maiours," "N. R. H.," 1878, pp. 220, 214; *Ragueau*, see *Du Cange*, "Z. S. S.," 1882; "G. A.," 228; *Hermann*, "Mobiliarvindict.," p. vi.

¹ "Form. Merkel," 39; *Thévenin*, no. 114; *Lindenbr.*, 19; *Bignon*, 27; "Bai.," 2, 14, etc.; *Wodon*, p. 51. Cf., the German "Wette," which is a pledge furnished by the debtor (stake); "pfant," a pledge distrained upon, or taken by the creditor; *Brunner*, II, 445. The hostage appears as a pledge in the following expression: "liber qui se loco wadii in altarius potestatem commiserit"; "Cap." 803, c. 8 (I, 114).

² Cf. as to the **Formal Act**, the theory of *R. Sohm*, "Procéd. de la L. Sal.," Fr. trans., 1873. According to the illustrious German scholar, this act would be halfway between the acts of law and the judicial procedure; it might be qualified as a "Selbsthülfe," which had been made regular. In our time public authority alone can administer the right of rendering justice; this was not so in the old law, where the mere individual had a share of this right; he was recognized as having a power of coercion by the use of the formal act (a verbal declaration accompanied by certain formalities); disobedience to the injunction contained therein meant the payment of a fine. *Sohm* perhaps exaggerates the importance of the formal act, at least in the case of the Salic Law, for, as *Geffcken* points out, in Titles 50, 52, where *Sohm* only sees an extrajudicial procedure, the words "culpabilis judicetur" imply the intervention of the "mallus," or a judicial sentence. Cf. the procedure against the "homo migrans." Thus judicial procedure would not have been restricted in the matter of offenses, as *Sohm* has seemed to think. Whatever may be the fact on this point, there is no doubt that the "Selbsthülfe" and formalism for a long time played a very important part in procedure (for example, adjournment, part taken by the parties, calling upon judges to judge, etc.): *Brunner*, "Grundz.," § 9; *N. Tamassia*, "Arch. Giur.," XI, 2 (1903), "Fidem facere." On the criticisms of *Thévenin* and *Behrend*, cf. "Z. S. S.," 1882, "G. A.," 228.

³ There is no room here for a procedure based upon the hearing of both

chio,¹ ego illo in hoc quod lex Salega ait." This permits the creditor to proceed with the execution; he forbids the debtor to pay anything to anybody or to give any pledge of payment before he shall have exonerated himself with regard to the creditor: "The possessions of the debtor are under attachment in his hands and cannot be moved until the day when he shall have paid." Following this, three times, from week to week ("per tres nondenas"), he goes to the house of the debtor and summons him to perform the obligation, waiting for this to take place until the setting of the sun ("solem ei collocet"). Each summons which remains without result means the payment of a fine, whose amount increases the principal of the debt. By this indirect means of compulsion the carrying out of the "fides facta" would be assured in the majority of instances. If, however, the debtor defies an accumulation of fines, the creditor has two means of putting an end to his resistance: 1st, the first one consists in himself distraining upon the movables of the debtor;² 2d, the other, in causing them to be distrained upon by the "grafio" of the locality assisted by seven "rachimbourgs."³ He can choose between private distraint and judicial distraint; but undoubtedly this was not so in the ancient Salic Law; private distraint was the only way which was open to him; he proceeded with it at his own risk

parties because of the formalities of the "fides facta," according to the opinion which is very widespread; or because there has already been a judgment, as has already been pointed out. — The judgment condemns one man to pay or to give a pledge: *Rozière*, "Form.," nos. 463, 467, 468. *Heusler*, II, 232 n. 5 (bibl. on this disputed point), also admits that from the barbarian period on, the sentence had executory force.

¹ "Nexti canthichus" in Ms. No. 1, ed. *Hessels*, is translated by "adstringas" in the "L. Emendata": *Brunner*, "D. R. G.," II, 447. Etymology: *Kern*, § 138.

² "L. Sal. Capit. extravag.," 73, ed. *Hessels* ("de pignoribus"): he who carries out the "pignoratio sine iudice" before the "nexti canthichio" loses his claim; if the "pignoratio" is not well founded he incurs a fine. On this text cf. *Geffcken*, p. 245, bibl.). One must conclude from this that the creditor after the "nexti canthichio" "may, if he acts 'bene,' proceed in person, 'sine iudice,' with the distraint upon goods of his debtor." Cf., however, *Schroeder*, p. 289.

³ Controversy on the point of knowing whether the § 3 of Title 50, of the Salic Law, is a continuation of § 2, or whether it provides for a distinct supposition; from the time of *Siegel*, "Gesch. d. deutsch. Gerichtsverf.," 1857, § 5, this last opinion is the most widespread: *Wodan*, p. 23 et seq.; *Geffcken*, p. 196. Cf. post, "Execution." — The promissor who does not carry out his promise on the day appointed is considered as "jectivus," and against him one can carry out the distraint upon movables. The word "jectivus" (cf. "jectare") is perhaps to be explained by the throwing of the "festuca"; the man had promised "per festucam"; perhaps in the same way it is considered that he failed to carry out his promise "per festucam": *Brunner*, p. 368; "Form. Marc.," I, 37; "Tur.," 33 and 6; "Cart. Senon.," 10, 26; "Form. Sen. Rec.," 1; *Wodan*, p. 38.

and peril, for, should it be irregular, he lost his debt and was himself subject to a fine. It is very probable that distraining by the "grafio" and the "rachimbours" was only introduced into the Salic Law by means of an addition to the early text.¹

One asks oneself how it is that the "fides facta" allows of the employment of a procedure as forceful as this. According to some, this would be an intrinsic effect, a special virtue, of the formal act; from the moment when the parties had conformed to the custom, the creditor found himself, as it were, armed with an executory claim; he was free to act against the debtor, who had, to a certain extent, condemned himself beforehand; the more or less absolute "Selbsthülfe" revested as of right. According to others, the efficaciousness of the formal contract would depend upon whether it were originally made to rest upon a "judicatum"; it is clear that one could not again question a transaction which had been adjudged; it was natural to proceed at once with execution. In time the formal contract would have become detached from its judicial origin, to be applied even in the absence of any order of a court. One would be constrained to accept this last opinion if it is true that the first obligatory contract was the pact based upon the composition for an offense fixed by law.

§ 365. **Forms and Cases in which the "Fides Facta" was applied.** — The Salic Law teaches us how the "fides facta" was carried out, but it does not tell us how this contract was closed nor in which cases it took place. The vague terms of Title 50 might lead one to suppose that the judicial "fides facta" and the extrajudicial "fides facta" are there being considered at one and the same time; they can either one of them be understood from these forms.² Elsewhere the judicial "fides facta" is dealt with, and everything leads one to believe that it was the first one made use of,³ admitting that it was the typical form. It consisted in the promise to pay the composition incurred, that is to say, to carry out the judgment. The procedure of execution described in Title 50 of the Salic Law, "De fides facta," thus rested upon a "judicatum,"

¹ *Wodon*, p. 31 *et seq.* (various interpretations); *Brunner*, II, 447, 448, 454 (part played by the "grafio"). Cf. *Heusler*, II, 235. Roman "Nexum," *Girard*, p. 477; "Z. S. S.," 1901.

² Outline of the different views in *Wodon*, p. 40; *Behrend*, "Festg. Heffter," p. 81.

³ *Tacitus*, "Germ.," 24, foresees, however, the gambling debt, — that is to say, an extrajudicial agreement; the stake is only a pledge. — As to the Swedish and Russian law, cf. *Kovalevsky*, p. 107; *Amira*, "O. R.," I, 278 (transfer of ownership). According to *Kovalevsky*, the Swedish "fastars" did not represent the popular assembly, but the family community.

and this is what explains why every resistance was forbidden the debtor; he must pay up at once as soon as he has been judged guilty; he had been granted a delay out of mercy; perhaps this was the judicial delay of forty days; the day having come, there was no more discussion; he was obliged to submit to the distraint. The "fides facta" was also very frequently a promise to furnish proof, to appear in court, or to cause some one else to appear there.¹ These judicial contracts abound in the old procedure; they were the means by which one succeeded in getting execution of the arbitral judgments of the judges of early times. The extrajudicial "fides facta" no doubt followed closely these engagements made in court (if we admit that it is not so old as they were)² and, finally, the procedure laid down by the Salic Law was applied in every case. The "fides facta" thus became a general way of binding oneself which was applicable to every agreement, just as the Roman stipulation was, after it too had been, originally, what one might call a contract of composition.³

As to the form of the "fides facta," we learn by means of the law of the Ripuarians that it was concluded "cum festuca";⁴ other documents confirm this indication or show it to us being

¹ Cf. "Sal.," t. 56, 52, 57, 2; 58; "Edit. Chilp.," 7; "Rib.," 58, 5; "Sal.," 36, 1; *Pardessus*, "Dipl.," no. 431, 434; "Form. Sen. Rec.," 2. Other examples in *Wodon*, p. 50. Frequency of these contracts during the feudal period in the South: "firmare," that is to say, to bind oneself with surety, to recognize the competence of the court ("posse curiæ"), to pay the fine ("firmare jus, directum"; "fermar per far ley"): *Franken*, p. 207; *post*, "Giving Surety."

² *Pertile*, IV, 467, maintains that the most important contracts were entered into at law (from thence came the names "thinx" "geding," which were given at one and the same time to agreements and to public assemblies): "Roth.," 172, 178, 179 ("Fabula"), etc.; *Grimm*, "R. A.," 600. *Post*, "Gifts." For less important deeds they would have been contented with witnesses.

³ The Edict of "Ratchis," 5, contrasts with the "wadiatio," which is to be carried out at once, the "stantia" ("convenientia"), which is "stabilis," but the immediate execution of which one cannot demand; this latter assumes a judicial discussion; the real contracts, such as sales and the penal clauses in a "carta," may be looked upon as "stantia": *Heusler*, II, 239; *Pertile*, IV, 471.

⁴ "Rib.," 30: "ejus præsentiam cum fistuca fidem faciat" (the master binds himself to bring his slave before the court within 14 days); 71: "de quacunque causa fistuca intercesserit, lacina interdiciatur sed cum sacramento se edoniare studeat"; one of the consequences of the employment of the "festuca" is to prohibit every discussion based upon a hearing of both parties; the defendant is held bound to justify himself by oath. Cf. *Wodon*, p. 47 (bibl.). — In Title 66 they merely say "fidem facere" without adding "per festucam"; these words should be understood. Loening accounts for the silence of the texts by saying that neither the "festuca" nor the "wadum" were required in extrajudicial deeds. But this distinction is not justified. Cf. *Pardessus*, "Dipl.," nos. 418, 431, 434; "Capit.," I, no. 26, c. 32; "Form. Merkel.," 27; "Sen. Rec.," 1, 2, 3 ("per fistucam adchramire"); *Thévenin*, "Textes," no. 107; "sua festuca jactante ad placitum se afframivit."

carried out "per wadium."¹ Here we have two methods which were originally distinct, but which seemed to be equivalent to one another and tended to become confused, which makes it difficult to state their characteristics precisely.

§ 366. The "**Festuca**," which was mostly in use among the Franks, is not the branch of a tree, but a rod, a boar-spear, a symbol of the national arm of the Germans; the lance, whose haft was furnished with a short and narrow piece of iron.² The free man presented himself before the tribunal, that is to say, the popular assembly, with his arms, holding a lance in his hand, ready to wield it in order to emphasize his claims. When customs became more civilized, the "festuca" was substituted for it, a judicial weapon without iron, which was analogous to the Roman "vindicta"; and the "festuca" degenerated in its turn into a still more inoffensive object, — a wisp of straw, "calamus stipula." The throwing of the "festuca," whether it were upon the ground or into the bosom

¹ "Form. Marculf.," II, 18; *Lind.*, 19; *Bignon*, 27; *Merk.*, 39; "Bai.," II, 14; "Cham.," 45; "Capit.," I, 50, c. 2; 144, c. 4; *Thévenin*, no. 167 and Table, see "Wadium." — *Pertile*, IV, 472: deeds of the twelfth and thirteenth centuries ("wadium dederunt, baculum porrigentes").

² *Tacitus*, "Germ.," 6; "Sal.," 46, 50. Cf. as to this, "Transfer of Ownership"; *Esmein*, p. 36; *Wodon*, p. 84; see *Thévenin*, "Textes," "Capit.," 6, 285; "M. G. H., S. S.," IV, 124; "L. L.," IV, 599 ("actores baculos vadimonii reis restituunt"), etc. See "to break the straw." — Cf. "gaira" among the Lombards; *post*, "Gift," *Pappenheim*, "Launegild und Garethinx," 1882. — On the "stipula," cf. *Du Cange*; "L. Rom. Cur.," 24, 2; *Grimm*, "R. A.," 187; see "Halm," "Festuca"; *Michelet*, "Orig.," 127-181. — In the transfer of copyholds they sometimes make use of the rod and sometimes of the straw. — Even a thread of the garment or a hair of the beard is sufficient, — objects always within reach of the parties; whereas in court one ran the risk of not being able to find immediately the wisp of straw or the stick required for the procedure, and this evil chance would at least have the effect of subjecting one to a fine: "Ord. des Maiours," "N. R. H.," 1878, 318, 322; *Lacomblet*, "Nied. Urk.," 1, 142; "N. R. H.," 1888, 91; *Homeyer*, "Hausmarken," 187; *Brunner*, II, 519, 354, 366, 369, 444, 435; "Urk.," p. 274; *Schupfer*, "Allodio," 147. There is some question in certain texts (*Thévenin*, "Textes," see "Festuca"), of a "festuca nodata," a knotted straw (*Wodon*, p. 137), or, rather, "notata," a stick marked with a sign whereby it could be recognized, or perhaps bearing magic characters, a formula of imprecation. Cf. the magic wand: *Michelsin*, "Festuca Notata," 1856; *Schroeder*, p. 292; *Heusler*, I, 76, who argues in this way from *Tacitus*, "Germ.," 10 ("surculi notis quibusdam discreti"), and from the fact that the "festuca" is often a little piece of wood. According to him, these signs or "runes" also served to make the stick individual, to allow of its being recognized, for it was the same "festuca" which ought to serve for the demanding of execution ("Sal.," 50), and which was given to the surety with the same object, that is to say, with the object of carrying out execution upon the principal debtor. *Post*, "Suretyship." For "runes," which had become unintelligible, were substituted signs or numbers, perhaps representing the amount of the debt. The wand was broken into two parts, which were brought together, if we are to believe *Isidore de Séville*, "Orig.," IV, 24, so as to recognize them; in this was seen the prototype of charter parties. These views are almost too ingenious to be true, but it is a pity. The king's sceptre, the usher's rod, the ambassador's staff.

("in laisum") of the one with whom one was negotiating, naturally symbolizes the giving up of a right, — for example, the abandonment of a piece of land, and, by extension, the transfer of ownership; and, as the weapon represents the right which it serves to urge, it is not astonishing that they should pass from the throwing into the bosom of the grantee to delivering it from hand to hand.¹ The pronouncing of appropriate words — in very old times they must have been essential² — while holding the "festuca" in his hand or throwing it, was also a solemn means of entering into an engagement. But here the symbolism is obscure and confused. It is not very difficult to understand how the throwing of the "festuca" might signify the giving up of the right, for example, the right of vengeance; but why should it mean an obligation to do something? Did the man who did this wish to say that by this means he gave himself up without defense to the other party?³ By handing him the "festuca,"⁴ did he place himself under the other man's power? Was the affirmation made while holding the "festuca" in the hand a sort of pagan oath upon the weapons or the survival of this oath?⁵ Or, finally, must one only see in the

¹ Wodon, p. 84; Grimm, "R. A.," 128; "Rib.," 33, 66.

² Heusler, I, 71.

³ Wodon, p. 121. When the parties put an end to their private warfare they had to disarm, give up all right of vengeance; and to carry this out the throwing of the "festuca" was the most natural of symbols. After this they bound themselves to respect the sentence of the judge to whom they had submitted their differences. These two simultaneous acts were practically inseparable. From this must have come the obligation "per festucam." Cf. "Z. S. S.," 1882; "G. A.," 228.

⁴ Thévenin maintains that the "festuca" was always held in the hand or thrown, never handed over. But he seems to us to exaggerate the distinction between the act of throwing the "festuca" into the breast of someone and that of handing it to him directly, which took place, — at least, at a certain period, — in matters of the transfer of ownership and in matters of obligations. Cf. *D. Vaissette*, "Preuves," no. 109; *Brunner*, II, 356. An agent "ad litem" is appointed by a declaration, with the "festuca" in one's hand, followed by the throwing of it to the agent; or, again, one places a wand in his hand (a deed of 1025). "Laisowerpire," which means to throw into the breast: cf. *Kern in Hessels*. Among the Scandinavians the "gaira" or the rod tendered by one party is touched by the other party with his weapon or with his hands ("manufirmatio"). — Obviously, a throwing of the "festuca" could be applied only to a case of the renunciation of a right: "Cap.," VI, 285; *Esmein*, p. 36. The monk renounces the world by laying down the "stipula"; *Du Cange*, see "Investit.," cites the tale of Garin, "By this stick I make you a present [of the land]." *Thévenin*, no. 137; "Form. s. Roth.," 143; "M. G. H., S. S.," IV, 124: the "proceres," throwing the "festuca," declared that they would no longer be subject to Charles the Simple. *Grimm*, "R. A.," 123.

⁵ Such was perhaps the case in the "L. Sal.," 50, 3; the creditor holds the "festuca" and pronounces a formula. Cf. *Cæsar*, "De. B. G.," 4, 11; 1, 3; *Gregory of Tours*, "H. Fr.," 5, 3, "Et. de Gl. Conf.," 68, does not distinguish between the oath and the "fides." The vassal's oath of fidelity; during the feudal period, fealty and homage: *Heusler*, I, 78; *Puntschart*, p. 487.

"festuca" a pledge "sui generis"? It is made use of as a "wad-ium" during the Frankish period; but it is doubtful if this were its original function.

§ 367. The "**Wadium**" (or the "wadia" among the Lombards)¹ consists in some object, such as a glove,² which the debtor gives to the creditor. It was made use of in the same way as the "festuca," less often, however, for the transfer of ownership.³ What was the "wad-ium" originally? Very probably a real pledge; that is to say, an object having a value corresponding to the debt which it guaranteed; if a value greater than that of the amount due, then the interest was the motive which led the debtor to pay in order to withdraw it; a lesser value, but in this case the pledge consisted in an object which had for its owner a value due to association, or one which was agreed upon, so that its final giving up must either be very repugnant to him or else pass as not being very honorable.⁴ The usage of adding a suretyship to the principal of the engagement allowed one to be content with some object in place of a "wad-ium"; for example, a piece of wood, the "festuca" itself,⁵ or even to dispense with the "wad-ium," although

¹ "Wadium," "guadium," etc. (Gothic, "vidan," meaning to bind: see *Du Cange*, "Roth.," 360 *et seq.*; "Liut.," 15; "Bai.," 2, 15, 3; 10, 2, 3; 17, 2; "Alam.," 36, 2; "Fr. Cham.," 48; *Rozière*, "Form.," 465, 511, etc.; "N. R. H.," 1880, 69. The Customs of Milan liken the stipulation to the "guadiæ datio."

² Throwing down the glove, picking up the glove. The pledges of battle in the judicial duel. A prolonged application to this act of the old procedure of the archaic method of forming the obligation: *Gaudenzi*, "Dig. Ital.," see "Campione d'Armi," *Loysel*, 808-819 (bibl.); *Patetta*, "Ordalie," 1890 (bibl.); *Hildebrand*, "De Purgatione Vulgari," 1847; *Pertile*, V, 507; *Ducoudray*, "Orig. du Parl.," p. 375; *Pfeffer*, "Z. f. Rom. Philol.," IX, 29 (formalities of the judicial duel according to the heroic songs).

³ It takes place "per wadios et andelantos," even among the Franks.

⁴ Cf. *Wodon*, p. 99, 143. In his opinion the "wadiatio" is a partial payment, a symbol of the future prestation. He points out the opposition set up by the texts between the "wad-ium" and the "pignus," the pledge based on an agreement and the distraint by one's own authority. "If the 'wad-ium,'" says he, "had been a real pledge, it would have consisted in movables, and during a period when money was scarce would have been an ordinary payment; now, we assume that the debtor can make no immediate payment." This remark is correct, but there is nothing to prevent our assuming that the "wad-ium" consists of an object, such as a weapon, or a piece of clothing, of which one is not going to deprive oneself, and which one reserves the right of taking back. If the "wadiatio" had been a part payment, the "wad-ium" would always have been a piece of money, — at least, at the time when the payment usually took place in money. Furthermore, there are texts, such as the "Cap. add. L. Rib.," c. 3, in which the "wad-ium" is treated as a real pledge. Cf. *Kovalevsky*, p. 110.

⁵ *D. Vaissette*, III, no. 64 (in 971). Proofs: the defendant gives back the thing which is claimed from him "per guadium suum," i. e., "per festucam devites" (by the oath); "Form. ad Roth.," 232, 362. In the form of the eleventh century "Qualiter vidum salicha spondetur," the "festuca" and the "wad-ium"

the rather frequent use of the term "pledge and surety" proves connection between the two kinds of security.¹

§ 368. **Security.** — The necessity of a **security** in order to render the agreement binding in the very old law² is not only attested by the frequency of real pledges³ and suretyships;⁴ it appears from the very procedure of the "wadiatio," that shows the security and the principal engagement united to one another, as the "wadium" given by the debtor to the creditor passes immediately⁵ from the hands of the latter into those of the surety.⁶ The "festuca" is made use of in the same manner. The Edict of Chilperic, c. 6, bears witness at the same time to the strict necessity of the security and the possibility of avoiding the rule. The man who is accused is held bound to promise that he will submit to the proof of the boiling water; if he finds no one who will vouch for him, — that is to say, who is willing to serve as a surety, — then he must hold the "festuca" in his left hand and present it with his right hand to the creditor, thus becoming his own surety;⁷ or, perhaps he presents his right hand to the creditor to give his own person as a pledge ("semetipsum in wadio dare").⁸ This are not distinguished: "actores baculos vadimonii reis restituunt": *Canciani*, II, 476.

¹ "Cout. de Loos," I, 39: the man who is convicted of a crime must either take or give a pledge before the sun sets; this pledge may consist in a "pfennig"; but he must also give surety ("Anc. Cout. de Belgique").

² "Bai.," 15, 11; *Beaumanoir*, 34, 58; *Daresté*, "Études," p. 13, 113.

³ From this come the expressions: To pledge and to release ("engager" and "degager"); they say a pledge when they mean an obligation. Cf. pledge of services. Cf. pledges ("gages") of battle. "Wadiate pugnam," one reads in the Lombard formulæ. Anglo-Saxon law: "wed" and "borh" (pledge).

⁴ "Fermansa," a pledge with surety, in the South of France during the feudal period: *Franken*, "Pfandr.," p. 217; *Du Cange*, see "Firmancia"; "Bai.," 15, 11; "Ratchis," 5 ("causa quæ per wadia firmatur"). A guarantee is an obligation imposed upon the vassal during the feudal period. English formula: "pone per vadium et salvos plegios"; *Pollock and Maitland*, II, 183.

⁵ Excepting among the Lombards: three days: "Roth.," 360; "Liut.," 15.

⁶ "Sal. Extrav. B.," c. 6, ed. *Hessels*, p. 421; *Geffcken*, p. 284; *Brunner*, I, 303; *Esmein*, p. 35; *Wodon*, p. 61. Association of the "wadium" and the sureties ("fidejusseurs" in "Alam.," 36, 3; "Bai.," App., 4; "Roth.," 360, 366; "Liut.," 36 et seq., 61, etc.; "Fr. Cham.," 16, 48; *F. Turon*, 32; *Thévenin*, no. 96; *Pardessus*, "Dipl.," no. 424. In the Italian sources, suretyship ("fidejussio") is called "vadimonium" or "guadimonium."

⁷ *Wodon*, p. 141; *Geffcken*, p. 271 (bibl.); *Schroeder*, p. 291. If they had wished to reproduce the symbolism of the suretyship, the debtor should have handed the "festuca" to the creditor with his left hand and have taken it back with his right. If the debtor gives himself "loco wadii," what is the use of holding the "festuca" in his left hand and then offering it with his right hand? It was sufficient if he offered it with the same hand.

⁸ "Cap. leg. Rib. add.," c. 3. Cf. other texts cited by *Wodon*, p. 74. The "Cap. de Parl. Saxon.," c. 27, declares that the goods of the man who cannot furnish any surety shall be placed "in forbanno." We have here no doubt milder provisions than the old precepts; formerly the man who could not fur-

shows the transition from the secured obligation to the solely personal obligation.¹ Already the "fides facta" of the Salic Law only places the creditor and the debtor face to face with each other; there is no question in Title 50 of either pledge or surety; had there been any, undoubtedly some allusion would have been made to it. There must have been introduced into usage at an early time provisions against the debtor himself, — provisions which the death of the hostage or the loss of the pledge might justify.

§ 369. **Consequences of Formalism.** — Formalism has the effect of compelling the judge and the parties to adhere strictly to words and acts, leaving to one side questions of intent. Or, to speak more exactly, in a law which is formalistic the will has no legal existence except to the extent to which it is expressed by exact words; it is incarnated in its material expression;² one is bound only by that which one has said. But in return for this one is bound by everything that one has said. Once the word has been spoken, however imprudent, however "nice," it may be, it cannot be recalled. This is the true meaning of the German adage, "Ein Mann, ein Wort," and it is singular that what is only the expression of a rigid formalism should have been taken to be a proof of liberty. Let us liken to this the French gibe, "As bulls are bound by the horns, — thus people do foolish things through their words."³ He who through inadvertency has promised more than he wanted to, who has made a mistake in his statements, is taken at his word. He cannot go back on what he has said. Mistake, or even fraud, good or bad faith, are things which make no difference. The strict tenor of the act is the only thing which matters. This

negates any sureties and could not pay immediately fell into the power of the creditor, even if he were solvent. — As to the "Selbstbürgschaft" or giving surety for oneself, cf. "Cap.," 818, 6 (I, 282); *Loersch and Schroeder*, no. 180; *Gaudenzi*, "Atti d. Romagna," 3 *et seq.*, III, 25; *post*, "Suretyship."

¹ **Solidarity** is a guarantee analogous to suretyship. It is presented quite naturally in the case of a composition due from the fellow perpetrators of an offense; each one of them owes the whole composition, so that if one dies or becomes insolvent the creditor shall not be the loser thereby; but this is the only advantage that he gets; he only has a right to demand the amount of one single composition ("una res vertitur"), for that is the price of peace. The same result follows in the case where the fellow perpetrators of an offense had bound themselves by contract to pay "una, pariter, in solidum." But this situation was not very precisely provided for in the Barbarian law: "Roth.," 12, 138, 263; "Liut.," 107; *Heusler*, II, 259.

² As to the mental attitude and the legal language of the Middle Ages, see the German "Weistümer," the Spanish "fazanas," the proverbs: *Ida de Dühringsfeld*, "Rüc. de Proverbes," 1896; *Heusler*, I, 65; *Günther*, "Recht u. Sprache," 1898.

³ *Loysel*, 357. Cf. "Frib. en Br.," 39.

was the result of the use of solemnities¹ or symbols² and of formulæ sanctioned by custom; and as the existence of the former is beyond a doubt, so several indications justify the conjecture that essential words were not unknown to the very old law;³ from the time when the gesture was regulated it would have been a surprising thing had speech been free. It goes without saying that they were not very long in seeking release from the early strictness. Questions of intent were taken into account as far as contracts were concerned, just as they were in the case of offenses. If the barbarian laws do not seem to have taken any account of mistake, fraud seems already to have been a cause of the nullity of contracts.⁴ As a consequence, as we shall see, formalism was forsaken for its rival, writing;⁵ this began by being nothing more than a luxury and became an annoyance from which it was necessary to escape. From this time on, — that is to say, at least, from the thirteenth century, — the Roman influence and that of the canon law led up to the modern theories.

§ 370. **Formation of Contracts by Means of Writings.** — It is from the Roman practice that the employment of written documents comes, but during the barbarian period this custom did not persist purely and simply; it underwent an alteration, which was all the more natural as it had been prepared for a very long time. At Rome, in the law of the classic period, a writing establishing a contract was a simple means of proof. Thus, when a stipulation had taken place, the promisor found himself bound by virtue of the "solemnitas verborum," of the interrogation and the reply, and not at all by reason of the "cautio" which recited it. But, if theory was very firm upon this point, practice gave more importance to writing. From the time of Paul and Ulpian concessions were

¹ Frequently they had begun by being acts of a practical nature; time had consigned them to the curiosities of ceremonial. For example, the act of measuring the width of a road with a lance placed across the saddle of a horse is a simple means of ascertaining that the way is free and is sufficient for the passing of a horseman. "A fortiori" the presence of witnesses "ad solemnitatem."

² Symbolism, for example, in the placing of persons in the care of some one (the hand in the hand) in delivery, in renunciation by a widow of the property of her husband, and in the placing under a person's power by cutting the hair and the beard. In the thirteenth century this symbolism is in full decline: *Declève*, "Curiosités du Formalisme dans les Actes et les Contrats" ("Mem. Soc. Sciences Hainaut," 1891); *Viollot*, p. 602: the Jews of Metz, touching of the garment for the formation of a contract; "Ruth," iv, 7.

³ "L. Sal.," 50, 3: "adprehendat fistucam et dicat verbum." Formulæ of the Lombard Cartulary, oath. *Paul*, "Diac.," I, 13: "Sanciant [the Lombards] libertatem per sagittam, immurmurantes patria verba."

⁴ "Bai.," 15, 9; "Roth.," 230.

⁵ *Heusler*, I, 75, n. 7 (investiture "per adscriptionem").

made to it, especially as far as the stipulation was concerned. This fact was the more noteworthy because there was, so to speak, no contract which was not terminated by the clause, "rogavit promisit." The stipulation passed to the stage of a simple statement in writing, i. e. a merely formal recital; if a document declares that the debtor has made a promise, it is implied that the creditor has made a stipulation.¹ It is very probable, even before the time of Justinian, that the deed drawn up between parties who are present, and which mentions the stipulation, could not be attacked under pretext that the "verba" had not really been pronounced.² Thus the stipulation tended to be absorbed by the "cautio" upon which it conferred its efficaciousness.³ The "cartæ" of the Frankish period⁴ resembled Roman deeds;⁵ thus one invariably finds in them the final clause, "stipulatione subnixa."⁶ Convinced that the Roman law demanded that contracts should be reduced to writing,⁷ confusing registration at the "curia" with drawing up in writing,⁸ distinguishing imperfectly the question of proof from that of the existence of the contract,⁹ seeing in the "carta" the Roman stipulation, and attributing to it the "firmitas inconvulsa" of the latter,¹⁰ the framers

¹ *Paul*, 5, 8, 2; *Dig.*, 45, 1; 134, 2.

² "Inst. Just.," 3, 19, 12.

³ On the subject of this evolution *cf.*, besides Brunner and Stouff, *Girard*, "Manuel," p. 484; *Steuffert*, p. 23 (bibl. and discussion).

⁴ The "notitia, breve" or "memoratorium" serves especially for the purpose of finding the witnesses to the deed; for example, the purchaser of a piece of land has a deed drawn up establishing the fact that such and such a man sold it to him. In the "carta" it is the man making the deed who speaks (the vendor promises "ego per hanc cartulam venditionis trado, per hoc vinculum cautionis spondio prestitum redditurum," etc.).

⁵ *Brunner*, p. 131; *Esmein*, "N. R. H.," 1886, 1.

⁶ *Haenel*, "L. Rom.," *Wis.* p. 368 *et seq.*: "stibulacio omnibus pactis subjienda," Roman "cautiones" in *Girard*, "Textes," p. 738 *et seq.* Deeds of the Frankish period: *Thévenin*, "Textes," p. 261; *Rozière*, "Form.," n. 47, 51, 63; *Stouff*, p. 285. Observe the clause: "with the Law 'Arcadiana' or with the stipulation of the Law 'Aquila' which gives to all deeds their power." "Cart. de Redon," p. 260; *Rozière*, nos. 324, 245; *Brunner*, pp. 246, 225 ("subscriptiōni subnexa," a confusion of the stipulation and of the signing); *Stouff*, p. 273; *Pardessus*, "B. Ch.," 1840, 432; *Zoeppf*, "Att. d. deutsch. R.," II, 345; "Z. S. S. G. A.," 1881, 115; 1883, 113; *Del Vecchio*, "S. Claus. cum Stip. subn.," in the "Studi" offered to Schupfer. — *Cf.* after the revival of the Roman law: "Olim," III, 917, 78 (in 1314). Examples in England (Lombards), *Pollock and Maitland*, II, 181.

⁷ *Rozière*, nos. 122, 220. Other examples in *Stouff*, p. 280. The Church and even the Customs are often found to be connected with the Roman law. Thus practice seeks to justify itself by taking refuge in the high authorities.

⁸ *Stouff*, p. 282; "Cart. de Cluny," 725, etc.; "B. Ch.," 1860, 440.

⁹ "Bai.," 15, 12; *Stouff*, p. 284. — *Cf.* *Bracton*, f. 100.

¹⁰ "L. Rom. Cur.," 24, 2: "causa sine scripto et sine fidejussore per stipulam finire"; *Marculte*, II, 10 *et seq.*, "App. Marc.," 50 *et seq.*; *Karsten*, p. 180.

of deeds in the barbarian period thought that it was by means of the writing that the contract was formed.¹ One can bind oneself "per cartam"² just as one can by means of the "festuca" or the "wadium."³—Further, through Germanic influence it is not only the drawing up of the deed which is taken into consideration, but its final delivery to the creditor. The "traditio cartæ" establishes a formal act, all the more readily as the writing was far from being looked upon by the barbarians as it might be in our day.⁴ For the barbarian the writing is something suspicious; in these characters, which are hieroglyphics to him, he is always afraid of finding some trap. We say, "The paper allows everything"; thus a German lawyer in opposition to whom a royal diploma was offered in the twelfth century ridiculed those who presented this deed to him by saying to them that the pen of the scribe had the ability to write upon the parchment anything it pleased. The ignorance and distrust which accompanied it must have contributed not a little towards likening the "carta" to the physical symbols which were in use for the transfer of ownership and the formation of contracts. The Romans and the barbarians here unite in a common practice.⁵—Guarantees such as suretyship and the pledge are replaced in the charters by **penal clauses**.⁶

¹ "Wis.," 5, 4, 3; "Bai.," 15, 13; *Esmein*, p. 16. Cf. "Rib.," 37; "L. Rom. Cur.," 2, 29; "Ed. Théod.," 52. — Confusing of the contract and the charter which is called "traditio donatio," etc. (thus differing from the "notitia traditionis," etc.), which is thus known, "By this charter I sell," etc. *Rozière*, 368, 372: "spondeo per hoc vinculum cautionis." The charter is often placed in the same rank as the "festuca" or the "wadium," no doubt because it is just as efficacious; delivery is made by the branch or the charter, etc.: *Brunner*, p. 110; *Stouff*, p. 278; *Rozière*, 244; "Cart. de Cluny," nos. 100, 822, etc.

² Must we not see contracts "per cartam" in those pacts with the devil signed in the blood of the man who sold him his soul?

³ Cf., however, *Heusler*, I, § 19, II, p. 238 (the "carta" would not always take the place of the "wadium" and would not carry with it executory force).

⁴ Cf. as to the Roman period, *Huvelin*, "Tablettes Magiques," 1900.

⁵ In various places; for example, in England and in the South of Italy, they attached a piece of straw or a knife to the bottom of the deed.

⁶ Examples of these clauses in *Thévenin*, "Table," p. 260; *Sjögren*, "Conventionalstrafe," 1896 (review in "Z. S. S.," 1896, "G. A.," 176; 1897, "R. A.," 300); *Bluhme*, "Bekräftigungsformeln," *Bekker's Jahrb.*, 1859; *R. Loening*, "Ueber. Ursprung u. Bedeut. d. Strafklauseln," 1875 (reprinted in "Vertragsbruch," p. 534); *Heusler*, II, 238, 241; *Stobbe*, "Handb.," § 174; *Pertile*, IV, 503. They became more scarce in the course of the eleventh century. *Beaumanoir*, however, devotes his c. 42 to them. In his time they must have served the purpose of indemnifying the man who was successful for the costs of the suit, for in the lay court the loser did not have to pay the costs (33, 1, and 43, 40), as took place after the Ordinance of January, 1324, "Victus victori" (cf. "Et. de St. Louis," I, 93; "Olim," III, 2, 1068; "Ord." of Dec., 1254, 29; "Code Hermog.," 5, 3), and as was already customary in the Courts of the Church: *Loyse*, 859.

Already frequent at Rome, the latter assumed in the documents of the Frankish period an entirely new importance.¹ They represent the pecuniary composition due in the case of every offense. For greater security, the treasurer is made an interested party, "sociato fisco"; he receives a part of the "pœna" and demands the payment of the whole of it, rather as he compels the perpetrator of the offense to pay the composition, a part of which goes back to him. Finally, imprecations and maledictions, true spiritual penal clauses, are added to the deed to corroborate the other sureties.²

¹ "L. Alam.," I, 2.

² *Thévenin*, Table, p. 261; *Giry*, p. 563.

TOPIC 4. CONTRACTS. FEUDAL PERIOD

§ 371. Persistence of the Law of the Frankish Period.	§ 375. The Promissory Oath.
§ 372. Contracts in Re.	§ 376. The Rule "Solus Consensus Obligat."
§ 373. Earnest Money.	§ 377. Contracts in English Law.
§ 374. Faith-Pledging. Blow with the Palm of the Hand.	§ 378. Obligations by Means of Writing and Written Proof.

§ 371. **Persistence of the Law of the Frankish Period.** — The law of the Frankish period still exists in its essential characteristics during the first centuries of feudalism; but from the thirteenth century on it is altered and disappears in order to give way to modern institutions. Various causes worked in this direction and contributed towards this result: the influence of religious ideas, the more energetic part played by the State, which allows of more liberty in the mechanism of contracts, economic changes which make of this liberty a need, and, in a general way, forces which lead legislation towards the Roman law.

§ 372. **Contracts in Re.** — The books of Customs of the thirteenth century still contain traces of the necessity of the performance of something for the formation of certain contracts.¹ Thus, according to the Custom of Montpellier of 1204, sale, that type of the Roman contract of mutual consent, can only be formed "re," or by means of the blow with the palm of the hand: "emtio non valet sine palmata vel sine solutione pretii particulari vel universali vel sine rei traditione" (Art. 100). The Assizes of Jerusalem, Court of the Citizens, c. 27 *et seq.*, lead one to understand that the parties can free themselves of their obligation as long as one of them has not performed; once performance has been begun, for example, if the buyer has paid one sou of the price of the sale, this is no longer possible.² The "Livre de Jostice" sets forth that in a case of non-performance in sale, letting, and lending, the debtor frees himself by means of his oath; it is otherwise if he has received the thing ("if the chattel was there"); the duel at

¹ *Glanville*, 10, 14; *Glasson*, "Inst. de l'Anglet.," II, 307; *Pollock and Maitland*, II, 191 *et seq.*; *Beaumanoir*, 34, 18, 20; 36; 37; 38; "Jostice," p. 166; *Boutaric*, I, 26, 59. Responsibility of the debtor, for example, of the innkeeper: *P. de Fontaines*, p. 211; *Beaumanoir*, 43, 41; *Hermann*, "Mobiliary.," p. 129.

² Rule: "Quod non fecit venditio reconciliat tarditio": *Esmeyn*, p. 22; *Marnier*, "A. C., Picardie," pp. 114, 122.

law is imposed upon the parties.¹ The uncertainty of our old books of Customs in the case of two successive sales to two different persons bears witness to the wavering of practice between two conceptions, — the old one according to which the sale was a real contract and the delivery settled the right of the purchaser, and the new one which makes of sale a contract by mutual agreement, and which is able to attach less importance to delivery.² There are none of them, until the time of the maxim, "To give and withhold is invalid," that do not bear witness to the tenacity with which the old idea of the necessity of the "res" for the formation of a contract maintained some of its positions.³ In the eighteenth century Blackstone, speaking of sale, II, 30, is not very far from the old theory. Moreover, most of the time, contracts "re" are concluded by the giving of earnest or established by writing, that is to say, they come within the class of acts with which we shall be specially concerned later on (*cf. infra*, "Consideration").

§ 373. **Earnest Money.**⁴ — Earnest money, which was in use in certain old legal systems, — especially in Greece⁵ and at Rome,⁶ — consists in a sum of money, or in some object, such as a ring,⁷ which one of the parties, the buyer or the seller, gives to the other at the time of the formation of the contract. The using of earnest money is almost entirely limited to sale,⁸ to letting, and to a few similar contracts.⁹ In the Roman law the giving of earnest money was merely of secondary importance, for it was simply considered as a sign — and this was not the only one — of the ex-

¹ "Jostice," 2, 16, 8 (p. 101); 14, 8 (p. 98); 16, 7; 8, 5, 5 (p. 171); 4, 4 (p. 125). — See the explanation of these texts in *Franken*, p. 75. "Sormise" there means, according to this learned man, a simple action, "schlichte Klage," without duel. A mere presumption, according to *Esmein*, p. 49; see *Godefroy*.

² "He who wishes to buy must pay": *Loysel*, 408; "L. d. Droiz," 513, 565, 673; *Desmares*, 414.

³ *Post*, "Gifts."

⁴ "Arra." The word is of Semitic origin. *Leonhard* in the "Realencyclop." of *Pauly*, ed. *Wissowa*, see "Arra," 2, 1219; *Post*, "Grundr.," II, 619.

⁵ *Caillemet*, "R. de Lég.," 1871, p. 661; *Beauchet*, "Hist. du Dr. privé Athén.," IV, 421.

⁶ *Girard*, "Manuel," p. 539.

⁷ *Dig.*, 19, 1, 11, 6; 14, 5, 5, 15; "Liut.," 30.

⁸ If earnest money is also given in the case of betrothals it is because the contract began by being a sale. *Cf.* Roman Customs: "Cod. Just.," "de spons.," 5, 1; *Papien*, 27; "Wis.," 3, 1, 3; 6, 3; "Et. de St. Louis," I, 128 (earnest money of marriage). The ring and the pieces of money used in the Christian marriage service had no mystical meaning; they were simply means of forming the contract: *Greg. Tours*, 4, 41; 10, 14; *Sohm*, "Eheschl.," p. 23. In the sources of the Spanish law the earnest money of marriage is understood to apply to the increase of the marriage portion which is determined upon at the time of the betrothal: "F. Real," 3, 2.

⁹ "Const. du Chât.," 26; "L. d. Droiz," 510; *Stobbe*, "Hand.," § 174.

change of assent; if it were lacking, the contract was none the less valid.¹ The juriconsults give to earnest money no other function. But the provincial laws make a means of retraction out of it, so much so that the Lower Empire contrasts the "arrha pœnitentialis" with the classic "arrha confirmatoria"; the man who has given earnest is authorized to retract upon condition of losing it; the man who has received earnest, on condition that he restore double its amount.² In the Frankish period, when earnest money was still being made use of, and in the early part of the feudal period, it occupied a sort of intermediate place; it was a means of rendering agreements compulsory which, by themselves, would not have been so.³ In the beginning it must have been a means of retraction, or, to put it better, a true pledge.⁴ It must be something of considerable value (pecuniary or moral) which the buyer has to give to the seller;⁵ the latter, who was liable because of something done by the buyer to lose a good opportunity to make a sale, was found to be damaged in advance. Conversely, the seller who did not keep his promise indemnified the buyer by restoring him twice the amount of the earnest money. In the legal system of the Frankish period and the feudal period earnest money consisted of a small sum, a sum too small for one to see therein any damages. It becomes a sort of "wadum,"⁶ serving to bind the parties. Thus, in the case of marriage formed by means of a payment, the "pretium," which was at first very high, was reduced to a very small sum, to a symbolical price. Then the giving of earnest money degenerates into a mere formality.⁷ If it had

¹ *Gaius*, III, 137; cf. "L. Rom. Wis.," *Gaius*, II, 9, 14; *Papien*, 35, 6. "Petrus," II, 14, demands for the formation of a sale neither earnest money, nor a blow with the palm of the hand, nor wine to seal the bargain; a mere meeting of the minds is sufficient.

² *Esmein*, "Mélanges," p. 413; *Girard*, "Manuel," p. 539.

³ *Esmein*, p. 14 (explaining "L. Wis." and "Bav."). Cf. "nummi testes" in *Pérard*, "Pièces . . . Hist. Bourg.," p. 107.

⁴ Cf. "erres," "errements" ("Code Proc. Civ.," 349; *Beaumanoir*, 30, 50, etc.); *Franken*, p. 64. According to *Laurière*, "Et. de St. Louis," 241, ed. *Viollot*, the ways of proceeding became the pledges of the process; whence by an extension comes the meaning acts of procedure: "Const. du Chât.," 50; see *Ragueau*, *Ferrière*.

⁵ "Tilgaef," the Scandinavian earnest money: *Amira*, "O. R.," I, 321, 330; cf. *Girard*, *loc. cit.*

⁶ But, as it consists more often than not in a sum of money, it is readily understood that it was used only in matters of sale and letting, as at Rome; it is a part of the price, a payment on account, which degenerates into a "wadum." In the giving of surety and elsewhere earnest money is not met with.

⁷ Controversy as to the juridical nature of earnest money. Some see therein a partial payment and make of the contract accompanied by earnest money a real contract; others look upon earnest money rather as a sort of "wadum,"

been given, the parties are bound, without being able to retract; should it not have taken place, they are not bound and the contract has not been formed. Sometimes the earnest money is deducted from the price, and this is what always takes place if it is at all high; sometimes it is dedicated to a pious use, such as placing the act under the protection of the Divinity: this is **God's pence**;¹ or else it serves to buy wine, which the parties drink together: this is the **wine to seal the bargain**.² It is clear,

and the contract becomes formal. *Heusler*, II, 253, opposes both of these points of view. According to him, the earnest money has no binding function: it is a counter prestation in return for a renunciation; the vendor who receives the earnest money gives up the right to alienate his property to other people until the expiration of the period agreed upon; it has been sought to bind him because he only wants money, and it matters little from whence this money comes; the purchaser is only compelled to pay the price if there has been "wadiatio"; he is free, but he will not abuse his freedom, for if he buys it is because he has an interest in doing so; he would not readily find an object of the same value at the same price; it has not been necessary to take any precaution against him. The incomprehensible passage of the "L. Wis.," 5, 4, 4, *cf.* "Cod. Euric," 297, furnishes arguments in support of this meaning. *Heusler* admits, moreover, that the law soon became modified, and that the earnest money fulfills the function of making a contract binding upon both parties; the "wadiatio" of the price seems superfluous: "Bai.," 16, 10. — This system does not explain whence comes the custom of a counter prestation in order to bind the vendor; it is easier to see in the earnest money a proceeding serving as a transition between the real contract and the formal contract; it does not seem to us to be demonstrated that changes of will are more to be feared on the part of the vendor than on the part of the purchaser. The "Cod. Euric," 297, speaks of a "prætium" which ought to be corrected, according to *Heusler's* opinion.

¹ "Denarius Dei," "Spiritus sancte," "Gottspfennig," "caparra" (Ital.). See *Du Cange*, Statutes of Arles, 1162-1282, 191 ("in honore Dei et candelæ b. Trophimi"); "Salon," 1293 (*Giraud*, II, 254); "Avignon," "N. R. H.," 1877, p. 593; "Alais," 101; "Montpellier," 100; "Marseille," 3, 6; *Beaumanoir*, 34, 60; *Desmares*, 178; Italian texts in *Pertile*, IV, 473; *Heusler*, II, 253; *Franken*, "Pfandr.," p. 61, n. 2; *Schroeder*, p. 716. Nothing proves that God's pence was at first given by the purchaser of Church property in order to recognize the right of the Church over this property. In Paris, where it is still paid by the lessee in case of the verbal lease of an apartment, it has indeed changed its object; the "concièrges" have turned it aside to their own profit: *Dalloz*, "Répert.," see "Louage," no. 86.

² "Mercipotus," "Weinkauf," "Litkauf." "Petrus," II, 14; "bibaria vini," a usage "pluribus locis": *Loysel*, 415; see *Ragueau*, *Grimm*, pp. 191, 608; *Holtaus*, p. 2057; *Warnkoenig*, II, 565; *Walter*, § 346; *Stobbe*, § 174; *Kraut*, "Grundr.," § 124; *Heusler*, II, 255; *Franken*, p. 61; *Brunner*, II, 392; *Maurer*, "U. d. Gerichtl. Weinen," 1846; *Pertile*, IV, 473; *Huber*, IV, 850, 834 (Swiss Customs of Morat), "Diesse": two-thirds of the "Trinkgeld" ("pourboire") at the expense of the purchaser, one-third at the expense of the seller. A pretext for copious libations which should have been prohibited. The wine to seal the bargain is often consumed by the witnesses and the parties together ("vinum testimoniale"); this is a means, like the small presents that are given the witnesses, to be sure that they will bear witness to the existence of the contract; a means the employment of which can be readily understood at a period when there was no such thing as legal compulsion to make them give their testimony in court. *Cf.* with various meanings the authors cited. "Méon," 4, 117 (drinking the wine of the blow of the hand). *Esmein*, "N. R. H.," 1887 (wine of appointment, a Russian custom: the meal together is the formality which seals

moreover, that the day when contracts of sale and letting are once more formed by consent, earnest money regains its twofold part of a means of proof, of consent, if it is a small sum, and of a forfeit¹ or penalty agreed upon if it is a larger sum of money.²

§ 374. **Faith-Pledging. Blow with the Palm of the Hand** ("palmata," "percussio manus"). — The employment of the "festuca" and the "wadium" is given up in the feudal period;³ for these formalities are substituted the blow with the palm of the hand,⁴ and the oath.⁵ The formal contract itself changes its character; it loses self-executory force because the law is in the habit of intervening more and more in its performance; there are more fines against the man who does not heed the summonses of his creditor, and they appear like an abuse and an excess of harshness; the pledge and the giving of surety are no longer an indispensable accessory; one does not often become one's own surety any more, one is limited to pledging one's faith. The pledging thus entered into is adaptable to every kind of obligation.⁶

The blow with the palm of the hand has not entirely disappeared even at the present time; it is still practised in our markets for the sale of domestic animals; the two parties who have come to an agreement strike palms, or, to be more exact, the buyer strikes⁷ with the right hand⁸ the palm of the right hand of the seller.⁹

a contract). *Schroeder*, p. 361: "Urkundsgeld," retribution of the witnesses, a very widespread custom: *Post*, "Grundr.," II, 621 (Yucatan); *Osenbrüggen*, "Studien.," 383.

¹ "Ass. de Jérus.," "C. des B.," c. 27 (*Franken*, p. 68; *Esmein*, p. 21); 163: "repentailles"; "Montpellier," 101; "Alais," 41; "Bayonne" (thirteenth century), 118, 1; *Beaumanoir*, 34, 62; cf. 49; "Jostice," 10, 14, 1; "L. des Droiz," 121.

² *Denisart*, *Guyot*, see "Arrhes" (bibl.); *Pothier*, "Vente," no. 490; *Britz*, p. 879.

³ Traces in Italy in the twelfth century; *Pertile*, IV, 472.

⁴ "Handschlag," German; "handsale," English: *Blackstone*, II, 30.

⁵ Oath and blow with the palm of the hand from the time of the Merovingian period: *Gregory of Tours*, "Hist. Franc.," 5, 3; "De Gloria Confess.," 68.

⁶ As to the character of this contract, cf. *Heusler*, II, 248; *Stobbe*, "Handb.," III, 73. A formal deed? an abstract promise? See as to the Frankish period: "Roth.," 366, and Com. on 367; "Ratchis," 5; "Liut.," 15; "Sal.," 50, 1. Contests as to the amount of the debt and as to the "causa debendi."

⁷ "Féir la paumée" (to strike with the palm of the hand): *Grimm*, 605; *Azon*, "Summa in Cod.," 2, 3: "dicitur (pactum) a percussione palmarum" (a usage which he attributes to the "veteres").

⁸ It is also with the right hand that one takes an oath. As to the symbolism of the hand: *Grimm*, 138; *Du Cange*, see "Dextra"; *Puntschart*, p. 355; *Kowalewsky*, 114: "I give you my hand in the name of God"; *Esmein*, p. 98 (classical antiquity).

⁹ In German law the pronouncing of a formula ("ich gelobe") is added to this act: *Puntschart*, p. 362. Cf. *Amira*, "O. R.," II, 289. The essential words have, it seems, completely disappeared from French law. Witnesses take part

This usage is very ancient, because it is already spoken of in the "Petrus," 2, 12, together with earnest money and the wine to seal the bargain; certain Customs make of this a condition of the validity of the sale, contrary to the Roman law, to which the "Petrus" adheres. It does not appear, moreover, that the blow with the palm of the hand was restricted to the case of sale; it may be applied to other contracts.¹ The clasping of hands, "*mutua manuum complexio*,"² seems to be equivalent to the "*percutio manus*."³ How are we to account for this popular usage? To-day one would see in it only a very simple means of manifesting to the eyes of everybody, parties and third parties, the concluding of the bargain; up to this point there had only been conferences; at this moment the transaction is terminated;⁴ thus the blow with the palm of the hand would be almost the same thing as the bringing down of the hammer by the auctioneer at public sales.⁵ But, if such is indeed its significance to-day, it seems as though it ought to be explained in some other manner with relation to the past. This is a popular practice derived from more ancient customs, the placing of the hand within the hand and the oath. In placing one's hand within the hand of some one else, one places oneself under his authority and in his dependence. Thus homage is done "*per manus porrectionem*."⁶ It is not astonishing that the debtor should

ordinarily in the act, but it is not an absolute necessity under any of these legal systems. It is not the same in the Scandinavian law, where the presence of witnesses and the publishing of contracts is indispensable: *Amira*, "O. R.," II, 320. Cf. Italy, *Pertile*, IV, 469; *Salvioli*, "Public. d. Vendita," 1895; *Daresté*, "Etudes," p. 315; usage in Denmark of publishing contracts at the "ting."

¹ "Montpellier," 100: "*emtio non valet sine palmata*"; "St. de Marseille," 3, 6; "Bayonne," 118, 1 (in *Balasque and Dulaurens*); "Charroux," 1170, Art. 14, and 1247, Art. 40; "Cout. de Gorze," 7, 3, 4; *Beaumanoir*, 44, 38, 40; "Const. du Chât," 84; "L. des Métiers," p. 17; *Du Cange*, see "*Palmata*," *Ragueau*, see "*Palmée*." — "Jostice," 2, 16, 3 (5 "sols." a blow of the hand for a waiver); 1, 2, 7.

² *Méon*, "Fabl.," I, 179; *Glasson*, "Inst. de l'Anglet.," III, 234 (Wales); "Saga de Nial," 71: "*dextris datis et acceptis*"; *Grimm*, 605: mere contact with the tips of the fingers, "*stupfen*," "*doppen*." Cf. *Hatzfeld*, "Dict."

³ A trivial and genteel civility has taken possession of this to extract from it our commonplace handshake. Thus do our institutions end.

⁴ *Sunesen*, 17, 1: (letting) "*solo consensu celebratur, sed impune rescinditur, donec percussione manus unius in manum alterius roboretur*." The "Livres de Jostice," 2, 16, 3 (p. 100), allows a man to free himself, even when there has been a blow with the palm of the hand, upon condition that he swear that he cannot carry out his promise and that he pay a fine. Cf. "Alais," 41, in "*Olim*," III, p. 1474.

⁵ In some texts "*palmata*" is synonymous with earnest money: *Pertile*, IV, 472; *Esmein*, p. 27, sees in it rather an imitation of the payment of the price and a fictitious delivery. But the ceremony of the blow with the palm of the hand scarcely accords with this interpretation: *Glasson*, VII, 590.

⁶ *Brunner*, II, 270. The kiss of peace is here met with as in other contracts: *Pertile*, IV, 472.

have put his hand into the hand of the creditor, as though to give himself as a pledge.¹ In this symbolical act there has been seen a sort of secularized oath, which was taken neither on the relics nor on the Gospels, and by which one did not call down upon oneself the Divine anger, but which one respected just as much as a true oath.² As it is forbidden to swear in vain, voluntary recourse is had to this; one pledges one's faith just as one became one's own surety formerly;³ this sort of act is undoubtedly what the books of the Middle Ages designated by the name of *faith-pledging*,⁴ *sworn faith*,⁵ and which the Romanists called the *stipulation*.⁶

§ 375. **The Promissory Oath**, which sprang from the old usages⁷

¹ The "Treugelöbniß" of the German law is concluded by an oath or by giving one's word of honor, and by carrying out the "Handsclag." In Saxony one raises the hand "curvatis digitis": *Heusler*, II, 245; *Puntschart*, p. 306. Cf. as to Scandinavian law, *Amira*, "O. R.," I, 290; II, 289; and as to Anglo-Saxon law, *Edward*, 2, 6; "Cap.," 803, 3.

² *Beaumanoir*, 34, 38, "jura" or "fianca." Then he asks himself if those who have made an agreement by means of their fealty or by an oath and have not carried out their promises can be held as perjurers: "Ét. de St. Louis," I, 31, 67; "Ass. de Jérus.," "C. des B.," 162: "Jurer aïer ou plevir une femme," means to become engaged to her.

³ They say: to give one's word, to pledge one's faith ("fides plivita," "Montp.," 69), to engage, to promise: "Chanson de Roland," 403; *Beaumanoir*, 34, 9; 34, 60; "Jostice," 178, 181; "Const. du Chât.," 26; "L. des Métiers," p. 77 (ed. *Depp.*), to engage one's faith. *Supra*, "Betrothals": *Esmein*, p. 72; *Franken*, p. 64, n. 2: to promise solemnly and in the same way as when one gives earnest money. Numerous deeds (cited by *Puntschart*) where one reads: "fide interposita promittere, fidem dare ore et manu," etc.: "Loven" in the "Sachsensp.," I, 7 ("Gelöbniß," "Treugelöbniß," cf. "Erbenlaub") has the same meaning, i. e., to engage one's faith, to make oneself responsible: *Stobbe*, § 174: "per fidem nostram christianam et honorem nostrum militare" (in 1394). England: to engage one's Christianity: *Du Cange*, see "Christianitas."

⁴ *Beaumanoir*, 38, 15; 11, 47, etc. (*Salmon*, "Gloss."): *Boutaric*, I, 36, 42; *Desmares*, 154; *Lacurne de Sainte-Palaye*, see *Godefroy*, "Trèves et Assurements"; "Ét. de St. Louis," I, 29, 31, 111; *Bigelow*, "Hist. of Proced.," App. 13.

⁵ *Esmein*, p. 65; *Pollock and Maitland*, II, 188; *Puntschart*, 486; *Amira*, "Recht," 188.

⁶ According to *Puntschart*, the German "Treugelöbniß" is not the binding contract itself; it is an act apart, intended to make the debtor responsible; it may even happen that it serves merely to engage the responsibility of a surety or of a "Treuhänder" (p. 406, Vol. II) to the exclusion of the debtor (p. 438, Vol. II). It seems to us that this theory is a little exaggerated.

⁷ Treaties sealed by sacrifices and imprecations: *Tacitus*, "Germ.," 24 (fides). On this text cf. *Puntschart*, p. 487. Perhaps the "fides facta" of the Salic Law was not given without an oath, or was only a sort of oath after the manner of the Roman stipulation. Under the Lower Empire the oath had made for itself a certain place in legislation ("Cod. Just.," 2, 42, 3; 2, 4, 41; 4, 30, 16; "Nov.," 74, 5); the "Auth. Sacramenta Puberum" of Frederick I appears rather as the complement of the imperial legislation than as a radical innovation: "Cod. Just.," 2, 28, 1. — Cf. Mussulman usages "Mille et Une Nuits," transl. *Mardrus*, IX, 11, 85 (to recite the preliminary Fatiha of the Koran in order to seal a pact).

and corresponded to Customs,¹ was instituted by the canon law.² Two **conditions** are required, as a general thing, for the regularity of the oath: 1st. The *pronouncing of a formula* by which one calls God to witness one's undertaking and binds oneself to Him to carry it out; the terms vary: one often says, "Per Deum juro et sic me Deus adjuvet," or, again, one swears by the Gospels, the saints or the cross, — that is to say, by a sacred thing.³ — 2d. *Certain gestures* in connection with the verbal declaration. The latter should be pronounced with the right hand resting on the relics or on the Gospels ("juramentum corporaliter præstitum")⁴ or, at least, with the right hand extended or raised.⁵ The **effects** of the oath consisted in a principal obligation towards God, and in a secondary obligation towards the creditor.⁶ One might demand the carrying out of the latter before the Courts of the Church.⁷ Just like the Roman stipulation, this was a unilateral and formal contract, one which was valid without any consideration,⁸ and which could be applied to every kind of object, to create a new obligation (*promissory oath*) or confirm a pre-existing obligation (*confirmatory oath*). If the promisor pledged himself to God, the debt could not be lost by prescription,⁹ which was a protection for the creditor. But to make up for this, the engagement was strictly personal because of its religious character; so that it

¹ "One could not affirm anything in the Middle Ages without reinforcing one's affirmation by an oath": *G. Paris*, "Extr. de la Chanson de Roland," 1887, p. 279; "Mélusine," III, 156, 566: oaths and profanity; for example, "ma foi," "ma fi" (my faith), etc.; the oath of St. Louis, according to *Joinville*, V, 766; "The faith which I owe you." — *Cf.*, however, *Pollock and Maitland*, II, 187 (prohibition of swearing in vain and its effects).

² Decree of Gratian, 2d p., Cause 22. Dig. X, 2, 24; "Sexte," 2, 11. See the commentaries on these texts and the commentaries like those of Innocent IV, Hostiensis and Panormitanus. Respect for the oath, "Capitul.," 789, 63.

³ *P. Lombard*, "Sent.," III, 39; F. "Glose" on c. 1, C., 22 q. 1; *cf.* c. 11 and 12. — The simple "fides promissa" is equivalent, according to the old canonists, to the oath: *Hostiensis*, "De Jurej.," p. 185. In the sixteenth century, *Covarruvias*, "Op.," p. 249, no longer admits it. — *Esmein*, "Contrats," pp. 103, 99 ("fides corporalis, manualis").

⁴ From the Roman period on.

⁵ "Cod. Just.," 2, 28, 1 ("per Jovem lapidem?"). — In order to see how far formalism goes, *cf.* "Roisin," p. 32 *et seq.* (one loses one's case if one does not hold one's thumb pressed against the palm of one's hand or if one moves one's hand). — *Supercheries*, *cf.* c. 10 and 11, C., 22, q. 5 ("Glose"). Anecdote as to the oath given by Harold to William the Conqueror.

⁶ *Panorm.*, on Dig. X, 2, 24, 1; "Decis. Capellæ Tolosanæ," 182, 7: "Deus recipit obligationem in favorem partis; remittente ergo parte et ipse Deus remittit."

⁷ *Gui Pape*, "Q.," 190; *Bartole*, s. 1, 56, Dig., 46, 1.

⁸ *Innocent IV*, on c. 6, Dig. X, 3, 7, p. 370. *Cf.* "Vow."

⁹ "Decis. Capellæ Tolos.," p. 183; *Benedicti*, see "Testam.," III, no. 41.

did not descend to one's heirs.¹ It was sufficient if one had attained the age of discretion for one to be able to pronounce a valid oath: those minors of twenty-five years who had attained puberty, according to the Authentic, "*Sacramenta puberum*," were capable of binding themselves by an oath.² Fraud annulled the act, but not violence ("*coactus voluit*"); as far as mistake was concerned, it was doubtful.³ Thus we see by this means that the efficaciousness of the oath was not easily questioned. The canonists brought to bear upon it an important restriction drawn from its religious character; they laid it down as a principle that one was not obliged to keep an oath if its carrying out placed in danger the safety of the soul of the man who had taken it: "One is not obliged to keep an oath made to the devil," says the popular proverb.⁴ As soon as the safety of the soul is no longer involved the oath still binds, even if it is made in violation of the civil law⁵ or the canon law;⁶ for example, the oath of the woman who binds herself for another, contrary to the Velleianum Decree of the Senate, the oath of the woman who has a marriage portion to abide by the alienation of the real property forming a part of the marriage portion, the oath to abide by a gift between spouses,⁷ etc.⁸ Thus applied, the canonic theory had serious consequences,⁹ especially as far as the **confirmatory oath** was concerned. The obligation to which it was joined was sometimes valid, and then, as a consequence of the oath, the promisor came under the jurisdiction of

¹ *Panorm.*, on 14 Dig. X, "de jurej.," no. 3. Cf., however, *Seraphinus*, p. 305. — Validity of the oath by proxy: *C.* 33; Dig. 63; Dig. X, 2, 7, 6; *C.* 1, § "Verum," VI, 3, 16; *Covarruvias*, "Op.," I, 262 *et seq.* — Transmissibility of assets.

² Cf. "Glose" on c. 10, Dig. X, 4, 1; *Covarruvias*, "Op.," I, p. 404 (one who has not attained puberty "*doli caper*"). — *Innocent*, c. 3, Dig. X, "de voto" (oath of the "*filius*" or of the "*filia familias*"). *C.* 15 and 19, *C.* 22, q. 4. Cf. "Numbers," xxx, 3. — *Pertile*, IV, 496.

³ *Panorm.*, on c. 28, Dig. X, "De Jurej.," no. 3. — Dig. X, 2, 24, 2, 8, 15 ("Glose"); *Seraphinus*, p. 475. — As to the three things accompanying the oath, — "*justitia, judicium et veritas*," — cf. *Esmein*, p. 266. — The confirmatory oath was only valid if it were free from all defects: *Esmein*, p. 331; "Auth. *Sacramenta Puberum*"; *Beaumanoir*, 34, 38, 39.

⁴ *Gratian*, c. 23, *C.* 22, q. 4; Dig. X, "De Jur.," 8, "Glose"; *Chaisemartin*, p. 258; *Beaumanoir*, 38, 16; 34, 24.

⁵ But not in violation of good morals and natural equity: *Sexte*, "De Reg. J.," 59. Cf. Public Order in the existing law; "T. A. C., Norm.," 4 (alienation of dower).

⁶ For example, the oath to pay interest, for he who takes this oath does not commit a sin in carrying it out: Dig. X, 2, 24.

⁷ *Panorm.*, on c. 28, Dig. X, "De Jur."

⁸ Renunciation to future succession, forfeiture clause, etc.

⁹ The Courts of the Church passed upon the validity of the oath; *Gui Pape*, "Q.," 199.

the Courts of the Church, the obligation ceased to be subject to prescription¹ and to be the subject of a set-off;² it had to be carried out in kind, if it consisted in an act.³ Sometimes the obligation was void, and in this case a distinction was drawn,⁴ and there were suppositious cases where the oath validated an obligation, and others in which the contract remained void although the oath was valid; but no agreement could be reached in these supposed cases, in spite of an attempt at systematizing which was made by Bartolus.⁵ In order to deal with the abuses resulting from the employment of the oath, the canonists made use of three means (cf. "Exc. doli, in integrum restitutio") at Rome: 1st. *Theory of implied conditions*: the oath is only binding if matters remain as the promisor had foreseen that they would (for example, if he does not become insolvent, or a marriage portion is promised on condition "si nuptiæ sequantur"), or, again, if the other contracting party carries out his promise ("non servanti fidem non est fides servanda").⁶ — 2d. *Intervention of the ecclesiastical judge* in order to compel the party who has received the oath to release the party who had made it when there would be vexatious consequences (for example, a promise of interest).⁷ — 3d. *The ecclesiastical superior*, the pope or a bishop, has the right to release every person from his oath if there is a just cause for so doing.⁸ The canonic theory of the oath had succeeded in being accepted by the secular courts; but it had the twofold defect of taking away persons from under their jurisdiction for the benefit of the ecclesiastical courts,⁹ and of allowing of the evasion of the prohibitions of the laws. There was some thought of forbidding

¹ "Decis. Cap. Tolos.," q. 221; *contra*, *Gui Pape*, "Q." 199.

² It was perjury not to carry out an oath. The penalty for perjury under the Carolingians was the loss of the hand. Afterwards it was disgrace in law or in fact, and arbitrary punishments: see *Ferrière*, (bibl.); "Ord." of 1269, 1273, etc.

³ *Panorm.*, Dig. X, 2, 24, 16.

⁴ *Panorm.*, Dig. X, 2, 24, 28, no. 8; *J. Faure*, "Ad. Inst.," I, 8, no. 10.

⁵ On "R." 56, pr., D., "de fidej.": the oath cannot strengthen contracts that are contrary to good morals, to the public interest, or void by reason of a defect in form; it can strengthen those that are prohibited in the interest of individuals, especially the debtor, or, again, those that are furnished with an action, such as the stipulation for another: *Masuer*, XI, 16.

⁶ Dig. X, 2, 24, 3. A preventive oath, which invalidated those that one might take afterwards: *Hostiensis*, p. 187. Cf. Mental restrictions of the casuists.

⁷ Dig. X, 2, 24, 1, 20; 5, 19, 13; "Jostice," p. 329.

⁸ Roman texts cited by *Hostiensis*, fo. 185 (Dig., "ad municip. l. imperatores"); *Gui Pape*, "Q." 140, 124.

⁹ Complaints made by the Diet of Worms, 1521; *Schilter*, "De Libert. Eccles. Rom.," p. 902.

notaries to append the oath to contracts.¹ The determination which was arrived at was to give the king the right to release from the oath² and "to declare null and void every oath which was contrary to a provision of the law, because this was contrary to good usage."³ By this means the promissory oath lost almost its entire usefulness.⁴ The canonic theory had at least contributed towards causing a respect for one's given word to enter into Customs and to destroy certain legal prohibitions which had become useless.

§ 376. **The Rule "Solus Consensus Obligat."**—The Roman law was not so far removed from this rule as would seem, with its contracts of mutual agreement, its lawful pacts (gift), and pretorian pacts, its stipulation reduced to nothing more than a clause in written deeds. Moreover, Pre-Glossators and Glossators upheld the old principle. There is no civil obligation "solo consensu."⁵ It is with the canon law that the impetus in the opposite direction started.⁶ For the theologians, the man who does

¹ *Fournier*, "Offic.," p. 87; "Ord." of 1302, 86 (I, 344); "Songe du Verg.," 1, 2, c. 175; *Benedicti*, see "Duas habeus," no. 247; *Glosson*, VII, 593. Italian Statutes of the thirteenth century: *Pertile*, *loc. cit.* In the sixteenth century an oath is looked upon as an accessory part of the contract; consequently, it is for the lay judge to take cognizance of it; the ecclesiastical judge only passes upon perjury. The "Ord." of August, 1539, Art. 1; *Beaumanoir*, 34, 38, cf. 11, 32, makes no mention of the competence of the Courts of the Church.

² *Chassaneus*, on "Bourg.," p. 653. The Chancery began, in the delivery of letters of restoration annulling contracts, by reserving to the ecclesiastical power the necessary dispensation (provided that the petitioner had been duly granted a dispensation by his own prelate): *Benedicti*, no. 247; "Dec. Cap. Tolos.," q. 148; Edict of Nantes, before 1598, 24; *Brodeau*, "Cout. de Paris," I, 529, no. 13; *Rebuffe*, "De Lit. Dilat.," 1, 1, 69. — But this ecclesiastical dispensation was granted without any examination ("Songe du Verg.," *loc. cit.*; "Dec. Cap. Tol.," q. 62; *Fevret*, "Abus," 7, 2, 43), so much so that in the end when a man took an oath he no longer made a reservation as to the rights of the Church (end of the sixteenth century): *Imbert*, "Pratique," l. 1, c. 33; *Ranchin*, on *Gui Pape*, "Q.," 140. Cf. 194, 225. — Cf. "Glose," Dig., 37, 14, 6, 4; "L. Imperatores," D., "ad Municip.," "L. fin. de re munic." Thenceforth the king could annul in advance oaths that were contrary to his laws: *Chassan.*, on "Bourg.," p. 664; *Constantin*, on "Ord.," 1539, p. 4.

³ *Bartole*, on l. 56, "pr.," D., 46, 1; *Panorm.*, Dig. X, 2, 24, 6. — "Glose" on c. 28, Dig. X, 2, 24; "L. des Droiz," no. 848; *Imbert*, "Enchir.," p. 108; *Doneau*, "Comm. de Jure Civ.," l. 24, c. 9. — Cf. *Pertile*, IV, 496.

⁴ *Covarruvias*, "Op.," I, p. 255; *Masuer*, 20, 3; *Louet*, D, 12; M, 7, etc.; *Pothier*, "Oblig.," 104; *Martin*, "Inst. Jur. Canon.," II, 91 (1788).

⁵ "Wis.," 5, 2, 5 *et seq.* Cf. "Interpr. wis.," on *Paul*, 1, 1; "Glose de Turin," 357; "Petrus," 2, 12; 4, 26; "Brachylogus," 3, 1, 3; 2, 7; 9, 4; *Azo*, "ad Cod.," 2, 3; *Accursius*, "D.," 2, 14, 7, 4 and 5. See in *Karsten*, p. 110 *et seq.*, the analysis of the opinions of Placentinus and Azo; the latter likens the pact to the contract and admits the existence of six "pacta vestita" (classical contracts, "coherencia contractus," unnamed contracts) and seven exceptions to the rule that the naked pact does not bind. Cf. *Bracton*, fo., 108; *Britton*, 1, 29, 2.

⁶ Other systems in *Seuffert*, p. 4. There is no need to connect it with the

not keep his promise becomes guilty of a lie, — that is to say, a sin; thus he incurs the ecclesiastical penalties; as a consequence, one is led to respect every agreement, and from the mercenary point of view one passes to the civil point of view. The Council of Carthage, in 348, had laid down this rule with respect to a written agreement: “*Pacta custodiantur*”; this formula plays a part in the Decretals, having therein a general validity,¹ and the canonists gave, in order to procure the carrying out of agreements, an action “*ex nudo pacto*” before the Courts of the Church.² In a spirit of equity the Italian commercial practice of the fourteenth century adopted the same rule.³ In the civil practice the custom of accompanying every agreement with an oath accustomed people to a respect for the given word, and one can understand that a time came when faith-pledging and the blow with the palm of the hand could be left out without any detriment to the validity of the pact; the heart should follow the word, as is said in the “*Livre de Jostice*,” which without doubt was inspired by the canon law from which it so often reproduced long extracts. The civil jurists themselves held two-sided pacts as binding.⁴ It is only, however,

old Germanic law, as has been attempted (only since the seventeenth century). “*N. R. H.*,” 1866, 180: a confusion of the “*carta*” with the “*notitia*.”

¹ Let us also observe that the most important of all contracts, that of marriage, is formed “*solo consensu*.”

² Ecclesiastical penalties against anybody who breaks the pact: “*Carthage*,” 348, canon 12 (with regard to a transaction in writing between bishops as to the limits of their dioceses), Dig. X, 1, 351 (generalizations). On this c. 1, *Bernard de Parme*; *Gratian*, 2d part, 22, 5, 12. *Innocent IV* on this same c.: excommunication (following the “*denuntiatio evangelica*,” a sort of criminal procedure). But later on the action is a civil one, for it is designated under the name of “*Condictio ex canone juramenti*” (*Gratian, loc. cit.*). Cf. *Joh. Teutonicus*, on c. 66, c., 12, q. 2. On c. 1, Dig. X, “*de pactis*,” see *Panormitanus*, *Sandeus*, *Gonzalez Telez*; *Thomas Aquinas*, “*Summa Theol.*,” sec. q. 110, 3 and q. 88, 3. Difficulties arise on the point of knowing whether the canonic rules could be applied before the secular tribunals. In the fourteenth century the jurists consults of the civil law established this as the opinion of the canonists by pointing out that it is opposed to the “*jus civile*.” The question is connected with a determination of the legislative and judicial competence of the Church: *Joh. Andree*, “*ad.*,” c. 2, VI, 5, 13: “*ubi versatur periculum animæ leges succumbunt canonibus*.” To which *Cinus*, “*ad Auth. Clerus*,” c. 33 (“*Cod. Just.*,” 1, 3) replies that if the Church had jurisdiction “*ubicunque est peccatum, turbarentur rerum officia*.”

³ *Bartole*, on l. 48, “*D., mand.*,” 17, 1; *Balde*, “*Lect. s. Décrétales*,” c. 1, Dig. X, “*de pactis*,” no. 8. They judge according to equity, says *Bartole* in the “*curia mercatorum*.” Now, in equity it is understood that there is no distinction made between the pact and the stipulation. Cf. *Alexand. Tartagnus*, “*Cons.*,” 3, 41, 2; *Karsten*, p. 228.

⁴ *Alexandre Tartagnus*, 1477. A naked pact gave rise to a natural obligation; the clause by which the usufruct was reserved, which was applicable to it, made it obligatory; furthermore, the reiteration of the pact is a guarantee against surprise and shows the seriousness of the consent. Cf. *Huber*, IV, 12 (delay in which to change one’s mind).

towards the end of the fifteenth century that the modern principle was declared in Italy.¹ In France it was not fully accepted until about the same date. But did not the juriconsults of the thirteenth century recognize it? It would seem so,² if we rely upon certain formulæ which cannot be accounted for without difficulty, such as this: "Agreements overcome the law," "which is related," says Beaumanoir, "to the rule that 'All agreements are made to be kept.'"³ In this we must only see a translation of the Roman rule, "*Pacta sunt servanda*," just as there is a borrowing from the canon law in the words of the "*Livre de Jostice*": "It is ordered that [in allusion to this law] agreements which are in conformity with good customs shall make a bargain, and not the blow with the palm of the hand; and the thoughts should confirm the words."⁴ These formulæ did not at first have the practical bearing which we should be tempted to attribute to them. They contain the germ of the new law, but they are not very much in accord with the judicial law of the thirteenth century; the same juriconsults who pronounced them — J. d'Ibelin, Beaumanoir, P. de Fontaines — forgot all about them as soon as they passed to practical solutions of them; their contradictions are proof that

¹ *P. Picus*, on l. 10, "C," "de pactis," § 5; *Socin le J.*, "Cons.," 56. Cf. theory of Bartole in *Karsten*, p. 165. — In Germany in the seventeenth century authority of *Carpzov*, p. 392 ("*Schandgemälde*" until 1577).

² *Esmein*, p. 42.

³ *Louysel*, 356; *Eisenhart*, 1 ("Geding bricht Landrecht"); "*Ass. de Jérus.*," *J. d'Ibelin*, 111; "*C. des B.*," 103; *P. de Fontaines*, 15, 6; "*Anc. Us. d'Artois*," 7, 14; *Beaumanoir*, 34, 2, 23; *Bracton*, 2, 5. Cf. *Franken*, p. 52; *Esmein*, p. 29. Cf. *Civil Code*, 1134; *Dig.*, l. 1, "de pactis."

⁴ *Beaumanoir*, 34, 2; cf. 34, 60: "A bargain is made as soon as both parties have given their consent to keep it . . . or as soon as God's pence has been given, or as soon as earnest money has been given; for each one of these three things is equivalent to a confirmation of the bargain." *Franken*, p. 53. If the accord of the parties is sufficient to make the bargain, what is the use of mentioning the earnest money and God's pence? As was perfectly logical, these early proceedings for the formation of contracts disappeared. *Beaumanoir* should have said, like the "*L. de Jostice*" or "*Petrus*": "earnest money is useless, although in practice it is customary to give it." In order to make his phrase intelligible one must translate "*creanter*" (to give one's consent) by to give the blow with the palm of the hand, or to give one's word. Cf. ed. *Salmon*, see "Gloss." Elsewhere *Beaumanoir* speaks of the blow with the palm of the hand as being current usage; he also mentions faith-pledging. It is true that in c. 34, which relates to agreements, he is especially concerned with unlawful agreements, which would lead one to believe that the question of form had lost some of its importance. The juriconsults of the fourteenth century speak of obligations entered into verbally, or of the stipulation, as though the Roman law were still in force: "*Gr. Cout.*," p. 201; *Boutaric*, 1, 42. — Cf. "*Sachsensp.*," I, 7; "*Schwabensp.*," 11; "*Cons. de la Mer*," 247; "*Stadr. de Fribourg en B.*" of 1520 (drawn up by *Zasius*), 39, and on that, *Heusler*, II, 227, 249. On the "*L. de Jost.*," *post*, "Proof"; *Beaumanoir*, 35, 19; *Desmares*, 154, "Jostice," p. 8: "Let him who wishes to give the blow with the palm of the hand do so."

they are in advance of their time. Moreover, the maxim, "Agreements overcome the law," was in old times only true in so far as the agreement was clothed with the required forms; this meant that individuals could make agreements in derogation of laws which were not of a public nature;¹ thus, to take the special case with which the juriconsults that we have just cited were concerned, a person can dispose of his possessions "inter vivos," although the Customs confer them upon his relatives; one would be wrong in concluding from this that the disposal would have been efficacious even if it had consisted in a declaration of will without any forms. Thus it is probable that in the thirteenth century the formulæ which are cited above are not an accurate expression of the Customary legislation.² The new law is in process of formation. To make up for this, Loysel, 357, presents it to us under the form of a rule which was already an old one in his time,³ "Bulls are bound by their horns and men by their words,⁴ and a simple promise or agreement is worth just as much as the stipulations of the Roman law." From this time on there was no hesitation about making this rule an article of faith, a principle of natural law.⁵

Modern law, by taking this as the basis of its theory of contracts, made their formation easier; and, by way of set-off for this, it had to show itself more strict in matters which con-

¹ Not because all agreements must be kept, but because laws of a private nature are only the probable expression of the will of individuals.

² *P. de Fontaines*, after having said, "One should fulfill one's agreements absolutely," 15, 1, with Roman texts to support him, declares a little further on, 15, 13: "He has no very good claim whose claim is based upon an agreement. . . ." On his part, *Glanville*, 10, 14, makes of sale a real contract, or one based upon earnest money, while at the same time setting forth the principle, "Conventio legem vincit"; a little further on, 12, 12, he states the practice to be as follows: "He who has neither gage nor pledge, but 'sola fides,' obtains nothing at the court of the king."

³ *Dumoulin*, on "Cod. Just.," 2, 3: every legal agreement "pro stipulatione habetur"; an action springs out of it; the c. 1, Dig. X, "de pactis" is applied "in utroque foro seculari et ecclesiastico" (motives drawn from "naturalis æquitas"): *Bucherellus*, "Inst.," 3, 16; *Duaren*, "Comm." on the title "de Verb. Oblig. epist. ad Lectorem": "hodie nullus contractus formula absque stipulatione concipitur" (allusion to the notarial deeds in which it was customary to say that there had been a stipulation, or at least to make use of the terms: to promise, to stipulate): *Argou*, I, 2, c. 34. — *Pasquier*, "Inst.," p. 596; *Domat*, I, 1, 2, 7; *Charondas*, "Pand.," c. 24, p. 279. — In the end the agreement which did not set forth the consideration for the obligation was called "paction nue." — Cf. *Goldschmidt*, "Handelsr.," 3d ed., I, 303.

⁴ Loysel did not understand this old proverb where allusion is made to the formal character of the old procedure. — "One is bound by one's words; once they have been spoken, it is no longer possible to withdraw them."

⁵ *Grotius*, "De J. Belli," 3, 2, 11, and his school. Precedents: cf. Romanists (*Karsten*, p. 87 et seq.) and Theologians. Cf. "Transfer of Ownership."

cerned the proof of their existence;¹ this is shown, for example, in the practical importance attributed to the drawing up of writings. In this sense the superiority of the system of freedom over the system of formalism is less than it would seem at first blush. But, to make up for this, it is possible for a contract to be formed between people who are not in each other's presence;² it is concluded by means of representatives;³ the personal presence of the parties may be required for the carrying out of certain solemnities, but there is no reason to demand it for the mere expression of the will.⁴ Looking at it from another aspect, just as soon as importance was given to the will of the parties, the question of intention preceded everything else; contracts had to be interpreted in equity, without taking account of the words which were actually made use of. "De æquitate canonica," says Baldus, "omnes contractus mundi sunt boni fidei." "Every act is in good faith," also declares Loysel, 670.⁵ The object and the consideration of the obligation thenceforth determined its validity, and all the more importance was attached thereto as there was no need to be concerned with the form of the contract.

§ 377. **Contracts in English Law.** None were at first recognized excepting contracts "re" or "litteris."⁶ An original development

¹ The question of the **Proof of Contracts** is of very great importance. The very old Customary law is not very far removed in this respect from the practices of the barbarian period. If we are to believe the "L. de Jostice," pp. 98, 100 *et seq.*, 126, 163 *et seq.* (*cf. Esmein*, p. 47), sometimes the defendant can defeat the claim by his oath (simple proof, opposition in the "Gr. Cout. de Norm.," 85), sometimes he has no other recourse excepting to "offer opposition by pledges of battle" (duel). He is allowed to defend himself by means of the oath when the contract has not been executed, — at least not entirely. *Cf. Stobbe*, "Vertragsr.," p. 70 ("Sachsensp.," I, 70, 2; I, 6, 5; II, 10, 2); "Ass. de Jérus.," "C. des B.," 105, 118 (apparent covenant). *Beaumanoir*, 63, 11, and *P. de Fontaines* do not make any distinction and always compel the defendant to rebut the testimony of the witnesses by means of the duel: *J. d'Ibelin*, 81, 117; "Et. de St. Louis," I, 118; "Jostice," 3, 4, 1; 4, 4, 1. Moreover, in the old times only the testimony of persons called in especially by the parties in order to take part in the act was admitted; *Beaumanoir*, 39, 57 (now it is quite otherwise): *J. d'Ibelin*, 79; "Jostice," pp. 156, 163, 171; "Summa Norm.," 61; *Brunner*, II, 392. When proof by witnesses was admitted without any of these restrictions it gave rise to such abuses that they found themselves obliged to limit its application: "Ord." of Moulins, 1566, Art. 54, and the maxim, "Writings are preferred to witnesses."

² *Valery*, "Les Contrats par Correspondance dans le Passé" ("R. Gén. Dr.," 1894, 3).

³ *Post*, "Order."

⁴ "L. Rom. Cur.," on *Paul*, 5, 2, 2; "Capit.," 817; "L. Long. Loth.," 14; *Heusler*, I, 206 *et seq.*, 214; *Brunner*, "Ürk.," p. 522.

⁵ "Const. Pis.," 11; *Balde*, on the c. 9, "De Plus Pet.," *Beaumanoir*, 35, 12; *P. de Fontaines*, 26.

⁶ As to the deed or specialty, *cf. Pollock and Maitland*, II, 215, etc.: actions of covenant and of account.

which took place from the fourteenth to the fifteenth centuries resulted in rules similar to those which were admitted upon the Continent. The action of debt, given on a contract "re," was originally an action for restitution, a reclaiming (for example, in the case of lending) against the man who withholds the property of another.¹ By a natural enough extension, it also served for the demand of payment of the price of a thing sold or the arrears of a rent. It assumed two things: 1st, that the plaintiff claimed a sum of money; 2d, that he had performed something for the benefit of the other party. In this there was seen a "legitima causa debendi," a "quid pro quo," or a "valuable consideration," according to the terms sanctioned afterwards. Whence came such a requirement? Originally from the well-established repugnance of the ancient law to the admission of gratuitous contracts;² following that, from the Roman theories upon the "causa," and upon contracts not specified by the law, — theories which were quite well adapted to the action of debt.³ From this action the theory of the consideration was communicated to the action on the case and the action of "assumpsit." Against the man who caused a material injury to a person or a thing there lay a delictual action of trespass ("de transgressione").⁴ In 1285 this action was applied to cases where there had been no direct injury (*cf.* action "in factum legis Aquiliæ") by terming it an action "on the case." In the fourteenth century the action on the case serves in the case of defective performance (misfeasance) of a "nudum pactum" (responsibility of a boatman who overloads his boat and thus causes the loss of the cargo; he is responsible, not by reason of the contract, but by reason of the offense); in the fifteenth century it serves in the case of non-performance (non-feasance) (under Henry VI, 1422-61, responsibility of the carpenter who does not finish the roof of a house; there is no distinction drawn between the blacksmith who does not shoe a horse after having promised to do so and the blacksmith who shoes the horse badly; in both cases the horse goes lame). The action is then called an action of "assumpsit" by allusion to the responsibility which a man *assumes*. It seems to us that it would have been more simple to declare every agree-

¹ *Pollock and Maitland*, II, 172, 203.

² *Cf.* The Lombard "Launegild": *Heusler*, I, 81; *Pollock and Maitland*, II, 211.

³ "Summa Norm.," 90 (ed. *Tardif*), see "do ut des, ut facias," etc. *Cf.* *Van den Berg, Gatteschi* translation, "Dei Contratti do ut des Sec. il Dir. Musulm.," 1877.

⁴ *Cf.* *Pollock and Maitland*, II, 523.

ment binding excepting only those which were not based on any "cause"; this is the French system. The English practice adopted the very opposite of this rule; it drew its inspiration more from the old ideas and bears witness to a spirit which is more restrictive in appearance, although in fact its results are about the same.

§ 378. **Obligations by Means of Writing and Written Proof.** — The custom of drawing up a writing in order to establish agreements becomes more and more widespread in the Middle Ages. By this means there is attained a method of proof which under certain conditions is the most positive of all.¹ Should we not go further and say that *writing* constitutes a special way of binding oneself? Although not very precise on this point, the texts of the thirteenth century show that at that time people were not very far from this conception.² Even the expression which Beaumanoir, c. 35, makes use of, "To bind oneself by writing," leads one to believe this.³ In general, in order to make a contract in writing, one binds oneself before the judge, and a deed or a writing of the contract is drawn up as though it were a matter of drawing up a judgment (*cf.* Judgment of settlement).⁴ It is only

¹ The restoration of the title in case of payment (Frankish period) is the counterpart of the "traditio cartæ"; it is torn up or it is annulled by a mention of the fact in writing ("cassatura"). If the restoration is impossible (and it is not agreed that the payment shall only be made upon restoration of the title, *Brunner, loc. cit.*) one delivers an acquittal ("epistola evacuatoria"); the creditor holds his debtor acquitted ("quietus") sometimes even without payment: *Marculfe*, 2, 35; "Form. Andec.," 18; *Beaumanoir*, 34, 21; 39, 60; *P. de Fontaines*, 15, 22. *Cf.* Dig., "de pactis," 1; *Huber*, IV, 837; *Glasson*, VII, 691 *et seq.*; "N. R. H.," 1886, 20, 178.

² *Cf.*, however, as to gifts, *Esmein*, pp. 31, 42, 44.

³ *Beaumanoir*, 68, 7 (or by the pledge); *Boutaric*, I, 25, "Const. du Chât.," 79; contract in writing; *Britton*, I, 29; *Glanville*, 10, 14 (written or delivered); "Ass. de Jéru.," "C. des Bour.," 216; *Esmein*, p. 43. Conversely (*Tardif, Schwabach*), one may bring to notice passages from *Beaumanoir*, 31, 5: "In another chapter we will speak of other methods of proof"; 35, 18: "Official writings are only equivalent to one witness"; 39, 3. *Cf.* the English *deed* or writing sealed and delivered by the debtor to the creditor, which is not only a probative title, but a method of contracting like the Frankish "carta": *Pollock and Mailland*, II, 217. The King's Court left to one side the old forms ("hand-sale," etc.); it was necessary in every covenant to produce a *specialty* or *deed* ("factum"); in the thirteenth century every free man has a seal which he places upon the parchment containing the agreement.

⁴ The custom of contracting at law goes back to the barbarian period; but only the tribunal of the king could give a deed of contract ("placitum") in such a way as to furnish the interested parties with an incontestable proof: *Brunner*, "Gerichtszeugniss," 154; *R. Hübner*, "Gerichtsurkunden d. Fränk. Zeit" ("Z. S. S.," 25). *Cf.* *Pertile*, IV, 469. During the feudal period contracts drawn up in court were first of all established by records, and then by writings: *Beaumanoir*, 35, 23; 39, 6; 63, 11; *J. d'Ibelin*, 117, 121; "Sachsensp.," I, 18, 2; 70; II, 10; "Roisin," p. 65 *et seq.* In England they are all the more readily

as an exception that they proceed in another way. According to Beaumanoir, there should be three kinds of writings which bind:¹ those which are sealed with the seal of the lord of the locality, or of the king (or of their representatives, for example, the royal bailiffs, "letters of authority");² those which are sealed with the seal of the council of the locality;³ and, lastly, those which are sealed with the private seal of a simple gentleman, who has no right of administering justice, on the theory that they proved an

used because there are no authenticated notarial deeds: *Blackstone*, II, 21; *Pollock and Mailland*, II, 202 (recognizance), 205. Thus everywhere is developed this application of non-contentious jurisdiction.

¹ *Beaumanoir*, 35, 18; 34, 59. Models: see also "Stilus Parl.," "Gr. Cout.," *Boutaric*, I, 26.

² According to *Beaumanoir*, 35, 23 (cf. 1, 44, "Ord." of Philip III), those who wish to obtain a **Letter of Authorization**, because they have no seal or because this means is more sure, should come before the bailiff, making a record of the bargain, and then require that the letters be delivered to them "in the form which follows: To all those who shall see or have these present letters, Phelippes de Beaumanoir, Bailiff of Clermont, gives greetings. Know ye all that in our presence P. and J. recognized at law that they of their own free will and for their own benefit have made such and such an exchange." Then follow the details of the agreement, and the obligation of keeping it and warranting (for this and what follows we are referred to the formula of sale, 35, 20): "And this bargain above mentioned have I agreed to warrant for all time for the said J. and his heirs against everyone"; the seller shall pay all the expenses and damages occasioned by his default in warranty (cf. "Ord." January, 1324) and shall furnish this warranty; should he so wish, he may bind himself even more strictly (damages may be fixed upon the oath of the creditor, 35, 19; *P. de Fontaines*, 15, 27): "And to bind myself firmly I have bound myself and my heirs and all I have in the present and in the future, movable and inheritances, to be adjudged by whatever justice he shall please to the said J. or his heirs, or to him who shall bear these letters . . . and to take, to sell, and to spend, without any delay, until the costs and the damages shall have been paid and I shall have given a lawful warranty." Then, finally, come the renunciations (cf. 35, 29) of every right and every law, canon or customary; of the privilege of the cross, taken or to be taken (*P. de Fontaines*, 17, 7, 14); indulgences of the pope or the king, customary delays, exception "non numeratæ pecuniæ," a "lesion" of more than half; all exceptions or defenses and the rule, "renunciations by way of gift are worthless" (*Meynial*, "N. R. H.," 1900-1901); "and in order that this may be a firm and stable deed I have had placed upon these present letters the seal of the bailiff of Clermont [35, 24]. This was done in such and such an incarnation [reign] and in such and such a month." For the letters of a gentleman upon his seal, *Beaumanoir*, 35, 20, maintains that they were given to the creditor: *Beaumanoir*, I, 41; 35, 6, 23; *Boutaric*, I, 106, 107. The royal seal is recognized throughout the kingdom, whereas the seal of the lord is only known in his domain. — Simple contract creditors went before the aldermen; "Artois," 49, 12, ed. *T.*

³ According to *Beaumanoir*, 35, 18 (cf. 39, 61; *Boutaric*, I, 107), they were only equivalent to a single witness when they were produced in the lay court (excepting in spiritual matters, — for example, a marriage or a will). It was the same with letters of the lay court when produced in a Court of the Church. But there was an exception made for the letter of the king or the apostolic letter (of the pope); these letters were everywhere equal to the full-testimony. Little by little the number of deeds that could be authenticated by the ecclesiastical judges was restricted. — *P. Fournier*, "Offic.," pp. 41, 195.

engagement entered into by him.¹ The seal conferred upon the deed an authenticity and a binding force. Moreover, its genuineness and physical wholeness signified a good deal; if only half of the seal were left, this was sufficient, according to Beaumanoir, to validate the deed.² These writings were nothing more than mere means of proof³ when the rule that consent was sufficient in order to bind was admitted.⁴

Nevertheless, **public writings** were contrasted, as had long been done, with private writings. The former, coming from public officers — whence their name — were principally the work of notaries, that is to say, of the representatives of the king and the lords. The affixing of the seal of jurisdiction⁵ gave to documents two privileges, — authenticity and executory force (without taking into account mortgages, which will be discussed further on). Thus they obtained full credence at law,⁶ and they

¹ But not to his own profit: *G. Durand*, "Spec.," 2, 22, 298; *P. de Fontaines*, 15, 22; *Beaumanoir*, 35, 10, 18; 39, 73; *Boutaric*, I, 106, 107; "A. C., Bourges," 27 (cf. seal of the king); *Loyseu*, 781 (bibl.), 856. Commoners had no authentic seal, which placed them under the necessity of applying to the lord and the bailiff, or to an officer; the gentleman also had recourse to them because of the advantages which he found in so doing. In Normandy, where serfdom disappeared at a very early time, the commoners often had private seals, just as the nobles did. From thence arose, no doubt, the English practice of deeds. — Cf. as to the effect of the deed under seal, *Schulze*, "Urkundenbew.," 1894; *Esmein*, p. 126; *Huvelin*, "Thèse" ("Contrats en Foire").

² *Beaumanoir*, 35, 11. Cf. *Joinville*, § 66 (only the bottom of the seal is left; St. Louis carried out the obligation contrary to the advice of his Council); *Loyseu*, loc. cit.; "Gr. Cout.," p. 380.

³ As to proofs in general, cf. bibl. in *Camus and Dupin*, nos. 1726 et seq.; and as to practice, cf. "Treatises on Procedure," and see also *Camus and Dupin* (*Pothier*, *Pigeau*, etc.); as to the profession of notary (*Ferrière*), "Répertoires" by *Ferrière*, *Guyot*, etc. Ordinances in the Conference of Guénois, I, 4; *Isambert*, see "Témoins," "Enquête," etc.; *Bonnier*, "Tr. des Preuves," 4th ed., 1874; "Tract. univ. J.," IV. — As to the old texts, cf. *Beaumanoir*, c. 35, 39; *Boutaric*, I, 105 et seq.; *Masuer*, 16 et seq.; "Artois," ed. *Tardif*, 49. — *Pollock and Mailland*, II, 595.

⁴ As one asks oneself if it was not already recognized in the time of Beaumanoir, it is easy to understand that one hesitates as to the binding or merely probative character of writings. Confusion of the "carta" with the "notitia."

⁵ *Loyseu*, "Offices," 2, 5, 60. Cf. as to the affixing of the seal, p. 905, and declaration of September 27, 1697, uniting the keepers of the petty seals to the body of notaries: *Ferrière*, see "Sceau de Justice"; *Masuer*, 18, 6 (bibl.). As to protocols, minutes and copies, see *Masuer*, 18, 18; 37; 53, etc.; *Rebuffe*, "De Litt. Obl."

⁶ The **Probatory Force** of the deed under seal varies according to the seal with which it is furnished; thus the seigniorial seal is not efficacious outside of the lord's domain, and the seal of the ecclesiastical judge outside of the diocese (*Beaumanoir*, 39, 71-76; 35, 18). On principle, sealed writings are as good as full proof. But they may be forged, — that is to say, it may be alleged that they have been forged or falsified (broken seal, scratches, etc.); *Beaumanoir*, 35, 9 et seq.; or their contents may be attacked by relying upon an alibi: *ibid.*, 35, 25; if they contain the names of persons called upon to serve as witnesses, and if these persons declare that they have taken no part in the

gave creditors a sure and speedy means of execution. This status is due to the fact that, originally, notarial deeds were judicial records, arising from the parties' voluntary submission of some transaction; they were at first drawn up in the presence of the judge, and later out of his presence. "But," says Loysel, "it is always the judge who speaks through them." They present the great practical advantage of cutting short many a quibble. They have no serious inconveniences, when the character and skill of the notarial profession is assured. Some countries, especially England, have, however, refused to admit them. Every deed must there be proved in court, and the parties ordinarily betake themselves for the drawing up of deeds to "attorneys" who are at the same time solicitors; this is not without its dangers, because the duty of the scribe is to prevent suits and the interest of the solicitor is to foster as many as he can. In the German countries the tendency seems to be to include the functions of a notary among the attributes of a judge, or, at least, to give to the judge the most important of the notary's functions.¹

Private writings did not acquire any probative force excepting by virtue of an acknowledgment or confession in court, on the part of the one who had signed them;² or else as a consequence of the procedure for the verification of the writing.

deed or give testimony contrary to that which the deed contains, then the deed is annulled: *ibid.*, 39, 59. Beaumanoir tells us that in order to avoid these cases of nullity it has ceased to be customary to have the names of the witnesses entered in the deed. These witnesses or "warrantors" ("Jostice," p. 156; "A. C., Bayonne," 85, 5; "A. C., Anjou," I, 56), however, are to be found once more in our modern witnesses to deeds. Cf. *Huber*, IV, 837, 17; *Glasson*, VII, 592. Obviously, also, when the deed establishes a debt, one may allege that there has been payment (custom of restoring it and of tearing it up in a case of this sort: *Beaumanoir*, 34, 21; 35, 10; 39, 3, 22; *Masuer*, 18, 59; "Toulouse," "de fide instr. de solut.'). Under these conditions the public deed is given credence, but only until the contrary is proved, and not merely until the allegation of forgery is made: *Masuer*, 18, 53. Imbert only speaks of the allegation of forgery as against depositions of witnesses. The "Ord." of Charles VII, of 1453, Art. 17, had forbidden the attacking of a public deed under pretext of forgery unless a criminal accusation of forgery were brought in one special case; that is, when it was a matter of a judgment having been altered by the judges after its having been pronounced (*Isambert*, IX, 211). *Fontanon*, on *Masuer*, ed. 1600, p. 344, seems to see in this a general decision. It is no doubt because the practice of his time had generalized it: *Fleury*, "Inst. au Dr. Fr.," II, 298; "Ord. Crim." of 1670, IX; "Ord." of January, 1383; February, 1737; *Glasson*, "Précis de Procéd. Civ.," I, 542.

¹ *Bonnier*, "Preuves," II, 18. — *Héraud*, "Formalité du Double," 1901.

² Deeds under private seal: *Boutaric*, I, 106; "A. C., Picardie," p. 115, ed. *Marnier*. Deeds written in household books or merchants' account books: *Masuer*, 18, 34; *Huber*, IV, 838, 18; *Posse*, "Privaturk.," 1887; *Bresslav*, "Forsch. f. D. G.," 26; *Schupfer*, "R. Ital. Sc. Giur.," 1889, 345.

The deed under private seal did not prove its own date, as far as third parties were concerned, unless bearing official stamp (when stamping was required, Edict of 1580, repealed in 1588, Edict of 1693). The privilege of gentlemen to possess an authenticative seal had no more reason for existing when feudalism declined; it disappeared, and the juriconsults of the sixteenth century, such as Dumoulin, did not hesitate to affirm that these seals had no more value than a private signature.¹

If private deeds had only a limited efficaciousness, oral testimony had still less. **Witnesses** were distrusted for many reasons. A person who has not taken part in an examination will never be able to realize the difficulty there is in extracting the truth from the confused and inaccurate depositions of the best intentioned; in other depositions, money or threats have induced lies;² death removes some, and age or illness³ causes others to lose their memory.⁴ Preconstituted proof, as embodied in written deeds, is manifestly superior provided they are removed to a great extent from the risk of loss and alteration.⁵ The Ordinance of Moulins, February, 1566, Art. 54, wishing, it says, to avoid the "complicating of lawsuits," decreed that a contract must be drawn up for everything which exceeded 100 livres in value.⁶ Thenceforth they no longer said, "Witnesses are

¹ *Dumoulin*, on "Paris," 1, 8, 12; "Ord." of Moulins, Art. 54; *Danty*, "Preuves," 2d part, no. 2. The evolution in English law has taken place in the opposite direction: the writing sealed with the seal of gentlemen has been preserved in the deed, a sort of document which in England takes the place of a notarial deed. The French law has likened gentlemen to commoners by taking away from them the right to have a seal; the English law has likened commoners to gentlemen by giving them this right.

² Even this fact was not necessary in order to justify the rule drawn from the Scriptures: "Testis unus, testis nullus": "Deuter.," xix, 2, 15; "Matt.," xviii, 16; Dig. X, 3, 26, 10; *G. Durand*, "Spec. de Teste," § 11; *Beaumanoir*, 49, 5; "Toulouse," "de test.," "Montpellier," 25 *et seq.*; *Loysel*, 779.

³ From thence arose examinations for perpetuating proof: *Masuer*, 17, 1 (and p. 307).

⁴ *Loysel*, 770, "He who shortens best, proves best." "Schwabensp.," 36^a. These disadvantages became worse with the system of *legal proofs* which prevailed in the old law, and which has its origin in the practice of the barbarian period. For this was substituted the system of *inmost convictions*, which one already finds at Rome, and of which there are traces in the canon law: *P. Fournier*, "Offic.," p. 193. Cf. *Beaumanoir*, 39, 19; *Loysel*, 867; *Glasson*, VI, 553.

⁵ Loss: *Masuer*, 18, 17, 51.

⁶ "Ord." of Moulins, Art. 54: "Concerning everything exceeding the value of one hundred pounds contracts shall be drawn up before notaries . . . without receiving any proof by witnesses excepting as to the contents of the contract, and without receiving any proof as to that which may be alleged to have been said or agreed upon before the contract, then and afterwards; by this we do not intend that proofs are to be excluded which are made by the parties

better than writing," but instead, "Writings are better than witnesses."¹

under their private seals and writings." "Ord." of 1667, 20, 2 (*deeds* instead of *contracts* in order to get rid of difficulties and to generalize more). Proof by witnesses is thus found to be excluded with a few exceptions; Civil Code, 1341.

¹ *Boutaric*, I, 106 (p. 620): "Know that oral testimony has more force than writings, if the witnesses testify contrary to the writings, and the judge ought to accept the deposition of witnesses who depose with sound memory, and pass sentence according to their deposition rather than according to the contents of the writings which do not support them." The Commentary required three or four witnesses in order to overcome a public deed; *Hostiensis* and the canonists are satisfied with two: *Masuer*, 18, 13, 53; *Loysel*, 774; *J. Faure*, I, 15; "Cod. Just.," "de fide instr."

TOPIC 5. NULLITY OF CONTRACTS

§ 379. The Nullity of a Contract.	§ 382. Absolute Nullity.
§ 380. Origin of the Theory of Nullity.	§ 383. Relative Nullity.
§ 381. Nullity and Rescission.	§ 384. Rescission.

§ 379. **The Nullity of a Contract**, in the very old law, arises chiefly from the failure to observe form; the absence of fundamental conditions, such as consent, is not so important as in modern law, because, ordinarily, if the act is regular as to form, the contract is otherwise binding. But in the later system of contracts formed by mutual agreement, the question of nullity is more complicated and becomes vital. P. de Fontaines, c. 15, and Beaumanoir, c. 34, having to deal with agreements, inquire first of all as to which are the ones that must be kept and which the ones that should not be deemed valid.

§ 380. **Origin of the Theory of Nullity.** — The canon law borrowed from the Roman law its theory of nullities, and especially the distinction between nullities “*ipso jure*” and “*exceptionis ope*” or “*per in integrum restitutionem*.”¹ This was applied in the same way, excepting that the absence of forms in the stipulation did not prevent the contract from being valid.² In its turn, the Customary law felt the canonic and Roman influence. From the thirteenth century we find in Beaumanoir a contrast between contracts which are void and those against which one can only plead some “*barre*,” such as asking for “*ratifying restitution*.”³ Voidable contracts may be validated by a short prescription;⁴ it does not seem to have been the same with regard to contracts which were void. But, though this difference can be pointed out, one must be careful not to think that the difference between nullity and liability to be avoided was very clearly distinguished by our old authors; their language and their ideas are far from being precise; the word “*nullity*” is the only one which they make use of to des-

¹ *Fournier*, “*Offic.*,” p. 226.

² Dig. X, 1, 41, 8; 3, 17, 3 and 6; 1, 40, 2; “*Dec. Grat.*,” I, 43, q. 10, 4; *G. Durand*, II, 3.

³ *Beaumanoir*, 16, 8; 34, 29; 16, 4, 11; cf. *Boutaric*, 1, 40, 19, 92; “*Olim*,” III, 202 (in 1306); 1180 (in 1317). — “*Capitul.*,” VII, 288; V, 181, 362.

⁴ A year and a day: *Beaumanoir*, 34, 29; *Boutaric*, I, 20; *Masuer*, 29, 19; “*N. R. H.*,” 1883, 326.

ignite two distinct situations at one and the same time;¹ at the most, in later times, *absolute nullity* is often used in the sense of non-existence; *relative nullity* is used for voidability.

§ 381. **Nullity and Rescission** or restitution in entirety. — In the thirteenth and fourteenth centuries every nullity is officially pronounced by the judge. Towards the fifteenth century² the law changes; two classes of contracts which may be annulled are dealt with: (a) the nullities established by the Customs and the Ordinances are applied “*de plano*” by the tribunals;³ (b) royal letters of rescission are necessary to plead the benefit of those which arise from the Roman law.⁴ “**Means of nullity have no place,**” they say;⁵ that is, it is necessary to have letters of rescission in order to plead nullity; but this is only true in the case of Roman pleas of nullity. What is the reason for this innovation? Almost all the old jurisconsults reply: It is because the provisions of the Roman law had no self-executory force in France except by permission of the king.⁶ In our time other explanations of this have been suggested. For some, letters of rescission would be due to the spirit of exaction which was displayed by the old royalty; for others, this would be one of the means made use of to restrain the jurisdiction of the seigniorial judges (cognizance of claims for rescission was taken away from them). But why should reform have been limited to the Roman nullities if it had only a political or fiscal object? It is more likely that one must abide by the explanation of our old authors, the political or fiscal reason being added thereto

¹ *Rebuffe*, “*Tr. de Resc. Contr. pr.*”: “*contractus aut nullus est, aut tenet, sed tamen est annullandus.*” In the first case it is required “*ut declaretur nullus*”; in the second case, that it should be rescinded: *D’Argentré*, “*Cons. Brit.*,” in 283, com. 1, nos. 7–10; *Dunod* (eighteenth century), “*Prescr.*,” p. 47 (absolute nullity and relative nullity); *Bouhier*, on “*Bourg.*,” 19, 12. Cf. *Pothier*, “*Oblig.*,” 1, 1, 1, 3; 3, 2 and 3; “*Proc. Civ.*,” 5, 4, 1. Cf. *Domat*, 1, 1, 5; 4, 6, 2 and 3. It is not without difficulty that the classical doctrine has taken shape in our time.

² *Boularic*, I, 92, and the notes of *Charondas*; “*Ord.*” of 1536, 18, and 1539, 134; *Du Cange*, see “*Rescissio*”: in 1481, letters of rescission in countries of written law; they are probably of a still earlier date in countries of Customs.

³ For example, a usurious contract (Ordinances), deeds of a married woman without authority (Customs).

⁴ For example, fraud: *Pollock and Mailland*, II, 533: Writ of Deceit (under John).

⁵ *Loysel*, 706; *Imbert*, “*Inst. for.*,” 1, 3, 3; “*Enchir.*,” see “*Contracts*,” “*Nullité*”; see *Ragueau*. Which can also be understood in this way: that, if there were no texts on the subject, a deed could not be annulled. — Cf. as to procedure: *Glasson*, “*Précis de Procédure*,” I, 14. — *Ceppolla*, “*Tr. Cautel.*,” 1732.

⁶ *Guy Coquille*, “*Instit.*,” p. 7; on “*Nivernais*,” p. 2; *Imbert*, “*Enchirid.*,” see “*Contrats*”; *Charondas*, “*Réponses*,” III, 102.

merely in order to strengthen it. At the same time, the old explanation itself has need of being rounded out. Taking it, in fact, as it was set forth by the juriconsults of the Customs, it would have been necessary to obtain letters for the application of all the Roman rules, a thing which did not, as a matter of fact, take place. This was done only in the case of nullities which were unknown to the old Customary law, and were opposed to its principles, and of such an exceptional character that their introduction was compelled to rest upon royal authority. The necessity for letters of rescission was extended (evidently for fiscal reasons) to countries of written law.¹ In this sense there was an extension; in another, a restriction; practice at first required letters in case of nullity "ipso jure" as well as in case of nullity "per exceptionem" or "in integrum restitutionem";² at the end of the seventeenth century³ and in the eighteenth century⁴ letters of rescission were no longer required for nullities "ipso jure."⁵ Their use was abolished by the Law of September 7, 1790, Arts. 20-21.

§ 382. **Absolute Nullity** resulted from lack of consent,⁶ lack of an object or a "cause,"⁷ and the unlawful or immoral character of the object or of the "cause"⁸ (improper consideration). The "cause"⁹ for the old juriconsults corresponds to the "quid pro quo" or to the "consideration" of the English law. They took as their point of departure the Roman ideas upon

¹ *G. Pape*, "Dec.," q. 141, 143. *Cf. Dupérier*, "Œuvres," III, 186; *Mortel*, p. 115 (*cit.*). *Cf.* "Advantage of Inventory," *post.* "Exceptions for Lorraine and the Franche-Comté": *Argou*, II, 13.

² *Rebuffe*, "In Const. Reg.," 423; *Charondas*, "Pand.," II, c. 28; *Pasquier*, "Interpret. des Inst.," 139; *Despeisses*, "Œuvres," I, 808; *Mornac*, s. 1, 16, "D., de min.," c. 3, C., 2, 22. For example, defect in form, an unlawful object. In such a case the Customary law and the Ordinances were ordinarily in accord with the Roman law to the effect that the deed should be annulled.

³ *G. Coquille*, "Inst.," p. 7; *Ferrière*, on "Paris," 223; *Fleury*, "Inst.," II, 43.

⁴ *Pothier*, "Procéd.," 727; *Guyot*, "Rép.," see "Nullité," § 7.

⁵ In practice, in order to avoid all difficulties, they often obtained letters in the case of an annulment "ipso jure": *Argou*, "Inst.," II, 480; *Dupérier*, "Œuv.," III, 401.

⁶ "Jostice," II, 16. As to promises on behalf of another, *Boutaric*, I, 40.

⁷ *Boutaric*, "Actes du Parl.," II, no. 6446 (in 1321).

⁸ For example, interests, a concubine, etc.: *P. de Fontaines*, 15; *Beaumanoir*, 34, 2, 23; 38, 15; 70, 2, etc.; *Boutaric*, I, 25; "Jostice," pp. 100, 325; "Montpellier," 67 (gambling). If one wishes to have some conception of the variations of the law upon this point one must remember that life insurance was prohibited as being immoral ("Ord." of 1681); *Portalis* in his "Discours Préliminaire sur le Code Civil" flays it: "This institution, which implies a 'Votum mortis,' could only be developed," says he, "among the English, where a vile spirit of commercialism has stifled the conscience."

⁹ *Domat*, "Loix Civ.," 1st part, "t. des Conventions"; see *Ferrière*, *Guyot*, *Pothier*, "Oblig.," — *Timbal*, "Thèse," 1879.

the "condictio sine causa," upon contracts which were not specified, and upon the nullity of stipulations, and from thence they drew up the rule: "No obligation without cause." "He has no good reason to claim," says P. de Fontaines, 15, 13, "who claims because an agreement was made with him, without advancing another reason."¹ This principle was all the more readily accepted because it squared in many cases with the older theory of the necessity of at least partial performance of the contract in order that an obligation should result therefrom.² Bilateral agreements carry their "cause" within themselves; the engagement undertaken by one party accounts for and justifies the engagement of the other (for example, sale). But the unilateral contract does not always reveal its "cause"; sometimes it is reduced to a mere abstract promise (I shall pay so much to X . . .).³ In this form the Roman law validated it on principle, excepting that it permitted an indirect attack to be made upon it and its effects thus to be paralyzed; our old law did not recognize the effects of a simple promise unless it rested upon a lawful "cause" (for example, I will pay 100 which has been lent to me, or for some one to build me a wall).⁴ The question was raised especially with respect to deeds under private seal or bills without a "cause"; sometimes the "cause" is not recited because it is unlawful, and sometimes in order to simplify matters.⁵ Was the bill thus worded a sufficient proof of the existence of the contract? The Romanists incline towards the affirmative of this question; those who were more true to the spirit of the old law maintained that title and promise were null, as though made without any "cause." A controversy took place over this question and until the very end they were not able to reach any agree-

¹ "Summa Norm.," 90, 3. On the contrary, the writing did away with all need for a consideration according to the old theory.

² *Esmein*, p. 64; *Boiceau*, "Preuve par Tém.," II, 3 (letters of rescission).

³ In the case of gifts the spirit of generosity has been qualified as the consideration.

⁴ *Charondas*, on *Boutaric*, p. 841 (II, 37); "Pand.," p. 542; "Cout. de Paris," p. 105.

⁵ The Decretals have, to a certain extent, given of the 1, 25, 4, Dig., "de prob.," an official commentary. Dig. X, 2, 22, 14; *Beaumanoir*, 35, 22: "The writing which says that I owe money and does not mention for what I owe it is a suspicious thing of malice, and when such a letter is brought into court the judge should know the thing from whence such debt arose before he insists on its payment." — *Boutaric*, II, 37 (p. 839: "Ego T. confiteor tibi debere C."); notes in blank to bearer. — "Toulouse," 44 (*cf.* Arts. 17, 26 *et seq.*, 43); *Casaveteri*, fo. 20 v. (not applied); *Soulatges*, p. 38; "Montpellier," 42; *Serres*, "Inst.," III, 22.

ment. From these discussions issued the obscure Article 1132 of the Civil Code.¹

§ 383. **Relative Nullity** affected contracts made by married women without authority,² or by prodigals who had been forbidden to make them;³ the other party was bound civilly towards the person under a disability,⁴ and the latter was only held bound by a natural obligation at the period when this Roman theory penetrated into the law-books.⁵

§ 384. **Rescission** took place in case of lack of consent, violence (force, fear), fraud (deceit, evil craft, cheating), mistake,⁶ in case of *any* "lésion" received by a minor⁷ ("minor restituitur non tanquam minor, sed tanquam læsus"),⁸ of *more than half* if it was a contract with a person over age, but then only in case of sale and commutative contracts ("lésion enorme"),⁹ and, finally, in case of a woman contracting in violation of the Velleianum Decree of the Senate,¹⁰ and by the son of the family in countries of written law, in violation of the Macedonian Decree of the Senate. The contract which was subject to rescission had all the effects of a valid contract until the rescission¹¹ was sanctioned in writing.¹² The

¹ *Merlin*, "Q. de Droit," see "Cause"; *Denisart*, *ibid.*; *Ferrière*, see "Promesse." Authors and Orders cited in great numbers. The difficulty became complicated as a consequence of the rejection of the "defense of unnumbered money": *Loysel*, 707; *Beaumanoir*, 35, 20; "A. C., Anjou," IV, p. 340, 363; *Boutaric*, I, 55; "N. R. H.," 1888, 319. Distinction between "I admit that I owe" and "I promise to account!" Cf. "Bill of Exchange."

² *Beaumanoir*, 43, 22; 34, 50, 56; 70, 7; *Desmares*, 289; *Boutaric*, I, 19; II, 29.

³ Cf. *Boutaric*, "Actes du Parl.," I, 2964; "Cout. Not.," 178; *Pothier*, "Oblig.," 1, 1, 1, 4. Annulment of the deeds of those persons prohibited from making them on account of dementia.

⁴ Cf. *Beaumanoir*, 34, 56; 12, 45.

⁵ *Domat*, 2, 7, 1, 11; *Pothier*, "Oblig.," 192; *Dunod*, "Prescr.," 127; *Mortet*, 131.

⁶ *P. de Fontaines*, 15, 50; *Beaumanoir*, 6, 25; 33, 6; 34, 26 *et seq.*; "Justice," p. 111 *et seq.*, 155; *Boutaric*, I, 19, 20, 54, 101; II, 25; "L. d. Droiz," no. 145; "A. C., Anjou," II, 106, etc.; *Desmares*, 141; "Olim," III, 560; *Boutaric*, "Actes du Parl.," II, 3308, 6867; *Mortet*, 133; *Siegel*, "Akad. Wien.," 128 (compulsion); *Loysel*, 830.

⁷ *P. de Fontaines*, 14, 10, 24; 15, 35; "Justice," 3, 5, 7; 9, 1; *Beaumanoir*, 16, 8, 11 (cf. Roman Law); "Const. du Chât.," 72; "Olim," II, 205.

⁸ *Flach*, p. 94, and authors cited.

⁹ "Wis.," 5, 4, 7; "Bai.," 17, 9 (a very low price does not cancel the sale; *contra*: Dig. X, 3, 17, 3, 6; *Giraud*, II, 58; "Olim," III, 480 (in 1307); *Masuer*, 23, 7, 40; *Pothier*, "Vente," no. 333; *Stobbe*, § 185; *Pertile*, IV, 503; *Glasson*, VII, 622; *post*, "Sale." [Lésion is our "failure of consideration."—Tr.]

¹⁰ *Thévenin*, "Textes," no. 131; *Labbé*, "Conc.," IX, 473, c. 19.

¹¹ Form of these letters: *Mortet*, 119. — *Lapeyrère*, "Décis.," 381; *Bourjon*, I, 583; *D'Aguessseau*, ed. 1772, II, 262.

¹² To ratify means to prove, to confirm, to accomplish, and, to a certain extent, to complete: *Du Cange*, "Interinare," "Integrare"; see *Ragueau*, *Ferrière*, etc. When the judge ratifies the letters of restitution or rescission he

only one who was authorized to rescind was the interested party, and he could do so either by using it as a defensive plea or by means of an action; it was not sufficient, to enable him to succeed, for him to prove that there was a just reason for rescission; he must furthermore show that he was justified because of some injury:¹ "Without damage no nullity." In case of serious injury the defendant could avoid rescission by indemnifying his opponent. The right of rescission was lost by ratification of the contract² or the prescription of ten years (Ordinance of 1510, 46);³ the defense of rescission was not lost by prescription.⁴

recognizes that the considerations for which they were issued really exist, and that they have not been given on a false pretense; consequently, he gives them his approval and orders that they be carried out: "Et. de St. Louis," II, 34, 37.

¹ *Guyot*, see "Lésion"; *Charondas*, "Pand.," II, 40.

² Renunciations made in advance contained in deeds were frequent, and they were confirmed by oath: *Beaumanoir*, 35, 20; *Masuer*, 18, 12 (general renunciation is void). Cf. "Cod. Just.," 2, 27, 1; "B. Ch.," 1849, 445; 1856, 466; 1874, 415; *Charondas*, "Pand.," II, 40; *Despeisses*, I, 807; *Pothier*, no. 103; *Ferrière*, see "Renonciation."

³ "Ord." of 1539, 134; *L'Hommeau*, p. 320.

⁴ "Temporalia ad agendum, perpetua ad excipiendum": *Imbert*, "Enchir.," see "Exception"; *Henrys*, "Œuvres," II, 961; *Dunod*, "Prescr.," p. 206.

TOPIC 6. SOME PARTICULAR KINDS OF CONTRACTS¹

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| <p>§ 385. Loan with Interest. — (A) Why was it forbidden?</p> <p>§ 386. The Same. — (B) Sanction of this Prohibition.</p> <p>§ 387. The Same. — (C) Reaction.</p> <p>§ 388. Establishment of Rents. — (A) Origin.</p> <p>§ 389. The Same. — (B) Rent-charge.</p> <p>§ 390. The Same. — (C) Constituted rents.</p> <p>§ 391. The Same. — (D) Life rents.</p> <p>§ 392. Assignment of Claims. — (A) Early inalienability.</p> <p>§ 393. The Same. — (B) Indirect means.</p> <p>§ 394. The Same. — (C) Assignment. Transfer.</p> <p>§ 395. The Same. — (D) Payment with subrogation.</p> | <p>§ 396. The Same. — (E) Bills to bearer and to order.</p> <p>§ 397. The Same. — (F) Bills of Exchange.</p> <p>§ 398. Agency and Representation. — (A) General Remarks.</p> <p>§ 399. The Same. — (B) "Salmannen."</p> <p>§ 400. The Same. — (C) Attorneys.</p> <p>§ 401. Sale. — (A) Formation.</p> <p>§ 402. The Same. — (B) Effects.</p> <p>§ 403. The Same. — (C) Warranty because of Eviction.</p> <p>§ 404. The Same. — (D) Rescission of the Sale.</p> <p>§ 405. Civil and Commercial Partnerships. — (A) Companies.</p> <p>§ 406. The Same. — (B) Commercial Partnerships.</p> |
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§ 385. **Loan with Interest.** — (A) *Why was it forbidden?* The forbidding of lending at interest persisted throughout the old law; only gratuitous lending was admitted, whereas the Roman laws allowed of the collecting of interest on money which was lent.² The Church drew this prohibition: 1st. From the Mosaic precepts,³ according to which the Hebrews when they lent money were not authorized to demand interest, excepting from strangers; among themselves they were to treat one another like brothers and to be contented with the restitution of the capital. 2d. From the words of the Gospel of St. Luke, vi, 35, "Mutuum date nihil inde sperantes,"⁴ and from the spirit of fraternity which is the

¹ The detailed study of contracts would carry us too far; we must limit ourselves to presenting with regard to some of them a few theories that are especially important. With regard to the others a short bibliography will suffice. Cf., in general, account books (French, *Bonis, Jacme, Olivier*, etc.).

² *Marculte*, 2, 26, 17; "App.," 15, 50; "Liut.," 16; "Wis.," 5, 5, 8, etc.

³ "Deuter.," xxiii, 19, 20; "Leviticus," xxv, 36, 37; "Psalms," xiv, 15. — In primitive legal systems interest is not a rare thing. Lending of domestic animals among the Ossetes: the increase is a natural sort of interest which is restored with the capital: "Senehus Mör. id." The Mohametan law prohibited lending at interest, under whatever form it may be disguised (even a case of interest where delay is granted), but the law is evaded by means of sale with future delivery ("salam"): *Daresté*, "Etudes," 58; *J. Kohler*, "Moderne Rechtsfr. b. Islam. Jur.," 1885.

⁴ "Vulgate" (cf. *contra*: "Luke," xix, and "Matt.," xxv: parable of the talents). Is this indeed the meaning of the Greek text: "δανείζετε μηδὲν ἀπὲλπίζοντες"? *Th. Reinach*, "R. des Et. Grecques," VI, 52, 1894, suggests that we read, "ἀντελπίζοντες" and translates: to lend without ex-

foundation of Christ's doctrine.¹ Once the rule was established and applied, an authority which was almost equal to that of the Scripture was found to justify it, independently of every religious motive; I refer to Aristotle. This philosopher had maintained that money was naturally sterile: "Nummus nummum non parit."² This was rather a poor sophism, but it is excused when one reflects upon the hard treatment inflicted upon people who were insolvent and the disturbance which the question of debts gave rise to in the ancient city.³ In the same spirit, Plato and other Utopians banished gold and silver from their ideal republics. But this did not prevent Aristotle from drawing a very good income from those sterile coins with which the generosity of the kings of Macedonia abundantly provided him. In the Middle Ages the paradox became a truth; the scholastics were able to take it seriously; in fact, the majority of the time gold and silver remained unproductive in the hands of those who amassed it, because they found absolutely no investment for it. By what right would they have demanded interest from borrowers? If they ran a risk of losing their capital, this risk was lessened and compensated for by the severity of the measures of execution against debtors. The economic condition thus tallied with the religious ideas, in order to justify the prohibition of interest. Humanitarian arguments came as a balance to the arguments drawn by the theologians from Divine law and natural law. Even in those periods when the Church was the most powerful, usury did not cease to be practised; the rate of interest was then raised to a ruinous rate, because the lender ran too many dangers not to impose upon the borrower the most burdensome stipulations. St. Augustine was

pecting anything in return; that is to say, without hoping that even the capital will be paid back, or, in other words, says, "Give": "Luke," vi, 34. Saint Basil's "Homily against Usurers" thus interprets the passage from the Gospel and explains it by the idea that "He who gives to the poor lends to God." Saint Gregory of Nyssus recommends that one give, and, if not, then one should lend (without interest); for "lending is a secondary form of gift." Cf. "Deuter." xv, 7; "Matt.," v, 42.

¹ Communitistic tendencies of the first Christians: Council of Nicea 325, c. 17; "Can. Apost.," 44, etc.; Decree of Pope St. Leo, 445. "Dec. Gratian," II, 14, q. 3, 1 *et seq.*; Dig. X, 5, 19; Benoît XIV, Bull "Vix pervenit," 1745; *Pothier, op. cit.*; enumeration of the classical laws; *R. de Pennafort*, "Summa," ed. 1603, p. 227; *Maffei*, "Impiego dal Denaro," 1744; *Lancelot*, "Inst.," 4, 7.

² "Polit.," 1, 3; St. Thomas, *loc. cit.* Another scholarly subtlety: When one lends money and takes back interest besides the capital it is as though one sold wine for a certain price and had oneself paid over and above for the use of the wine. (Cf. lease of a house for a price based on the use one has of it).

³ Hebraic Jubilee ("Levit.," xxv.), abolition of debts by Solon. History of the "nexi" at Rome. In Gaul, "obæratî": *Cæsar*, "De Bell. Gal.," VI.

angry at seeing the capitalists strangle the poor man: "trucidat pauperem fœnore." How much more true was this phrase in the Middle Ages! The legislator thought it was his duty to intervene,¹ but he overshot his mark: the more harsh he became, the more did the evil increase.

§ 386. **The Same.** — (B) *Sanction of this Prohibition.* By usury was understood all interest, no matter how little it might be.² It is especially on the occasion of the lending of commodities that usury is committed; it appears there openly. But it may also be met with in a disguised form in other contracts; there is scarcely any kind of contract where one is not liable to see this "turpa lucrum," of which the Church has a horror; for, ordinarily, one does not act except with a view to profit. The casuists sought to proscribe this everywhere. As a consequence of their extreme views, the forbidding of usury was extended almost beyond belief and becomes, as it were, the keystone of political economy in the Middle Ages: sale, payment, damage, partnership, banking, bills of exchange, — in so many matters is it especially dealt with.³ The jurists only follow the theologians at a distance along this way; especially from the sixteenth century do they make the prohibition applicable only in the limited field of the loan, and jurisprudence in its last stages only provides against excessive usury. At first the prohibition was only applied in the laws of the Church,⁴ to the ecclesiastics; it was less a precept than a piece of advice; it was addressed to those who aspired to a perfect state rather than to the mass of Christians. But the stricter tendency prevailed; to lend for interest was considered a mortal sin, even in the case of the laity.⁵ This conception passed into secular legislation under the Carolingians (Cap. 789, c. 5).⁶ From this

¹ Cf., the measures taken by Napoleon I against the Jews of Alsace, anti-Semitism in certain localities (Poland, Galicia).

² Cf. Dig., tit., "de usuris et fructibus" "Capit," I, 119 (*Anségise*): "usura est ubi amplius requiritur quam datur"; *Du Cange*, see "Usurarii." The German term: "Zins" ("census"), meaning rent.

³ Cf. *Endemann*, *op. cit.*; *Ashley*, I, 164 (theory of St. Thomas as to the fair price). Taxes on bread and other produce: *Gui Pape*, "De Contr. illicitis q. usurarii," in "Tract. ill. J. C.," VII, 72; *Loysel*, 715; *Bonacina*, "De Contr.," 1621; *Polier*, "Juste Prix," Thesis, 1903.

⁴ *Bruns*, "Conc.," "Tours," I, 13 (II, 142); "Orléans," III, 27 (III, 200). Cf. the rule that the cleric should not carry on any commerce.

⁵ Decretal of St. Leo, in *Gratian*, II, 14, 4, 7 (in 444); Decree of Gratian, 2d p., cause 14, q. 3 *et seq.*; Dig. X, 5, 19, "de usuris" (following the title "de furtis"); Council of Vienna, 1311 ("Clem.," 5, 5, 1); *Hostiensis*, fo. 672; *G. Durand*, etc.

⁶ "Omnino omnibus interdictum est ad usuram aliquid dare." The Capitulary invokes the Decretal of Pope Leo, the canons of the apostles and Scrip-

time on it was sanctioned by a large number of laws,¹ and it increased in the majority of the Customs.² The legal effect of the prohibition of lending for interest was civil or penal. 1st. *From the civil point of view*, the contract was absolutely void; the lender could not claim the interest which had been agreed upon; the borrower who had paid this interest was authorized to have it restored to him.³ 2d. *From the penal point of view*, the lender was exposed to canonic penalties, loss of their position in the case of clericals, excommunication in the case of the laity.⁴ The Customs confiscated the body and the possessions of the usurer for the benefit of the lord;⁵ the Ordinances prescribed various penalties against them; thus the Ordinance of Blois, 1579, Art 202, inflicted upon them for the first time the public penance and pecuniary fines, one-quarter of which was paid to the informer; in case of repetition, confiscation of body and possessions (the galleys or perpetual banishment). But in reality these penalties affected only excessive usury; the public Ministry did not especially prosecute moderate usury, although the text of the Ordinances was general.⁶ The result of what we have just said is that the right to judge usurers belonged at the same time to the Courts of the Church⁷ and to the secular tribunals. In the end the latter attained an exclusive jurisdiction in this matter, as in many others (sixteenth century); they were not lacking in reasons for its justification for example, such reasons as these, — that lending gave

ture. Cf. in the *Boretius* ed., Index, see "Usura," "Fœnus"; "L. Edwardi Conf.," 37; "Const. Sic.," I, 6. Italian statutes in *Pertile*, IV, 594; "Siete Part.," 5, 1.

¹ "Conf. des Ord. de Guénois," IV, 7; 1254, 1311, etc., 1579, 1629, etc.; *Isambert*, Table, see "Usure," "Intérêt," "Prêt"; see *Guyot*; *L'Hommeau*, 336; *Argou*, IV, 18.

² "T. A. C., Norm.," 49; "Summa," 19; *Beaumanoir*, 68; *Glanville*, X, 3; *Boutaric*, II, 11; "Gr. Cout.," 573; "Ét. de St. Louis," I, 91; *Giraud*, "Essai," II, 15, 19, 23, 37, 226; "Schwabensp.," I, 165; "Ac. lég. Toulouse," XI, 51; XII, 400. — All the more was compound interest condemned. Difficulties of proof: "Toulouse," 112.

³ "Quid" if there has been an oath? Dig. X, 5, 19, 13. "Fides plivita?" "Montpellier," 68 (to keep the oath). Cf. *Pothier*, 112; *Serres*, III, 15. — The Parliament of Toulouse did not allow interest which had been voluntarily paid to be reclaimed.

⁴ With excommunication are connected a refusal of religious burial, the cancelling of the will, and the disability to be a witness: *Du Cange*, see "Usurarii," "Reg. de l'Offic. de Cerisy," no. 9 et seq.; *Desplanque*, "Infâmes," p. 18; "Olim," Index, see "Usur."

⁵ Anglo-Norman law: dead, he belonged to the king, and living, to the Church: "Summa Norm.," 19; "Regiam Maj.," 2, 54, 1; "Dialog. de Scacc.," II, 10.

⁶ Cf., however, the Ordinance of Jan. 13, 1311; *Fleury*, "Inst.," I, 445.

⁷ *Beaumanoir*, 58, 56; "Ét. de St. Louis," I, 255.

rise to a personal action, or that usury fell under the prohibition of the Ordinances.

§ 387. **The Same.** — (C) *Reaction.* Neither the Church nor royalty put an end to lending at interest; it was too essential a factor in economic order not to be justifiable in spite of the proscriptions.¹ Step by step, it regained the ground which it had lost. People did not do any more lending, but they associated themselves together, one furnished the money and the other his labor, and the benefits were divided; agency, the assignment of real estate for payment of a debt, sale with the power of redemption, exchange, and the establishment of rents performed the function of lending. The latter was tolerated on the part of the Jews, to whom their religion did not forbid it; in lending, the Jews did not contemplate doing a charitable act or a kindness; they were speculating, and, as they occupied no regular place in the social organization of the Middle Ages, trading in money became for them a profession and, as it were, the trade of an outcast.² They had the monopoly of this until it became divided between them and the Lombards and the inhabitants of Caor;³ the State thus granted to them for a money price that which made it violate a law of the Church, but it superintended them, which to a certain extent eased its conscience. The progress of business and the advantages which arose therefrom caused the mistake made by Aristotle to be understood; money became fruitful and multiplied; at the time of fairs in certain towns interest was allowed;⁴ maritime loans,⁵

¹ So much so that the monasteries filled the part of establishments of credit. We know the operations carried on by the Templars. As to monasteries in Normandy, from the eleventh to the thirteenth century, *cf.* thesis by *Génesthal*, 1901. In very old times the temples were the bankers of the State.

² A system of expulsion and calling back followed by confiscation practised by the old monarchy against the Jews, in such a way that the king benefited by their plunder while at the same time appearing to satisfy popular sentiment. As to the legislation in matters of usury, *cf.* *Isambert*, see "Juifs," "Intérêts," etc. A very high rate of interest is tolerated; for example, more than 43 per cent (1311). — *Cf.* Dig. X, 5, 19, 18; Council of Lateran, 1215; *Endemann*, II, 383. — Italy: *Pertile*, IV, 602. — Bohemia: "Ord." 1497; *G. Durand*, "Spec.," IV, 4; *Giraud*, II, 29, etc.

³ "Ord." 1250, 1311, etc.; *Isambert*, see Table. *Ashley*, I, 257, cites a statute of 1235: a loan nominally for three months, after which compensatory interest will be due "ex mora."

⁴ Fairs in Champagne, 1311; in Lyons, 1419. Towns of Montpellier, Alais, Tournai, Saint-Omer, Barrois. — *Contra*, Dig. X, 5, 19, 19; *Fassin*, "Thèse," 1900.

⁵ Contrary to the "Decr. Naviganti" (Dig. X, 5, 19, 19) which prohibits bottomry loans. Tremendous risk incurred by the lender, enormous profits in favor of the borrower: *Pothier*, "Tr. du Prêt à la Gr. Aventure"; *Camus and Dupin*, pp. 224, 439 (bibl.); *Ashley*, II, 492.

and sometimes even commercial loans,¹ escaped the general prohibition. In these exceptional cases,² whether persons or localities were concerned, the rate of interest was ordinarily limited by the legislature.³ A mass of expedients was devised to evade the prohibition in the instances where it still survived;⁴ some were rejected by the theologians and the jurists,⁵ and others were openly practised and recognized as lawful⁶ by the Church and the State: thus the "rente" for example. The theory of *compensating* interest (due in the case of "damnum emergens"), which was held to be lawful from the fourteenth century,⁷ in contrast with lucrative interest (due in the case of "lucrum cessans"), which was unlawful, made a large breach in the principle. It was not difficult to find cases where interest was only an equitable compensation for the disadvantage suffered by the lender in giving

¹ *Scaccia*, "De Commerciis" (end of sixteenth century), 1648; *Argou*, III, 30; Provence, Dauphiné, Béarn, Franche-Comté, Alsace; *Henrys*, I, 4, q. 110; *Serres*, "Inst.," III, 15 (obligations between merchants). But cf. *Pothier*, 68, "Tr. de la Pratiq. des Billets et du Prêt. d'Argent entre Négociants," 1684; "Tr. des Prêts de Commerce," 1738.

² Other exceptional cases sometimes admitted, sometimes disputed, by jurisprudence and doctrine; for example, funds of the ward, marriage portion, etc.: Civil Code, 2001, 1372-1375; *Ferrière*, see "Deniers pupillaires"; Macedonian "Senatusconsultum," *supra*.

³ Cf. *Pertile*, IV, 604 (texts).

⁴ *Cepolla*, "De Simulatione Contractuum," fifteenth century. These tricks of the new law in order to break through and overpower, thanks to the art of the casuists, the scruples of timid consciences as well as the provisions of the laws, are the despair of the Jansenists: *Pascal*, "Provinciales," I, 8. Cf. the old teachers (*Maillart*, etc.).

⁵ Such are the "usurious" ("mohatra") contract condemned by Innocent XI and the triple contract condemned by Sixtus V, 1586. The *usurious contract* was the buying on credit of merchandise which one immediately resells at a loss to the vendor himself; one receives the price of the resale, for example, 9000 francs, and one pays back the purchase price, — for example, 10,000 francs; the difference between them represents the interest: *Pothier*, "Vente," 38. — The *triple contract* ("trinus contractus") was: (a) in the case of an association; I furnish 100,000 francs to a trader, who will give me 20 per cent of the profit that he will make; (b) insurance; out of my share of these profits I promise him 10 per cent by way of insurance premium, in order that he shall bind himself to pay me back the capital under any circumstances; (c) in case of a sale; as it is not certain that there will be any profits, I sell him back 5 per cent of them, which represents my uncertain profit; and he pledges himself to give me a lesser share of the profits, 5 per cent, which he insures me. This is the same as though I had lent at the rate of 5 per cent. Practised between three different persons the triple contract is lawful: *Pothier*, "Sociétés," no. 22; *Ashley*, II, 518. — On the "mort-gage" (practised by the abbays (Gellone, Redon) as well as by individuals), cf. *post*.

⁶ The result of this is treatises like that of *Broedersen*, "De Usuris licitis et illicitis," 1743; *Camus d'Houlouwe*, "Tr. des Intérêts," 1774 (that is to say, lawful interest).

⁷ On the theory of the "Id Quod Interest," see the canonists and the treatise by *Dumoulin*; cf. *Nani*, "Arch. Giur.," XVI, 207; *Endemann*, II, 243, 317; "L. Wis.," 7, 5, 8; 2, 5, 7.

up the possession of his money (for example, delay by the debtor);¹ and as the number of secure investments had become greatly increased, it became a truth when one said that the lender suffered a damage rather than lacked a profit.² Speculators invented new forms of credit outside of the traditional limits, which escaped the now antiquated legislation,³ by reason of the time of their birth. The exceptions overthrew the rule,⁴ In the eighteenth century philosophers and theologians were still disputing; but the cause of the lawfulness of lending at interest was won.⁵ The Revolution met with no resistance when it decreed the new principle on the 2d of October, 1789. It was not suggested that they establish the absolute freedom of lending at interest, but that they fix by law a maximum rate which lenders could not exceed, and this was in the interest of the foolish and the necessitous whom the State ought to protect just as it does minors or the feeble-minded. But this law was not enacted during the Revolution,⁶ a fact which had this result without its being intended, that is, the rate of interest was unlimited until 1807. At this date the Law of the 3d of September fixed a maximum (which it took from the legislation of the Old Régime with relation to "rentes"), — five per cent, that is to say, one denier in twenty according to the old

¹ **Pawn Shops** ("Monts-de-piété," "Montes-Christi") were meant by their founders to be establishments of free credit for the poor; they deducted a moderate interest so as to cover their general expenses. The oldest of them is perhaps that of Orvieto, 1463 (following the teachings of Fr. Bartolomeo da Colle). Details and bibl. in *Pertile*, IV, 608; *Endemann*, II, 374; *Ashley*, II, 530; *Holtzapfel*, "Anfänge d. Montes pietatis," 1903.

² Theory of *P. de Castro* (proof of the "lucrum"). Theory of the risk incurred by capital: *Endemann*, II, 322.

³ *Voltaire*, "Dict. phil.," see "Intérêts": the Sorbonne has decided that lending at interest is a mortal sin. There is not one of these reasoners who does not put his money out at interest, when he can, at 5 or 6 per cent, by buying on the exchange bonds on farms, shares in the India Company, and Canadian bonds: cf. *Pothier*, 94; *Pertile*, IV, 610.

⁴ There were still so many adherents to this rule that it was not necessary to seek an excuse for allowing lending at interest in the idea of a fiscal monopoly or a right to have oneself paid (*Champeaux*, *loc. cit.*). This is the reason why this rule was upheld during the monarchic period. The Memorial of Turgot, which was the decisive manifesto on this question, only goes back to 1767.

⁵ From the sixteenth century on: *Dumoulin*, "Tr. Usur.," *Calvin*, in a letter to Ecolampade, maintained that the Scriptures only condemn excessive usury which oppresses the poor, and not interest demanded from the wealthy man who realized great profits by means of the money that had been lent him. Following them: *Saumaise*, 1637; *Montesquieu*, "Esp. des Lois," 22, 19; *Voltaire*, see "Dict. Phil."; *Turgot*, 1767; *Bentham*, 1787. The Reformation did not affect this evolution; Luther and Zwingle condemned lending at interest. Cf., however, *Ashley*, II, 540, 545 (England).

⁶ Law of the 5th Therm., year IV; Civil Code, 1907.

system of computation.¹ The attitude of the Church in the face of this legislation has been rather embarrassing; it has refused to declare that interest was lawful in itself; but it has recommended that the ecclesiastical authorities should not concern themselves with lenders who acted in conformity with the laws, "Quousque S^a Sedes definitivam sententiam emiserit." We are still waiting for this pronouncement.²

§ 388. **Establishment of Rents.** — (A) *Origin.* According to the current opinion, rents³ were devised with the object of evading the prohibition of lending at interest. This is not so at all; they have an entirely different origin; the only thing which is true is that they did serve to attain this object after having been turned aside from their original object. They began by being a means of developing lands and not at all as a transaction of credit. Lands were granted charged with rent or a portion of the products. Quit-rent and rent are synonymous in the old language. But the rent was distinguished from the quit-rent by losing all of its feudal character; it was termed merely rent by contrast with the seigniorial rent or quit-rent; it was applied at the decline of feudalism to those possessions which had preserved the stamp of feudalism the least of all, — for example, to houses in towns;⁴ it represented in the case of feudal possessions the part of the income which corresponded to improvements, to the superior value, and was superimposed upon the quit-rent, which represented the income of the land itself. Thus it acquired an independent existence. Modeled in the beginning upon the juridical type of quit-

¹ Switzerland: after the sixteenth century, a limited freedom: *Huber*, IV, 868. Police Ordinances in Germany, 1577, 1600 and 1654.

² The modern canonists admit that there are extrinsic circumstances or rights that can make interest lawful: 1st. The lender sustains some damage ("damnum emergens"). 2d. He deprives himself of some profit ("lucrum cessans"), at least if the profit is morally certain; what if it is probable? *P. de Castro*, "Cons.," II, 55, 3. 3d. If the capital invested runs risks ("periculum sortis"), the interest represents an insurance premium; if it is a matter of exceptional risks, — for example, by reason of the circumstances in which the debtor's fortune happens to be. 4th. "Titulus legis civilis," the law authorizes it; this is a right which it is difficult to justify (general interest? Does this assume the existence of the other rights?): *Ashley*, II, 535.

³ "Renda," "rendita" (ninth century), "redditus," meaning revenue. *Du Cange* "Arrérages" expresses the same idea with this difference, that he assumes the rent to have fallen due and the debtor to be in arrears, "arriéré." *Godefroy*, see "Arriérage"; *Ragueau*, *ibid.* However, the rent is contrasted with the arrears; it then becomes lawful to demand the arrears (to yield a rent, to draw one's rent): *Pothier*, "Personnes," no. 260.

⁴ Lords' rent on houses: *Beaumanoir*, 24, 19, 20; "Gr. Cout.," 315 *et seq.*, 833. Rent on the revenues of the State, upon the Hotel de Ville, *Loyzel*, 517; *Larroque-Timbaud*, 39 *et seq.*

rent, of which it was merely a variant, it departed more and more from its original form, and approached the type of a loan at interest.

§ 389. **The Same.** — (B) *Rent-charge*.¹ It will be sufficient for us to recall the fact that by this is understood a rent established by means of the alienation of an estate. The grantor retains over the land a real right,² which is immovable and cannot be repurchased;³ the grantee becomes the owner, subject to this charge,⁴ with power to escape therefrom by giving up the land,

¹ *Pothier*, "Tr. du Bail à Rente," IV, ed. *Bug.*; *Felix and Henrion*, "Tr. des Rentes fonc.," 1829. — English law: *rent service* as contrasted with the *rent charge* and the *rent seck* ("redditus sicus") which *Pollock and Maitland* designate by a generic name: *non-tenurial rent* (II, 128). Cf. *Rent of a room*: *Bracton*, fo. 203b.

² Indivisibility of the quit-rent and of constituted rents or rent on land: *Desmarest*, 276; "Cout. Not.," 165; "Gr. Cout.," p. 354; "L. d. Dr.," 789.

³ Except there be an agreement to the contrary, whereas constituted rents, at least in the later stages of the law, are essentially capable of being bought back. To buy back a rent on land is to dispossess the creditor. However, the papal bulls have sometimes authorized this buying back, and the royal ordinances have also allowed it as an exception for reasons of public utility which we shall set forth, but also because the buying back often appeared as nothing more than the reimbursement of a claim, — even when it was a matter of a rent on land. The Ordinance of 1441, Art. 18, declares that the rents on houses in Paris can be bought back at the rate of 8½ per cent, because the owners of houses charged with excessive rents allow them to go to ruin. The Edict of May, 1553 (other towns); "Paris, N. C.," 12 "Orléans," 270; *Glasson*, VII, 323. It is upon this occasion that the Declaration of May, 1609, intending to allow the debtor to take advantage of the lowering of the rate of interest on rents, — that had passed from one-twelfth of the capital or 8½ per cent, in 1576, to one-sixteenth of the capital, or 6¼ per cent, in 1601, — decided that the debtor could on his own authority subrogate to the rights of his creditor the lender from whom he borrowed the necessary sum for the buying back; the creditor who had his money invested at more than 8 per cent would not have consented, because he could not invest it at more than 6½ per cent, and the lender would require guarantees: *Regulating Order of the Parliament of Paris*, July 6, 1690; *Pothier*, no. 23. *Glasson*, VII, 325, cites the Ordinances of Apr., 1393, Oct., 1409, July, 1410, 1443, May 27, 1424, July 31, 1428. *Isambert*, Table, see "Rentes"; *Ashley*, II, 475 (buying back in Germany).

⁴ In default of payment of the quit-rent or the rent, the old procedure accords with the primitive conception of our institution; the creditor has the rights of an owner, whereas in the case of constituted rents, according to the opinion of *Dumoulin*, he descends to the rank of an ordinary creditor. Cf. *post*, "Execution." — Distraint or seizure of the possessions that furnished the house, and, consequently, an obligation to furnish it ("Cout. Not.," 3, 36, 81, 187; "Parl. aux Bourg.," p. 137); execution on the standing crops upon land. Fine, except in the city and outskirts of Paris. If the house is empty and abandoned or in ruins, the seizure is publicly announced: "Cout. Not.," 169, 179, 31, etc.; "Gr. Cout.," pp. 316, 277, 199, 544 *et seq.*; "Const. du Chât.," 62 *et seq.*; "Paris, N. C.," 86: right to three years of arrears for the quit-rent (the same for rents, "Ord." of 1563; *Loysel*, 524); 163: in the case of rents only three-fourths can be pledged, for the old delay of a year and a day here maintained makes one lose the right of seizure. Difficulties in the frequent cases when there are several successive quit-rents or rents: *Beaumanoir*, 24, 20; "Gr. Cout.," 315 *et seq.*; "Cout. Not.," 117, 151; "A. C., Anjou," II, 419; *Buche*, "N. R. H.," 1884, 76. — English law: the *rent seck*, a variety of the

for he has only held "propter rem";¹ conversely, after-purchasers by private right were subjected, as were universal heirs, to the payment of the rent; the real right of the holder of the rent could, in fact, be set up against every person who occupied the land. The upholding of rent-charges with these consequences was incompatible with the system of the liberation of lands which was inaugurated by the Revolution; generalizing a provision that royalty must have been given its land as an exception (rents over houses in Paris and other towns), the Law of August 11, 1789, declared that they were capable of being repurchased.² To-day the seller of a piece of land in consideration of a rent has only a personal right,³ which is a movable and can be repurchased; to make up for this, the purchaser who is held personally liable has been deprived of the power of giving up the land, Civil Code, 530.

§ 390. **The Same.** — (C) *Constituted rents.* Instead of land, one person may grant to another a sum of money, a capital, charged with the payment back to him of a perpetual or life rent; the rent which is thus established is called *constituted* perpetually or for life. This operation is only a variation of lending at interest; it differs in that the capital cannot be demanded back; it depends upon the debtor to pay it back, but he can choose his own time; the creditor cannot compel him to free himself; if he needs his capital he has no other resource excepting to transfer his rent for a money consideration to a third party, assuming that there should be third parties disposed to buy it. At first blush it seems as though there were no reason for not treating this act just like the ordinary case of lending at interest, because the differences which we have just set forth had nothing essential in them. But hypothetical forms are met with where the constituted rent would merge with the rent-charge, and the latter because of its origin was radically different from lending at interest.⁴ Hence these hypothetical cases, being favorable, and the only ones which were known in the old

constituted rent, does not allow seizure to be made use of (*Bracton*, fo. 203b); the *rent charge* does allow it.

¹ Excepting if there be an agreement to the contrary (a clause to furnish and to plead): "Cout. Not.," 95, 96, 97, 171, 70; *Desmares*, 183; "Gr. Cout.," 317. The giving up consisted in the abandonment at law of the ownership (and not only of the possession); the acquirer himself was allowed to do this: *Loysel*, 520-366; *Fleury*, "Inst.," II, 50.

² Cf. Law of May 14, 1790, 7; of Dec. 18, 1790, 2; of Oct. 16, 1791; "Code Civil interméd.," Table, see "Rentes"; *Sagnac*, 107, 147, 336 *et seq.*

³ In addition, it is true, to a privilege and an action for cancellation.

⁴ The lessor of a copyhold could receive and did receive most of the time a portion of the issues of the land granted.

times, they induced the canonists to declare the constituted rent lawful.¹ There is very little difference, for example, between the case where one sells a piece of land charged with a rent and the case where one buys this piece of land in consideration of a price paid to the vendor, after which the land is restored to him charged with a rent. The canonists, looking at it from this point of view, could hardly make any distinction between rent-charges and constituted rents: the former were reserved at the moment of the grant, "**census reservativus**"; the latter were created or charged on land which belonged to the debtor; "**census constitutivus**," "**consignativus**"; in both cases the creditor had a real immovable right. In order to make the analogy complete, the canon law required that the transaction should affect a "**res**" which produced profits.² As the two transactions which we have just been speaking of were not always so closely allied as we have assumed, the canonists, in order to avoid stigmatizing the constituted rent as usury, declassified it, so to speak, and made of it a sale. According to them, the debtor sold the right to collect the income; the creditor bought this right and paid for it out of his capital.³ Thus the rent appeared like a legal being distinct from the income and producing returns in the same way as a piece of land, "lasting forever." When the debtor paid back the capital which he had received, it was said that he "repurchased" the rent.⁴ Finally, by means of this artificial analysis they succeeded in giving the reason for the fact that the capital could not be demanded; to demand the capital would have been to compel a vendor to buy back the object which he had sold. There is no need to observe that the fact of not being able to demand the capital was due to entirely different reasons; it is to be accounted for by the original relationship which existed between the constituted rent and the

¹ Innocent IV (1243), Commentary on Decretals "*ad c. in civit., t. de usuris*"; discussion until the Bulls "*Regimini*," of Martin V, 1200, and of Calixtus III, 1455 ("*Extravag.*" 3, 5, under the title "*de emtione*"). Cf. also the Bull of Pius V, 1568.

² The arrears of the rent had to be in proportion to the revenue of the land or the house charged with their payment; if the latter diminished in value or became of no value at all, the rent did the same.

³ A theory already pointed out in the Compendiums of the sixteenth century.

⁴ According to *Pothier*, the buying back is a right of the debtor's that cannot be lost by prescription, and which cannot be affected by any clauses in the contract. However, it is not allowed in cases of a life rent. And no doubt in the old canonic doctrine the perpetual rent, which was likened to the rent on land, could not be bought back excepting if there had been a special agreement to that effect: *Loyssel*, 511 and the note (Bull of 1568). Cf. *Ashley*, II, 473; *Pasquier*, "*Inst.*," p. 559.

rent-charge; grants charged with a quit-rent or a rent were perpetual and irrevocable as a consequence of the social and economic conditions of the later Middle Ages.¹

Constituted rents offered approximately the same advantages that lending at interest did; the forbidding of the latter made the former more numerous. And when they had once come into current practice, debtors were no longer seen to give as a guarantee of the payment of the rent a charge on a stipulated piece of land, but a general obligation over all other possessions. The analogy with the rent-charge thus ceased to exist. It was asked whether the law ought to sanction a security, or even a personal obligation of the debtor, which at a given time also allowed one to proceed against all his possessions, even when there was no mortgage. Dumoulin became a partisan of the validity of **personal rents**,² which were unknown in the old law; and his opinion, which was advanced in 1545, was sanctioned some years later by an order of the Parliament of Paris of the 10th of May, 1557.³ He found a powerful argument in the analysis of the rent which was put forth by the theologians; the charge affecting a specified piece of land only seemed like a guarantee of payment; if it were lacking, the transaction still existed; thus it was nothing

¹ Consequences: (a) The rents were divided up according to the law of the locality where the immovable was situated, and not according to that of the domicile of the debtor. (b) They were indivisible, just like the quit-rent, and the adjudication of the land by decree did not clear them off as though it had been a case of a mortgage where the beneficiary had neglected to offer any opposition: *Desmares*, 220; "Cout. Not.," 43; "Paris, A. C.," 70, 71; "N. C.," 99, 101. (c) An assignment meant the alienation of the land up to the amount of the capital required for the payment of the rent; the creditor thus acquired a splitting of the ownership. He had to give homage and fealty for fiefs to obtain the seisin in the case of common tenures, and to pay the transfer taxes: *Desmares*, 189, 221; *Beaumanoir*, 24, 20; "Gr. Cout.," 174, 265; "A. C., Anjou," vol. 2, pp. 238, 417, 547; "Paris, N. C.," 82. In the pledge-giving countries the acquiring of this rent assumes that the formalities of vesting and divesting had been carried out; elsewhere it was sufficient if the arrears were paid (*cf.* recognitory rent): "Anjou," 291; *Merlin*, see "Assiette de Rente." (d) The giving up of the land freed it from the rent in the same way as its loss would have done: *Argou*, IV, 15.

² *Balde*, "ad l. un. C. de his q. pœnæ nom.," admitted of personal rents "inter bonos" and in conformity with the local custom (but *contra*, "si de feudo vasalli," n. 7). *Jean Faure* maintained that assignment did not necessarily imply alienation ("Inst. de act.," § "item serv.," "de assign. libert.," "Code de don.," "ad l. si quis arg."). Some of the casuists allowed personal rents when they were constituted by a trader or an artisan, for they then sold a portion of their profits: *Dumoulin*, "De Us.," 22. *Cf.* on "Paris," 84, 85; *Loyseau*, *op. cit.* But "Navarre," "De Usur.," q. 15, n. 115; *Tiraqueau*, "De Retr.," 1, 6, 15, condemned general rents, rents that can be bought back, and rents that may be easily removed; to the same effect, a Bull of Pius V, in 1568.

³ A propos of the lords' due and sales: "Paris, A. C.," 58, "N. C.," 83.

more than an ordinary mortgage, an accessory of the debt, and not an essential part of the transaction. This opinion, which prevailed¹ because it was more in harmony with the economic needs of this time, should have caused constituted rents to be classified among movables; as a matter of fact, they were only credits affecting certain sums of money.² But tradition was stronger than logic; they continued to be placed among immovables under pretext that the rent formed a legal being, which was distinct from the income, and because of the more serious motive that it had too much value not to be subject to the protecting rules of investments in immovables in the interests of families. The Revolutionary law proceeded to the natural consequences of the opinion of Dumoulin: at first these rents were practically converted into movables, as they could no longer be mortgaged, and later on they were converted into movables by means of a formal enactment.³

§ 391. **The Same.** — (D) *Life rents.* This species of constituted rents⁴ was first of all seen under the form of a charge (contracted, for example, by a monastery) of lodging and supporting until the end of his days the person who granted a domain or land (*cf. infra*, "lease for support").

§ 392. **Assignment of Claims.** — (A) *Early inalienability.*⁵

¹ Consequences: the assignment is only a mortgage; no lords' due and sales taxes have to be paid for the constitution of rents; the loss of the land leaves the rent still in existence; sale by decree clears off perpetual rents (and not life rents): *Desmares*, 223, 272; "Cout. Not.," 122, 130; the rent is called movable in some of the Customs ("Blois," 157; "Reims," 181, etc.) and in the countries of written law: *Ferrière*, see "Rente"; however, as a general thing, it is held to be an immovable: Ordinance of 1747, 1, 3. The complaint is no longer admitted excepting in cases of rents on land: *Laurière*, on "Paris," 96 (*contra*, *Desmares*, 38); *Loysel*, 507-518.

² The Ordinances, at least those since the sixteenth century, fix a maximum rate of interest beyond which the rent cannot go without being tainted with usury. This rate of interest has varied; it was 10 per cent according to the "Extrav.," "Regimini"; 8½ per cent in 1567; 6¼ per cent in 1601; 5% per cent in 1634; 5 per cent in 1665, and especially according to the Edict of June, 1725. *Isambert*, Table, see "Rentes." The Ordinance of May 3, 1350, etc. Prescription of arrears in five years: Ordinance of June, 1510, 71; January, 1629, 142; Decree of August 20, 1792; August 24, 1793, 151; *Loysel*, 508-513; *Legouix*, "Déchéance quinquennale," 1901; *Lair*, "Intérêts," 1860.

³ Law of Dec. 18, 1790; Law of 11 Brum., year VII, 9; 22 Frim., year VII, 7.

⁴ *P. de Fontaines*, p. 131; *Beaumanoir*, 50, 13.

⁵ The intransmissibility of claims persisted in the English common law until 1873; up to that time the creditor who wished to assign his right could only do so, just as in the Roman law, by means of agency; the assignee, or, rather, the attorney acted in the name of the assignor; the agency came to an end upon the death of either one of the parties. There was an exception made in favor of the king. The courts of equity, on the other hand, admitted the validity of this assignment.

Neither claims arising "ex delicto" nor claims arising "ex contractu" could, in early times, be granted to a third party; by what right, in fact, could the latter have prosecuted the debtor? He had been the victim of no injury on the part of the latter, and he had received from him no engagement whatsoever (for example, no oath). Just as to-day the changing of a debtor without the consent of the creditor cannot be conceived of, so in olden times they could not understand the substitution of one creditor for another. They had also in mind the fact that the harsh means of coercion with which creditors were armed—physical constraint, for example—could be used in very diverse ways, according to the mood of the persons who had a right to make use of them; the creditor that one had chosen oneself, a relative or a friend, would, as they knew, employ a great deal of care in making use of them, whereas a stranger might very likely show himself to be pitiless and inhuman. Even to-day, although the transfer of claims is in common use, it is not a matter of indifference as far as the debtor is concerned to have such and such a man for his creditor.

§ 393. **The Same.** — (B) *Indirect means*, however, of arriving at results which were rather similar to those following an assignment, were open to the parties. — 1st. *Novation by changing creditors*;¹ this assumed a new undertaking on the part of the debtor towards the third party who took the place of the original creditor; consequently, it was dependent upon the will of the debtor. — 2d. The order "ad litem";² when representation at law was admitted the creditor could give an order to a third party to reclaim the payment of the debt, and, if necessary, to arraign the debtor before the courts; the agent had only to keep intact the amount of the claim; but this method of assignment was very imperfect, because, if the agent should die before having been paid, his powers did not pass to his heirs; none the less, it remained in force in England until 1873. — 3d. *The simultaneous undertaking of the debtor towards the creditor and towards a third party*;³ the latter by virtue of his designation has the right of demanding payment without showing himself entitled to a right to the claim.

¹ "Blume des Sachsensp.," II, 2, 98; *Boutaric*, I, 26.

² English law and German law, "Stat. de Goslar," 70, 8-10, etc. In Germany the assignor adds to the power of attorney a renunciation to his own rights of action. Cf. in Rome, "procur. in rem suam." — "L. Anastasiana," Goldschmidt, p. 311.

³ Cf. in the Roman law the "adstipulator," the "adjectivus solutionis gratia."

As long as representation at law was not admitted, this was only done in an imperfect manner; there was in this a convenient expedient by which the same object might be obtained. From the Frankish period we see the creditor making the debtor promise him that he will pay the creditor in the hands of a third party (designated beforehand or whom he has reserved the power of designating afterwards). These clauses, while they developed in the interests of commerce, gave rise to bills to order and to bearer.

§ 394. **The Same.** — (C) *Assignment. Transfer.* When formalism disappeared and the means of carrying out execution against the debtor became less harsh, the assignment of claims could be made in a direct manner;¹ the creditor transferred his right to the assignee.² According to the Custom of Paris of 1510, Art. 170, "A mere transfer does not give seisin," which means that the transfer, according to the Custom of 1580, Art. 108, must be notified to the debtor or accepted by him. Up to that time the debtor is released by paying the transferrer, the creditor of the transferrer can have himself paid out of the claim which has been transferred, and, finally, between two successive assignees, the one who has first notified the creditor has preference over the other. The primitive meaning of this axiom is not very well established;³ it is not certain that the old texts require the above

¹ In France transmissibility is not admitted of by certain Customs; others accept it at an early time. As to the former, *cf.*, *Boutaric*, I, 26 (p. 146), 11 (p. 54); "Roisin," 51, 56, 57. — On the other hand, this assignment appears after the thirteenth century in *P. de Fontaines*, 15, 49; "Ass. de Jér.," "C. des Bourg.," 212, ed. *Kausler*, 237; *Beaumanoir*, 35, 19 (*cf.* 18); *Varin*, "Arch. Adm. de Reims," 1, 2, 744, 1118; *Delisle*, "Jug. de l'Echiqu. de Norm.," no. 267 (in 1249); "L. d. Droiz," § 760; "Summa art. not.," p. 27; *Méry*, "Hist. du Commerce de Marseille," 1, 292 (in 1224).

² The agency clause is only inserted in the assignment for the sake of greater precaution: *Varin*, "Arch. adm.," I, 2, p. 1097. "Procuratio in rem suam" borrowed from Italy. Nevertheless, the assignee is not treated like a legal representative; thus he has no need of letters of authority in order to proceed against the debtor; *Bartole*, c. 1, "C. J. de O. et A."

³ *Loyse*, 365, 657; "Saintonge," 42. *Cf.* "Blois," 263, and "N. C., Paris," 108. It is connected with the L. 3 of *Gordien*, "Cod. Just.," "de nov.," *Villequez*, "R. h. Dr.," VIII, 466. But the Romanists look upon the claim as being transmitted by the assignment, and not by the notification, and do not specially concern themselves with it, as the "N. C., Paris," 108, does with the notice requiring the production of a copy of the deed of conveyance; *Brunner*, "N. R. H.," 1886, 28, 1, proposes two explanations: (A) The seisin of the rents only takes place upon the attainment of the arrears, when investiture no longer applies: "A. C., Anjou," § 332. This rule was extended to claims. (B) It must have been a particular application of the rule: "A gift is invalid without seisin," that was applied first of all to rents and then to claims, *Bourdote de Richeb.*, III, 175, 189 ("Mantes," 4, 3, 90), and then extended under

meaning;¹ but it was too useful not to be demanded very soon; in fact, thanks to this maxim, the debtor who was notified of the assignment could not pay off his debt into the hands of the assignor without incurring double liability. Thus, against third parties, this notification became the equivalent of delivery in the case of corporeal things.²

§ 395. **The Same.** — (D) *Payment with subrogation* is only the Roman privilege of the assignment of actions combined with the "successio in locum creditoris" as far as mortgages were concerned.³ We must assume that a third party pays the debt of another when due; he is allowed, in order to have the money he advanced paid back to him, to make use of the rights which belonged to the creditor, whose interest has ceased, and especially of mortgages given in his favor, according to the rank with which they were invested. For this purpose he requires an agreement, made with the creditor or with the debtor, which will be the case when he acts in the interest of one or the other, or else, if the third party acts in his own interest, a requisition addressed to the creditor, whether the latter knows it or not. — It was not without difficulty that subrogation based on an agreement with the debtor, and carried out in spite of the creditor, was introduced into our law; but this was only a logical consequence of the institution. If the *third party* transmitted the money to the debtor and the latter paid the creditor, then the creditor had no reason to offer any opposition to the third party exercising those rights for which he himself had no further use. As to subrogation upon a requisition for the benefit of those who paid what they owed with others or for others (sureties, joint and several debtors, etc.) it would have been logical to decide that this type of subrogation would take place as matter of law; because the creditor could not offer any refusal in opposition to the demand which was made of him,

the influence of Law 3, *supra*, and of the necessity of a notification for every assignment.

¹ *Masuer*, 31, 7. Acceptance by the assignee: *Laurière*, on "Paris," 108.

² Bills payable on presentation: "Zf. Handelsr.," 22, 59; "N. R. H.," 1886, 178; *Franken*, "Pfandr.," I, 248; "Avignon," 50; "Toulouse," "de solut." The handing over of the bill ceased to be absolutely necessary when the latter was no longer looked upon as anything but a means of proof; and when the "carta" and the "notitia" were no longer distinguished, instead of restoring its effect to the deed, or of invalidating it by a mention in writing, or by tearing it up, they often limited themselves to the delivery of a receipt to the debtor, — a thing that was absolutely abnormal during the Frankish period.

³ Confusion: cf. *Bartole*, on I, 1, D., "quæ res pig.," *Negusantius*, "De pign.," 5, 3, 45 (cited by *Beaum.*, p. 159); *Favre*, "Def.," 1, 2, 3; *Pothier*, "Intr.," no. 66 *et seq.*

the latter being nothing but an idle formality. This is what Dumoulin upholds in the first of the formal lectures which he gave at Dôle, and which was in accord with the precedent of the "successio in locum." Here the jurists were not in accord with the courts.¹ Though in that period it does not seem that Dumoulin's opinion prevailed, the framers of the Civil Code very properly sanctioned it (Art. 1251).²

§ 396. **The Same.** — (E) *Bills to bearer and to order.* This class of writings contained a promise to pay a person other than the creditor, a third party who was unknown at the time of the making of the bill, and who would be determined in one instance by the possession of the latter, — *clause to bearer*, — in another instance by a writing of the creditor named in the bill, — *clause to order*. In the *bills to bearer* the debtor promises to pay: 1st. Sometimes to the creditor or the bearer ("vel cui hoc scriptum in manu paruerit"). 2d. Sometimes simply to the bearer ("ad hominem apud quem hoc scriptum in manu paruerit"). The first of these forms is met with in Italian records of the ninth century; the other is only found about a hundred years later. From Italy bills payable to bearer passed into general usage in other countries.³ In France they are to be found in the thirteenth century.⁴ The alternate clause ("to N. or to bearer") is the most commonly used.⁵

¹ With the same meaning as Dumoulin gives it, cf. *Serres*, "Inst.," III, 21; *Orders in Maynard*, II, 49; *D'Olive*, IV, 31. — To the contrary, *Pothier*, *Renusson*, etc.

² Cf. "personal subrogation" and "assignment of claims." The creditor is free to convey his claim; subrogation is imposed upon him. The assignee speculates; the man subrogated rather does a service or carries out his own business; also, when he pays 9 for a claim of 10, he can only reclaim 9, whereas an assignee would have the right to 10; and in the same way the surety can only demand from his fellow sureties their share. Subrogation must not injure the creditor; it is imposed upon him because "sibi non nocet, alteri prodest (nemo contra se subrogasse censetur.))" The man subrogated is not held bound to furnish a guaranty as the assignor is. The man subrogated does not have to give the debtor any notice.

³ *Brunner*, "Zf. Handelsr.," XXII, 119, 505; *Pertile*, IV, 461 (testamentary executor).

⁴ Alternative clause: *Warnkœnig*, "Flanfr. Rechtsg.," III, 2, 159 (Act of 1276); *Beaumanoir*, 35, 20; "A. C., Artois," 3, 34; *Mazure*, "F. de Béarn," p. 285; "Gr. Cout.," p. 834, etc. Simple clause: "Cartul. de Flines," I, 252 (no. 231), in 1281; "Roisin," p. 303, etc.; *Brunner*, "N. R. H.," 1886, 36. — *Bracton*, fo. 46 b ("missibilia").

⁵ See as to this clause the detailed analysis in the texts: "N. R. H.," 1886, pp. 37–50, 139–148; "F. de Béarn," 42, 110, 117; cf. ed. 1715, p. 29; "A. C., Artois," 2, 8; *Boutaric*, I, 11 and 107: "principal" and "command" (which *Brunner* reads instead of "convent") means creditor and bearer (notes by Charondas); "Mém. Soc. Antiq. Norm.," 18, p. 64; "Gr. Cout.," p. 433; "Cout. Not.," 27; *Desmares*, 171, 179, 164, 378, 255; *J. Lecoq*, q. 4; *Masuer*, "De Solut.," 15 (but cf. *Berius*, "Decis.," pp. 580, 277, ed. 1599); *Rebuffe*, "Comment. in Const.," 1599, I, 39; "Inst. for.," I.

The holder of a bill which contains this clause may demand the amount without being compelled to show whence he obtained the bill, and without having to prove the regularity of his possession.¹ Thenceforth it presents the great advantage of allowing the creditor: 1st. To assign his claim without any writing, and without notice to the debtor, by the mere handing over of the bill. 2d. To have himself represented by the bearer, without letters of authority, and without warrant of attorney; it is true that the bearer may abuse his powers by transmitting the bill to a third party, and that this cannot be undone, for, so long as he has possession of the bill, the debtor has no other creditor but him. However different his position might be from that of an agent, our old jurisconsults nevertheless called him an attorney of the creditor's with the object of justifying his right to act at law; this was a fiction invented in order to harmonize the old practice with the Roman ideas. At first it had no very great influence upon these facts;² but at the end of the sixteenth century it resulted in causing bills to bearer to be treated like ordinary bills which name some one, and recovery upon which one would have left in the hands of an agent; this was to deprive them of their most essential advantages. The need which practice had for the effects of a rapid circulation led to the invention of *notes in blank*; at one time this sort of bill replaced bills to bearer in civil and commercial usage; but the courts looked upon them as dangerous and prohibited them; they were even proscribed, with bills to bearer, by an Edict of 1716, which was intended to reserve the privilege of the clause to bearer for notes of the State and those of the national bank. The prohibition did not survive this famous system; at least in 1721 another Edict authorized bills to bearer.

The *clause to order*,³ which is of no less importance than the clause to bearer, is connected, as is the latter, with very old formulæ. From the seventh century deeds contain clauses of such a tenor as this: "I will pay to N. . . . or to him 'cui dederit hanc cautionem ad exigendum'"; in the eighth century they say: "vel cui in manum miseris"; in the old Italian deeds of the twelfth

¹ The conception that people had of the "carta" and of the rôle it played in law must have contributed towards this result.

² However, the rule that agency is extinguished by the death of the agent was applied to him: *Desmares*, 164, 378; *Loysel*, 377.

³ "To N. or his order," a formula that is equivalent to, "To the order of N.," for N. can designate himself: *Stobbe*, § 178. Cf. in "N. R. H.," 1886, 169, the comparison between the agency clause and the clause to order under their various forms: *Heusler*, § 48; *Debray*, "Thèse."

century: "vel cui ordinaveris."¹ The French formulæ of the thirteenth century, "to N. or his depositary, or his messenger," in the seventeenth century are replaced by the clause to order, which comes from Italy and which prevailed everywhere. The bill to order served the same purposes as the bill to bearer; but the latter could circulate through several hands, whereas the bill to order "only admitted of one transfer, for the depositary was obliged to prove that title had been given to him by the person mentioned in the deed," and this was ordinarily done by the presentation of a warrant of attorney.² A practice of Italian origin, indorsement,³ dispensed with the production of a special warrant of attorney, because it was a real authority written on the back of the bill.⁴ The innovation consisted less in this mention on the back of the bill — a rather widespread custom, at least since the fourteenth century, in very diverse cases, and one which passed without difficulty to bills to order⁵ — than in the sanction of a series of successive transfers which ensued upon it.⁶ Bills to order thus took the place of bills to bearer, which had been forbidden, and became a medium of circulation. It is in this sense that the assertion of

¹ Bill of exchange to order, *cf.* Act of May 18, 1760 (Genoa): "Monum. h. patr."; Chart. 2, no. 882. Bills to order in Marseilles, 1247-1248 (*Blancard, op. cit.*). *Cf.* the Neapolitan Law of 1607.

² Instead of "letter of attorney," it would be better to say "designation of the depositary"; the only thing that has to be proved by the depositary (who is actually the *bearer*) is that he was designated by the payee "ad exigendum," it matters little for what reason (gift, assignment for a consideration, or agency). Has this designation the effect of making the holder an attorney or an assignee of the payee? It is very unlikely, because the old law knows neither agency nor assignment. Thus we are reduced to the necessity of saying that the holder has a right of his own that is acquired by him directly by virtue of the clause to order; thus he is not the assignee of the payee; he does not act in the latter's name; nor can he be met by defenses available against the latter (for example, payment, *Loysel*, 704; *Boutaric*, I, 44): "Olim," II, p. 1362 (in 1318). The analogy between bills to order and bills to bearer militated in support of this idea in the past, and the needs of commerce kept its practical consequences in existence afterwards, at least up to a certain point, when under the influence of the Roman ideas in the holder was seen only an attorney of the payee (whether in "rem suam" or in the interest of the latter).

³ A French origin is ordinarily attributed to it: "N. R. II," 1886, 174 (bibl.). But *cf.* *Goldschmidt*, 451; *Debray*, 47.

⁴ The order is also placed at the bottom of the bill of exchange in the same way as a signature guaranteeing payment.

⁵ "Gr. Cout.," 265; *Du Cange*, see "Indorsare"; *Boutaric*, I, 49. *Cf.* "Cod. Just.," 8, 43, 14; *Damhouder*, "Praxis rerum civil.," c. 89 (indorsement of every substitution of an agent). A custom of indorsing bills of exchange was first of all established in order to confer the power of attorney. Ordinance of 1673 which contrasts indorsement (giving of power of attorney) with the order (assignment).

⁶ *Cf.* *Debray*, 47.

Savary that there was no indorsement upon bills of exchange before 1620 is accurate.¹

§ 397. **The Same.** — (F) *Bills of Exchange.* The merchant who goes to a fair or to a distant place of business has need of foreign money; he can procure it upon his departure or upon his arrival by exchanging his specie for other specie (*manual exchange*, transmitted from hand to hand). But the transporting of money, especially in the Middle Ages, was troublesome, and not very safe; it was better to apply to a merchant or banker who had a correspondent (associate, etc.)² in the place where one was going; by paying value to him one obtained from him the promise that he would cause the necessary amounts to be furnished by his correspondent (*exchange drawn*, exchange of specie with transfer to another locality; transfer from place to place).³ A writing, "instrumentum ex causa cambii" was ordinarily drawn up to furnish proof of the transaction, as in the case of every other deed. But it had no special effects, and it is not from this source that the bill of exchange came; we may merely note the fact that it habitually contained the clause to order; the correspondent must pay to the man who gave value "vel suo nuntio" (to the person presenting the bill). The bill of exchange has its origin in the letter of notice or draft addressed by the banker (*drawer*) to his correspondent (*drawee*) which asks him to pay the sum which he, the banker, has promised; this was a mere message without any value in law; ⁴ it co-exists in the thirteenth century and the beginning of the fourteenth century with the notarial deed which we have been discussing. During the course of the fourteenth century it comes to be substituted for the latter and eliminates it, and this is possible because there are found therein the same statements, and it is intrusted to the man who

¹ *Parère*, 82; *Goldschmidt*, 451: from 1560 on, great number of indorsements in Italy: "Pragmatique" of 1607 and 1617 (prohibition); Law of Venice of 1593; *Clairac*, "Usances du Négoce," pp. 35, 62; Ord. of 1673, 5, 23. Cf. *Debray*, 51 (theories of the seventeenth and eighteenth centuries).

² Or even originally an overseer or clerk. Cf. "passive" clause to order "per me vel per meum nuntium."

³ Cf. *Goldschmidt*, *op. cit.*, p. 412 ("cambium ad risicum maris," or, on the other hand, "salvum in terra").

⁴ Various systems as to the origin of the draft. *Goldschmidt* connects it with the domestic bill of exchange; *Schaube*, with business letters between merchants; *Lastig*, "Zf. Handelsr.," 1878, 138, with the mentioning of it in the registers of the bankers or "campsors," which in Italy had executory force and were accompanied by a notice or letter of payment; *Freundt* connects it with letters patent and sealed letters delivered by the kings or towns to their creditors. On these points and on Arabian influence, cf. *Huvelin*, *op. cit.*

gives value himself in order to be presented at maturity, either by him or by his legal representative, to the drawee who shall pay on presentation. It has, moreover, the special advantage of summary proceedings at law, and it carries with it a recourse by the man who gives value against the man who has signed the bill, when unpaid by the drawee. The clause *value received*, and the handing of the letter to the payee, implies an acknowledgment of the debt on the part of the drawer. The order to pay, which is given to the drawee, is to be accounted for by the fact that he is the partner of the drawer, or that he has received value from the latter (*provision*); under these circumstances, one can understand that the drawee was held bound to accept the letter. This was originally done verbally "per retentionem litterarum," and later on by a notice written upon the deed itself; a refusal to accept was also proved by means of a written notice of the drawee; but this custom, which was not very favorable to credit, disappeared, and the responsibility of making a protest for non-acceptance was left to the bearer. By acceptance, although the drawer is not liberated, the drawee binds himself as regards the bearer; he does it rather in the name of the drawer than in his own name, which allows him to avail himself (until towards the sixteenth century) of the defenses which the drawer could oppose to the payee (for example, the latter had not furnished him with value). If the drawee accepted "*without cover*," when no value had been given, he was considered as being bound, nevertheless, because "acceptance presumes value." Thus the tendency to make the rights of the bearer independent of the relations between the drawer and the drawee is timidly advanced with the object of facilitating the circulation of the bill and giving more security to the bearer. The clause to order and numerous indorsements furthermore allow the bill of exchange to fulfill a new function; at first it only served to avoid the transporting of money; now it becomes a means of payment and an instrument of credit, a sort of currency between merchants; the value which it represents is incorporated in it, and the complex practice of modern times thus springs in an unexpected way from the formalistic "carta" of the barbarian period.

§ 398. **Agency and Representation.** — (A) *General Remarks.* In the very old law juridical acts should be carried out by the interested party himself; this is a consequence of their formalistic character; ceremonies or words which they assume imply his own

presence; they would have no meaning if they came from a third party. Under the system of non-formal transactions (for example, contracts by mutual consent),¹ representation became possible; each one could make known his will, not only by means of a letter or a "nuncius" ("epistola loquens") but by an agent furnished with powers and instructions which were sufficiently broad for one not to be able to term him merely a mouthpiece. Owing to a rather natural fiction, however, he is likened to a mere messenger; the act of the agent is looked upon as the act of the principal. Cases in which it is necessary to act through representatives have occurred at all times,—for example, one is absent or ill. How did one proceed in the formalistic period to do a legal act in such a case as this? Inaction is not always possible; for example, if one is summoned to appear in court, one is compelled to appear so as to avoid the penalties which fall upon the defaulter. The head of the family sometimes escaped this necessity by using the people dependent upon him, the people of his household;² but their sphere of action was rather limited, for it is evident that they could not bind the master "in infinitum."³ To be sure, representation was less called for than one might believe, for every act which involved a person under a disability was performed by his custodian, who acted in his own name by reason of his status as head of the family; such would also be the case when an individual "sui juris" had an interest in giving up his independence and placing himself under the custody of some other person, with the result of placing that other person over his affairs.⁴ As far as obligations were concerned, bills to bearer furnished a means of dispensing with representation. Besides the preceding cases,⁵ it was possible to secure the performance of the majority of acts by a third person in his own name, assuming that one obtained afterwards from him the transfer of the advantage or the burden which resulted there-

¹ *Heusler*, I, 210.

² *Boutaric*, I, 12 (founders and factors); *Beaumanoir*, 34, 5, 6; 29 (sergeants). Monks in the case of monasteries: *Dig.* X, 3, 35, 6. — *Paul*, 5, 2, 2 ("L. Rom. Cur.").

³ *Goldschmidt*, I, 244.

⁴ Act of 693; *Pertz*, "Dipl.," 68; "Sachsensp.," 1, 42, 1. — Cf. Roman command; "L. Wis.," ed. *Zeumer*, Index, see "Mandatum"; *Rozière*, "Form.," I, 314 *et seq.*; *Thévenin*, "Textes," 262; *Du Cange*, see "Mandare"; "Siete Part.," 5, 12, 20; "Cart. de St. Victor," I, 27.

⁵ Also the English institution of "uses": a third party acquires "ad opus" (French: "ces," "os"; English: "use") "monasterii": *Pollock and Maitland*, II, 226.

from. Thus one person bought a piece of land and paid for it, after which he resold it to the one on whose account the purchase had been made; but this complicated proceeding is not without its risks; one of the parties may suffer by reason of the insolvency of the other; if the transaction is an advantageous one, the third party may possibly want to keep it for himself; he may die before having carried out the transfer, and his heirs may refuse to carry it out; if the transaction is a bad one, it is the third party who is liable to lose, as a consequence of a change of will or the death of the one who is chiefly interested.¹ Nothing can take the place of representation, properly so called.² It entered the Customary law in proportion as formalism disappeared.³ But, in order to show how slow was its progress, it is sufficient to establish that it was not allowed, upon principle, in Germany before the thirteenth century. Were it a matter of endowing a monastery, one did this only when the relics had been placed there; it is to the saint himself, in person, upon the shrine where his remains are, that the transfer is made; if one is to restore a piece of land to St. Victor of Marseilles, the monks bear

¹ *Beaumanoir*, 34, 36, 37, 55; cf. especially c. 29 (services carried out by order). Cf. "Jostice," 162. — "Commission," cf. *Ferrière*, see "Facteur"; "Dict. économique," see "Commissionnaire"; *Goldschmidt*, I, 331; *Du Cange*, see "Commissio." — Will by commissioner: *R. Caillemer*, "Exécut. test.," p. 512. — Election of an agent: cf. "Répertoires," see "Prête-nom.," *Soldan*, "R. Gén. Dr.," 1885, 113.

² With regard to **Promises and Stipulations on behalf of another** there is a great deal of confusion in the old doctrine. Cf. *J. Faure*, "Inst.," 3, 18, 3 and 19; *Gui Pape*, "Q.," 317. They are not very clearly distinguished from promises and stipulations made by the interposition of a third party: *Bucherellus*, "De æquitate canonica"; these deeds are valid, and, in fact, the rule has so many exceptions that one is inclined to ask whether it was possible to apply it: *Pothier*, "Oblig.," 53 *et seq.* (cited by *Grotius*). In the very old law one promises a certain thing for another (for example, that he will appear in court), and one stipulates for another, for from the moment the required formalities have been carried out the promisor is bound; the question as to whether the man making the stipulation has a moral or pecuniary interest in the carrying out of the obligation is not gone into. The examples ordinarily cited give rise to difficulties: appointment of a marriage portion by the wife's relatives, conferring the fief upon a lord in order that he shall invest the purchaser, deeds by a "Salmann," life rent for the benefit of a third party, substitutions, stipulations in contracts of marriage for the benefit of children to be born in the future, bills to order and to bearer. *Stobbe*, § 172. The Roman axioms penetrated the old doctrine, although they were contradictory to the rule that all contracts were in good faith. But this was not done without some difficulty: *Beaumanoir*, 34, 36 *et seq.*; "Stat. Bonon.," 1454, 118 (one may stipulate on behalf of another, "non obstante quod sua non intersit," and the third party has an action "ipso jure," just as though he had stipulated): *Pertile*, IV, 455; *Bartole*, on l. 1. D., "de pactis"; *Voet*, "Pand.," 46, 1 *et seq.*; *Charondas*, "Rép.," X, 46; *Buchka*, "Stellvertr.," 121; *Lambert*, "Contrats en Fav. des Tiers," 1893.

³ *Pertile*, IV, 452, believes that it is older than this: "L. long. Lud.," 14.

his shrine to the place and leave it there three days. There was, however, in this a particularly favorable case, because it was absolutely impossible for the monastery to act; therefore, one approached as nearly as possible to the personal act. And, when representation is accepted, it is not a rare thing to find that there are doubts cast upon the validity of the act of the representative, and that this act must be confirmed by the man who is represented as soon as that becomes possible. Scruple and hesitation have disappeared towards the end of the fourteenth century in a general way, and before that period in many instances.¹ The status of agents for business transactions (by contrast with agents or attorneys at law) was worked out by borrowing from the rules of the Roman law and the canon law (the Sixth Book of Decretals, 5, 12, 68, 72).²

§ 399. **The Same.** — (B) "*Salmannen.*" With ordinary representatives let us compare testamentary executors, whom we will deal with later on,³ and the "*Salmannen*" of the German law.⁴ The "*Salmann*" is, as his name indicates, a person who carries out the "*Sala*" or transfer of land, but who carries it out for some one else; he is an intermediary between the grantor and the grantee. Originally, he is found officiating for transfers "*mortis causa*";⁵ in danger of dying, I wish to please some one after my death; but, if I survive, I intend to keep my possessions; in order to attain this object I confide them to a third party, to the person whom one would call a "*Salmann*" during the feudal period, at the same time making him promise to carry out my wishes; by this means I shall be better assured of recovering them in case I

¹ *Beaumanoir* contrasts sergeants (those who render *services*) for wages and by command, whom he likens to people of the household (39, 6), and whom the lord cannot disown so long as they fulfill their offices (excepting in the case of a crime), with sergeants by request or appointment, to whom only their expenses have to be paid, and who are bound with respect to third parties (29, 6), and finally with those who serve without wages or having their expenses paid, at their own risk and peril: *Du Cange*, see "*Serviens*"; *Ragueau*, see "*Sergent*."

² Dig. X, "*de procur.*," 1, 38, and commentaries of *Hostiensis*, etc.; *G. Durand*, "*Spec.*," *ibid.*; *Boutaric*, I, 10; *Masuer*, 4; *J. Faber*, "*Inst.*," III, 26; IV, 11, etc.; *Loysel*, 371 *et. seq.*; *Domat*, I, 15; *Pothier*, "*Tr. du Mandat*," 1767. — Cf. *ibid.*, on the commission, the administration of affairs, guardianship and custody. — As to the contract of agency or brokerage, cf. *Loysel*, 416; *Goldschmidt*, "*Zf. Handelsr.*," 28, 115. — Sub-agents: *Loysel*, 371; *Beaumanoir*, 4, *in fine*.

³ Cf. "*manda*" in the case of a will: "*Fuero Real*," 3, 4.

⁴ *Heusler*, II, 215; *Stobbe*, "*Z. R. G.*," VII, 405; *Beyerle*, "*Grundeigentumsrecht*" (Constance), I, 1; "*Salmannenrecht*." Cf. "*Z. S. S.*," 1900, "*G. A.*," 351.

⁵ "*L. Sal.*," tit. 46 (appointment of an heir).

survive than if I had directly deprived myself of them in favor of the person for whom they are really intended; and, moreover, the latter might not be present at the time when I wanted to make the disposition. In a general way, recourse was had to this kind of alienation by means of a person interposed, whenever there was an obstacle to direct alienation.¹ And in the end the "Salmann" was sometimes even given the part of a warrantor of alienation.² Outside of this exceptional situation there has been a great deal of discussion upon the function and the rights of the "Salmann." According to some he is a representative of the grantor; according to others, a purchaser in trust.³ As we look at it, the difficulty arises from the fact that his rôle was not always the same; he began by being a fiduciary purchaser and tended to become an agent with powers which were more or less extensive. It is precisely because of this evolution that his acts are not reconcilable and have been capable of furnishing arguments in different directions. At one period, when representation was not admitted, the grantor who could not dispose directly for the benefit of the one for whom he intended his property, found himself under the necessity of granting the full ownership of it to a friend, at the same time charging him in his turn to make a similar grant to the ultimate grantee. This friend became the owner, but he bound himself by

¹ "Cart. Sen.," 50; "Hist. Frising.," nos. 224, 287, 308, 366, 342, etc.; "Urk. St. Gall.," nos. 325, 342, etc. In 1160 Conrad, the Duke of Suabia, serves as an intermediary in the case of an acquisition for the benefit of the Prior of Burglen, because the relics of St. John were not on the spot at the time the deed was drawn: *Heusler*, I, 208.

² "Saleburgiones." Cf. the texts cited by *Heusler*, II, 222. "The Bavarian 'Salmann,'" says this learned man, "is the living land register of all property; he bears witness to the regularity of the alienation." Cf. *ibid.*: "The stranger, by whom the acquisition of a piece of land situated in a town is not on principle permitted, is authorized to purchase if he has the assistance of a 'Salmann' who is a citizen of the town."

³ According to *Heusler*, *loc. cit.*, the truth would seem to be half way between the two systems. As far as he is concerned, the "Salmann" would be in a position analogous to that of a guardian ("Vormund"). But the powers that he is recognized as having assume that he has become the absolute owner, — at least in the very old law; in fact, in order that he may transmit the property to the person for whom it is intended, he carries out an absolute alienation with "resignatio"; it is the same when it is a question of restoring the property to the original grantor. If the latter should carry out the transfer, such an act as this on his part would be invalid, and it would be necessary for the "Salmann" to intervene. The appointment of the "Salmann" takes place "per festucam." Sometimes, even, we find that the grantor has transferred the property to him by carrying out both the delivery and the "resignatio." Had he not been the owner, he could not have validly carried out the formalities of the transfer of ownership, and could not have served as a warrantor for the purchaser. Cf., however, texts and discussion in *Heusler*, II, 218.

"fides facta" to make restitution; it is the "fidelis manus," "treue Hand," which restores that which it has received. The value of this proceeding depends a great deal upon the good will of the intermediary. It is true that the "fides facta" allows one to compel him to perform, but the beneficiary of the deed — that is to say, the one who is chiefly interested — is not authorized to compel him to do so; only the grantor and his heirs have the right, which is not sufficient, because the grantor cannot always act, and it is possible that heirs who are indifferent might not wish to do so. Then it was that they must have thought of limiting the right of the "Salmann" over the possessions which he received, so as to remove from him the temptation to which he was exposed of unlawfully keeping them; it is undoubtedly by reason of this that the grantor stops with a simple "traditio," without "se exitum dicere" which allowed of his more easily recovering that which he had given. In places where the institution of the "Salmanen" existed their powers were restricted; as a general thing, they disappeared to make room for ordinary agents.

§ 400. **The Same.** — (C) *Attorneys.* One could not be *represented at law* during the barbarian period by reason of the formalistic character of procedure.¹ There was no exception, even in case of a lawful excuse, unless one pleaded in the court of the king, or had obtained a royal privilege.² Principle and exceptions are to be found in the Customary law. Many of the Customs still forbade representation at law,³ unless by virtue of a privilege of the king or a lawful impediment.⁴ But privileges were multiplied:

¹ For the same reason a defect of one party halts the proceedings; one can only accomplish this originally by indirect means, such as the fine and placing outside of the law: *Brunner*, § 113; *Pollock and Maitland*, II, 592. Later on the rule, "Absens pro confesso habetur": *Loysel*, 871; *Glasson*, III, 452; VI, 495. Cf. theories of the excuses, etc.; *Tardif*, "Procéd. au XIII^e s." — Champions or defenders in the duel at law: *Beaumanoir*, 41, 6; *P. de Fontaines*, 22, 13.

² *Marculfe*, I, 21 (appointment of a representative "per festucam"), 24; II, 31; "F. Arvern," 2; "Turon," 20; *Rozière*, 344, 384, 387, 391; *Thévenin*, "Textes," 269; Capitulary of 802, 9 (I, 93); *Heusler*, I, 205; *Hübner*, "Gerichtsurk. d. fränk. Z.," *Battaglia*, "Rist. dir.," 1889. As to "Sal. Extrav.," 12 (76), cf. *Geffcken*, bibl.; *Brunner*, "Mithio," p. 6. — The representative was in a position analogous to that of a "Salmann." Cf. "advocati" ("avoués"), lawyers, ecclesiastical "vidames" (the clergy is pledged to plead by means of an attorney, Council of Carthage, 75). "Capit.," see Table; *Pardessus*, "Dipl.," II, 233. The vassals of the king can also have them. Cf. for "vicini," *Fumagalli*, "Cod. ambr.," no. 121.

³ *Beaumanoir*, 2, 16; 4, 2 and 31; "Coust. du Chât.," p. 79; *Langlois*, "Textes parl.," pp. 19, 20, 135; *Aubert*, "Hist. du Parl.," II, 44. Germany: privilege of the lord.

⁴ The representative at law is called "procurator," "procureur," "attorné" (Normandy), "alloué." General texts: *Beaumanoir*, 4; "A. C., Artois," 9,

such was the one which was granted in a general manner to the Church and the prelates, which was the easier to be accounted for as the Courts of the Church admitted of representation.¹ In Normandy and in England the rule is that before the court of the duke or the king one may be represented.² The Parliament of Paris did not go so far as this, and made between the plaintiff and the defendant a wide enough distinction, which the other tribunals took unto themselves: the defendant was free to have himself represented;³ the plaintiff, who can choose his own time for pleading,⁴ must obtain a *charter of exemption*.⁵ These charters were not granted originally excepting to those who had a lawful excuse.⁶ But, when it was seen that they had no more reason for existing, they degenerated into a fiscal provision,⁷ and in the fourteenth century they were granted to anybody who paid the fees of the chancery. Many people had been allowed to dispense with them at an early time, — churches, towns, bailiffs, and guardians, — and they were not demanded in countries of written law.⁸ In the end

10; "Gr. Cout.," 3; "Olim," I, 833, 45. He does not have to furnish surety "de rato" in the lay court. *Beaumanoir*, IV, 24: the act of the attorney is looked upon as the act of the principal: *ibid.*, 29, 6.

¹ "Ord.," I, 118 (in 1290); cf. *Langlois*, "Reg. de Nicolas IV," 825.

² Cf. *Pollock and Maitland*, I, 190 (attorney); "Summa Norm.," 64 ("de attornato").

³ "Et. de St. Louis," I, 106; *Beaumanoir*, IV, 31 (only noblemen: the men of power must have the permission of the king or of the lord justice). Monks, clericals and women have this right, *ibid.*, cf. III, 9. — But in criminal matters the defendant must appear in person: *Beaumanoir*, IV, 14, 23; "Jostice," pp. 106, 132; "A. C., Anjou," IV, 317; "Olim," II, 228, no. 7; *Gwilhiemoz*, "Enq.," p. 109; "Toulouse," 2, 2; "A. C., Bret.," 91; "A. C., Artois," 7, 21; "Picardie," 14; "Cap.," IV, 14; VII, 337.

⁴ He does not always choose it, for we must not think that one pleads for pleasure; ordinarily one only has recourse to the courts if one is the victim of an injustice, and in this case it is often urgent to ask for a reparation of this injustice. Nevertheless, the defendant is favored rather than the plaintiff, because the wisest thing to do is to maintain the "statu quo" as long as it has not been established that it is unjust to do so.

⁵ *Beaumanoir*, II, 16; III, 32; IV, 2; "Jostice," p. 105; "L. d. Droiz," I, 209; "A. C., Artois," 9, 5; "A. C., Anjou," 2, 103; "Gr. Cout.," p. 394; "Stil. Parl.," 13; *Masuer*, 18. As to the delivery of these charters, cf. "Gr. Cout.," pp. 19, 433, 394; *Boutaric*, I, 10; *Le Coq*, "Quest.," no. 86; Ord. of Nov. 3, 1400. Valid only for a year; whence the necessity for renewing them in many cases: *Beaumanoir*, IV, 10.

⁶ The "Stilus Parl.," 13, 3 and the "Gr. Cout.," p. 449, explain the necessity of charters of exemption by two motives that are equally false: the seat of justice is more honored by the presence of the parties; it is only when the demand is unlawful, some little trickery, that the complainant fears to present it himself; the king spares him by passing his shame on to another. (Cf. "Et. de St. Louis," II, 8; *Pasquier*, "Rech.," II, 4. In these charters of exemption it is easy to recognize the royal privilege of the barbarian period.

⁷ "Gr. Cout.," p. 432; *Boutaric*, I, 10; "A. C., Artois," 2, 8, 9; "A. C., Anjou," II, 103; IV, 74.

⁸ *Loysel*, 374, 375; *Beaumanoir*, IV, 31; "Gr. Cout.," pp. 432, 393; "A. C.,"

they were abolished by force of the remonstrances of the States-General of Tours of 1484.¹ Not only had representation become lawful, but the official solicitors had to be employed by pleaders in their interest. By one of those oddities which are not rare in the history of the law, the formula itself of the old principle, however, survived; the saying is, even at the present time: "**No one in France pleads by means of an attorney save the king.**" It is true that it has assumed a meaning very different from that which it was given at first. The powerful lords were in the habit of having at the court of the king permanent attorneys charged with representing them in all their actions. Now, the latter pleaded in their own names. The Parliament forbade this; and decreed that the name of the party himself figure in the pleadings and in the judgment, and this even before the name of the attorney. It was necessary that the greatest lords should not seem to be superior to the justice of the king and should call upon it just as ordinary individuals did.² It is obvious that this reason did not exist in the case of the king. It no longer existed even for the lords when they pleaded before their own courts; thus they were authorized to plead therein by means of attorneys.³

In the olden times the plaintiff who was capable of appearing at court came in person and appointed his representative before the judges in the presence of the adverse party, and perhaps with the consent of the latter.⁴ (Cf. "cognitor.") This archaic method was abandoned first of all for the benefit of the powerful lords, who

Artois," 2, 8; 3, 32; 9, 5; *Boutaric*, I, 12; "Olim," I, 694; "A. C., Bourg." in *Giraud*, II, 294; *Langlois*, "Textes s. Parl.," nos. 46, 103; *Lot*, "Frais de just." ("B. Ch.," 1872); "Toulouse," 3; *Blanchard*, "Doc. inédits sur le Commerce de Marseille" (agency in the thirteenth century); "B. Ch.," 1878. Fiction of representation in the Italian statutes of the twelfth and thirteenth centuries.

¹ *Isambert*, XI, 61 (Art. 17). Attempts in 1414. Cf. "Journal" of *Nic. de Baye*, II, 198; *Aubert*, "Le Parl.," pp. 251, 355; *Lot*, "B. Ch.," 1872, p. 592 (legal expenses, fourteenth century); *Tanon*, "Ordre du procès civ.," p. 16; *Rozière*, "Ass. de Senlis," p. 13; "R. crit.," 1875, 638; 1876, 353; *Percerou*, "Nul ne plaide par procureur," 1898. Ordinance of Nov. 15, 1407: at the Châtelet the attorneys no longer plead the other attorney's lack of a charter and no longer ask for these charters, which does not, however, prevent them from making the clients pay for them: Ordinance of Jan. 13, 1528; *Lebret*, "Souver," III, 10; Edict of June, 1549 (queen).

² This is the current explanation; it is not a very satisfactory one.

³ *Loysel*, 861 (bibl.); cf. "Toulouse," 3.

⁴ *Beaumanoir*, 4, 17, 18, 20 (towns); "A. C., Anjou," II, 102 (partnerships); "L. d. Droiz," nos. 802, 846, 975 (church). Salaried attorneys of the great men of towns and of communities: *Aubert*, "Hist. du Parl.," pp. 255 *et seq.*; *Boutaric*, I, 6, 10; "Toulouse," *ib.*

were authorized to appoint an attorney by authenticated writings addressed to the judge. In the case of ordinary individuals also, the duty of appearing in person was soon replaced by an authenticated power of attorney,¹ the regularity of which the judge had to verify. As soon as the cause was at issue the attorney became master of the proceeding and could no longer be ousted; he was looked upon as pleading on his own account.² Elsewhere we have described how the attorney's profession, originally free from interference, was regulated by the tribunals and transformed into an official position.

§ 401. **Sale.** — (A) *Formation.*³ Sale, having once more become a contract based on mutual consent,⁴ was subjected in almost every way to the Roman rules. Our old law, however, admits that the sale of something belonging to another is not lawful,⁵ and that the risk of the "res" is on the owner and not on the creditor;⁶ this is, at least, the tendency which arises from the midst of the discussion, and it should be noticed that it harmonizes with the early system according to which sale was formed "re." The variations of the law on the subject of the formation of contracts perhaps also account for the classic controversy on the question of a **promise to sell.**⁷ Some, like Decius, held that only an obligation "facere" resulted from the unilateral promise to sell when accepted by the buyer. The promisor was only liable to pay damages when he refused to carry out the sale. Others, such as Jason, held that an obligation arose therefrom and

¹ "Procuratorium," *Beaumanoir*, c. 4; *Boutaric*, I, 10; *Giraud*, "Essai," II, 152; *Mazure*, "Fors de Béarn," p. 247; *Varin*, "Arch. lég. de Reims," I, 96. General power of attorney and special power of attorney (according to circumstances, — for example, to compound, to compromise: *Beaumanoir*, IV, 30, 36; "A. C., Anjou," II, 101 *et seq.*; IV, 80, 317, and according to the period): "Et. de St. Louis," I, 107; II, 109.

² "Gr. Cout.," pp. 397, 419, 433; *Boutaric*, I, 10, 107; *Masuer*, IV, 13; "L. d. Droiz," I, 213; "A. C., Anjou," IV, 395; "Const. du Chât.," 71 (death of the beggar).

³ Sales by authority of the law (ordered by the law and carried out under its control): "encan" (movables seized), "licitation" (selling at auction) of the immovables which cannot be partitioned, "décret" (decree) or adjudication upon a decree of immovables which have been seized, sale at law of the immovable possessions of minors.

⁴ As to the publication of sale (Italy): *Pertile*, IV, 555; *Salvioli*, "Publicita n. vend.," 1895. — *Jagemann*, "Daraufgabe," (earnest money), 1873.

⁵ Cf. *Paul*, II, 17, 1 ("L. Rom. Cur."); "Wis.," 5, 4, 8; "Bai.," 15; *Caillet*, cited by *Pothier*, no. 48; *Denisart*, see "Gar."; *Beaumanoir*, 34, 3, 9, 55; "A. C., Anjou," II, 234, 507; *Boutaric*, I, 27, 48; *Argou*, III, 23; *Domat*, 1, 2, 4, 13. Origin of this idea in the Canon law: *Endemann*, 2, 24, 82, 87; *Kohler*, "Abh.," 224; *Daresté*, 96.

⁶ *Glanville*, X, 14.

⁷ *Aubépin*, "R. crit. de Lég.," 1859, 177, 399; *Texereau*, "Thèse," 1899.

allowed the buyer to have the thing which had been promised delivered to him. There was a like controversy with regard to the reciprocal promise to sell and to buy. According to Jason, to sell was one thing, to promise to sell was another thing; the promise did not carry with it the transfer of the title; it did not throw the risk on the party who had promised to buy. Dumoulin, together with Alexandre, maintained that the promise to sell was equivalent to sale from the moment when all the elements of the contract existed together, — agreement of the parties, an ascertained object, and a settled price. However, they distinguished the promise “*de præsenti*” from the promise “*de futuro*”; if it were made to be carried out in the future it did not carry with it any present obligation; the lord’s fees were not due; in case it was not performed damages had to be paid; the vendor, by inserting a clause in the promise, could reserve the right to dispose of the object of the sale, and the buyer did not have the risk. Dumoulin’s doctrine prevailed in the French practice.

§ 402. **The Same.** — (B) *Effects*. The obligation to deliver and to warranty is incumbent upon the vendor, that of paying the price is incumbent upon the buyer.¹ The old authors subordinated the transfer of the ownership of the thing purchased to the payment of the price.² In practice this means that the vendor has a lien on immovables which have been sold; he also has one on movables, but only as long as they are in the hands of the debtor. If there has been a sale for cash, the vendor is even given a right of seizing within a short period sold movables which are in the hands of third parties and of keeping them until he has been paid;³ this is all that is left of

¹ Tariff for the price of merchandise: “*Capit.*” of 794, c. 4 (I, 74), etc.; *Pertile*, IV, 566. — As to the fair price spoken of by the theologians, cf. *Endemann*, II, 29; *Ashley*, I, 164; *Garnier*, “*Thèse*,” 1900; *Polier*, “*Thèse*,” 1903. Rescission in the case of a great injury (excepting in the case of judicial sales, which, however, often take place for a very low price; they are necessary). Law of Sept. 7–11, 1790: doing away with the chancery and, consequently, with letters of rescission. Decree of the 14th Fruct., year III: abolition of rescission for injury (because of the tremendous variations taking place in the price of immovables). Law of the 3d Germ., year V, and Law of the 19th Flor., year VI (temporary). Law of the 2d Prair., year VII: no rescission for injury from the sale of national possessions, even though it were paid for in assignments: *Sagnac*, p. 202. Thamasius had criticised this institution.

² *Loysel*, 407, 408 (a contradiction which is to be accounted for by the history of the formation of sales). *Argou*, III, 23, reproduces the Roman ideas: *Beaumanoir*, 34, 59; 35, 20; 24, 28; “*Jostice*,” 328; “*Toulouse*,” 98, 99; *Boutaric*, I, 67; *Pertile*, IV, 568; *Desmares*, 195. Cf. “*Paris*,” 177; “*Orléans*,” 458; *Pothier*, no. 322; *Ferrière*, on “*Paris*”; *Serres*, “*Inst.*,” 2, 1, 41 (a special and preferred mortgage over the immovables).

³ “*Paris*, A. C.,” 194; “*N. C.*,” 176; “*Orléans*,” 458; *Dumoulin*, on “*Paris*.”

the Roman rule. Warranty¹ protected against hidden defects and eviction. Formerly hidden defects did not allow of any recourse to warranty; so much the worse for the buyer, if he had not been aware of them. But warranty was stipulated in the writing, and then came to be implied in the case of the more serious defects, so that it then was regarded as a natural incident of sale. This matter was regulated by the Customs, especially with regard to trading in domestic animals.²

§ 403. **The Same.** — (C) *Warranty because of Eviction.* Even at the time of the very old law the vendor must have found himself compelled to protect the vendee against anybody who wanted to dispossess him of the thing which had been sold;³ if through any fault of the vendor the vendee could not keep the thing sold, the vendor had to pay him a composition, because he was then guilty of an offense as far as the vendee was concerned, and his responsibility was the greater, as the third party who was reclaiming the thing was proceeding against him "ex delicto."⁴ However, it was not unusual for the warranty to be stipulated for;⁵ and thus it becomes a matter of contract; the cases in which it applies are more clearly specified; the vendor is not permitted to take refuge behind the idea that he has given up every right which he had and should not be held accountable for anything else; and, finally, the amount of the fine becomes fixed beforehand. It is in this way that the once delictual obligation became a civil obligation for damages, by virtue of an agreement which is implied in every contract of sale. Evolution in this direction took place during the Frankish period; at the same time there are found traces of the

The sale was not cancelled for this reason. Cf. Naz, "Thèse," 1870. Serres, *loc. cit.*, does not mention this right of withholding.

¹ Du Cange, see "Garens," "Waranthus," etc. *Prov.*, "guiren." German etymology: "weren," meaning to defend: Grimm "R. A.," 603; Brunner, II, 501; "L. Rib.," 33, 4: "fordro" (literally predecessor). — "Roisin," 145: Warranty due by the castellan to his men who are cited to appear before the aldermen.

² "L. Bai.," 16, 9; Loysel, 418 *et seq.*; Glanville, X, 14; "Ass. de Jérus.," "C. des B.," 34 *et seq.* (slaves); Pertile, IV, 561; Chaisemartin, 271; Stobbe, § 185; Huber, IV, 854. — Strykius, "De Vitiis rer. ven.," 1709.

³ Cf. the Roman "deceitful selling" ("Stellionat"): D., 47, 20, 3, 1; see Ferrière,

⁴ "Bai.," 15, 4, 12; 17, 2; "Sal.," 47, 2; "Roth.," 231; "Rib.," 59, 6; 72, 6, 7 ("cinu werduinia"? Brunner, II, 504); Loening, "Vertragsbr.," 107.

⁵ Thévenin, "Textes," Index, p. 262; Huber, IV, 853, 13. As to the double penalty cf. Pertile, IV, 558; "Milan," 9; Lattes, "Dir. consuet. Lomb.," p. 208 ("Guadia fidejussores"). Greek law, warrantors furnished by the vendor: Beauchet, *op. cit.*, IV, 138; "Const. du Chât.," 51, 67; Dareste, pp. 13, 46.

early conception during the feudal period. — This early conception rests essentially upon the idea that a recourse to warranty takes the form of a penal action directed against the buyer. He is accused of an offense; he replies by calling in his warrantor¹ ("vocare warantum").² He is granted a delay in which to bring his warrantor before the judge;³ this is the day of warranty ("dilatio garendi") of the feudal period.⁴ Instead of this postponement granted by the plaintiff himself, the later law substituted the summons given by a public officer; and this also took place in matters relating to warranty.⁵ — 1st. *If the warrantor does not appear in court.* As a general rule, the man who does not produce his warrantor loses his action. "He who calls upon a warrantor and has no warrantor loses his cause," Loysel, 499, still says. A few of the barbarian laws, however, show less strictness by allowing the party to exonerate himself by means of the oath accompanied by fellow oath-takers.⁶ All the more reason why the later law should be still more indulgent and allow him to

¹ Another system: the withholder refers the complainant to his warrantor: "Roth.," 231. Cf. "Æthelr.," 2, 8, 9. Old Russian law.

² *Glanville*, III, 1; X, 15; *Bracton*, fo. 257, 380; "Stil. Parl.," 12; *Masuer*, 2; *Imbert*, I, 20; *Boutaric*, I, 33; "Gr. Cout.," III, 16; *Desmares*, 140, 354; "Cout. Not.," 67, 114.

³ "Rib.," 33; "F. Andec.," 47; *Thévenin*, no. 114 (40 nights). — Can the warrantor himself have his own warrantor brought into the action? The Frankish law does not limit the recourse to warranty, whereas the Scandinavian law and the Lombard law require one to go no further than the third warrantor, permitting him to escape the consequences of a theft by restoring the thing stolen and by swearing that he has bought it: "Sal.," 39, 47; "Rib.," 58, 72; "Burg.," 83; "Bai.," *loc cit.*; "Wis.," 7, 2, 8; 5, 4, 8; "Roth.," 231. "Otto.," I, 7; "Ina.," 58. — Only three warrantors according to the "Gr. Cout. Norm.," 50; "A. C., Bourg.," 83; "Amiens," 32. Seven: "Et. de St. Louis," I, 91; "L. d. Droiz.," no. 109. Indefinite recourse in Saxon law: *Laband*, "Verm. Kl.," p. 126.

⁴ *Beaumanoir*, 34, 44; "Et. de St. Louis," I, 31; "A. C., Anjou," I, 122; "Ass. de Jér.," "C. des B.," 250; "Schwabensp.," II, 93. — The warranty was of all limited to the year and a day, for when this time had elapsed the purchaser was in a position that could not be attacked: "Const. du Chât.," 83, 51; *L. de Beaumont*, 37; "Ass. de Jér.," "Abrégé des C. des B.," 22; *J. d'Idelin*, 80 *et seq.*; 112, 132; *Ph. de Navarre*, 80. Cf. "L. d. Droiz.," 569. But one may stipulate for warranty to last indefinitely (fourteenth century) and in the end people came to dispense with this special agreement. — The duration of the delay for the warrantor is eight days if he resides within the jurisdiction: "Us. d'Amiens," 49; *Laroque-Timbaud*, 20; *Delisle*, "Jug. de l'Echiq.," no. 168; — arbitrary: "Et. de St. Louis," II, 27; *Beaumanoir*, 34, 64, 65; "Bayonne," 102, 1; "A. C., Bourg.," 14; *Delisle*, *op. cit.*, no. 280; "Gr. Cout.," 412.

⁵ "Ass. de Jér.," "C. des B.," 250; "Gr. Cout. Norm.," 50; *Beaumanoir*, 34, 44; "Bord.," 208; "Us. d'Amiens," 49.

⁶ *Jobbé-Duval*, p. 62; "Sal.," 47; "Rib.," 33, 75; "Roth.," 231; "Wis.," 7, 28; "Bai.," 9, 7; "Bordeaux," 15; "Us. d'Amiens," 49. Death of the warrantor: "Sal. extrav.," 7 (the withholder does not incur any penalty); "Roth.," 231 (heirs).

go on with the trial.¹—2d. *The warrantor appears in court.* (a) He acknowledges his status of warrantor. In this case he himself takes the place of the accused and pleads, not in the name of the latter, but in his own name; the accused is "ipso facto" removed from the action and the accusation falls upon the warrantor.² This rule, which persisted throughout the old law,³ is due to the criminal character of the old procedure. This became less as soon as warranty took upon itself the aspect of a civil action; the buyer was only excluded from the action if he asked to be so.⁴ But the obligation of the warrantor always subsisted, in the case of *formal warranty*,⁵ to take upon himself the responsibility of the one he guaranteed, and not merely to intervene for him, as in the case of *simple warranty*.⁶—(b) The warrantor does not admit that he is responsible by reason of any warranty; he maintains that he has not sold the object in litigation.⁷ Equity would require this new question to be the object of a special action, following which the warrantor would be declared not to be responsible or else compelled to defend his buyer. This is indeed what happens in the thirteenth century⁸ and afterwards. But the very old law was afraid that this recourse to warranty was only a trick intended to retard the settlement of the principal action, and perhaps to allow the guilty man to escape the penalty incurred; so the defendant received the same treatment as in the case in which the warrantor whom he had vouched did not present him-

¹ *Beaumanoir*, 37, 3. "Stil. Parl.," 12, 2: reserves the right to defend himself which was done away with by the Ordinance of December, 1363, 5.

² If it is a matter of a movable it is handed over to him: "Rib.," 33, 3; 72, 6; *Jobbe-Duval*, p. 65. Cf. "Roth.," 232; "Burg.," 83, 2; "Sachsensp.," I, 53, 2; 3, 83, 3; "Firmatio," "Bai.," 15, 12; *Brunner*, II, 516; commentary on "Roth.," 231; *Pertile*, IV, 252 *et seq.*—The "Et. de St. Louis" only speak of warranty in dealing with movables, the "Stil. Parl." in dealing with immovables, and refuse it "in casu novitatis," 18, 2. *Boutaric*, I, 33; "Gr. Cout.," III, 16.—*Günder*, "Laud. auctoris," 1883. No representation.

³ *Beaumanoir*, 34, 45; "Et. de St. Louis," I, 95; II, 17; "Jostice," 19, 36, 6; "Bord.," 18; "F. de Morlaas," 64, 224; "Ass. de Jér.," "C. des B.," 247; "A. C., Bourg.," 14; *Boutaric*, I, 33.

⁴ Before the action comes on for trial.

⁵ *Masuer*, p. 41; *Imbert*, p. 137 ("requesta formalis" addressed to the warrantor). Cf. as to reclaiming against the farm tenant: *Schwalbach*, p. 57; Civil Code, 1727.

⁶ See "Giving of Surety," and "Warranty in the Matter of Offenses": "Stil. Parl.," 12, 18 *et seq.*; *Masuer*, 2, 11, 19; "Gr. Cout.," III, 16.

⁷ *Loysel*, 410 (forced sale; all right to warranty and then afterwards to plead the force).

⁸ *Beaumanoir*, 34, 44; 63, 8; "Ass. de Jérus.," "C. des B.," 246, 250; *J. d'Ibelin*, 131. If the sale is not established the withholder is condemned: *Loysel*, 699. Cf., however, 37, 3; "Et. de St. Louis," II, 17.

self. — The Ordinances of 1667, 8, 1,¹ finally regulated this matter of warranty.²

§ 404. **The Same.** — (D) *Rescission of the Sale*³ (and of other bilateral contracts) by reason of non-performance by one of the parties.⁴ The Roman law did not consider the sale as rescinded by reason of default in the payment of the price⁵ unless there were a special clause to that effect ("lex commissoria," forfeiture clause).⁶ As this clause was in common use in deeds, our old law implied it; it even went further and, taking its support from the Roman text relating to innominate contracts,⁷ it allowed the parties in every bilateral contract to ask the courts⁸ to rescind the contract if one of the parties did not perform his engagement through his own fault.⁹ In such a case the title reverted as matter of law to the seller.¹⁰ The real rights, which had been granted by the buyer for the benefit of third parties, should also have become void by virtue of the maxim: "Resoluto jure dantis, resolvitur jus accipientis." But a distinction was made: 1st. Rescission is fully retroactive when it takes place "ex causa antiqua

¹ See the Commentators on this Ordinance: *Berthelot*, "Evictions," 1781; *Isambert*, Table, see "Garantie" ("Ord." of 1559, 18, etc.).

² *Principal warranty* or principal action, which is distinct and brought against the warrantor following the eviction; *incidental warranty*, or action in warranty grafted upon the principal action in such a way as to settle the rights of third parties and those of the warrantor at one and the same time. As to the dangers of principal warranty, cf. *P. de Fontaines*, 15, 10; *Beaumanoir*, 34, 11; *Boutaric*, I, 33, 8. These juriconsults seem to refuse to give any recourse to the warrantor who is guilty of pleading secretly. — Warranty in the matter of the assignment of claims: *Jousse* on "Ord. civ.," 8, 1. — As a general thing, exercising the right of repurchase cannot give rise to any warranty because the evicted purchaser must be indemnified by the person exercising repurchase: "F. de Béarn," "R. de Contr.," 22; *P. de la Janès*, II, 245. — Cf., however, in exceptional cases: "Const. Chât.," 51, 67, 86; *Tailliar*, "Rec. d'Actes," p. 341.

³ *Naz*, "Résolut. de la Vente," Thesis, 1870.

⁴ Disgrace, loss of the benefit conferred by the deed and of the amount specified in the penal clause according to the law, "Si quis major," of Arcadius, "Cod. Théod.," 2, 9, 3, which the documents of the barbarian period connect with the Aquillian Stipulation: *Paul*, "Sent.," 1, 1, 3; "Petrus," IV, 27; *Thévenin*, "Textes," p. 260. Canonic penalties.

⁵ The only right which the vendor had was to refuse to deliver the thing sold so long as the purchaser did not pay him (defense "non adimpleti contractus").

⁶ In the South necessity of the forfeiture clause and cancellation of absolute right. Tendency to do away with forfeiture by the holder of a long-term lease in default of payment of the ground rent: *Gui Pape*, 111; *Despeisses*, "Dr. seign.," 4, 5, 14.

⁷ Cf., also, the canon law (analysis in *Naz*, p. 145).

⁸ Canonic penalties and, consequently, necessity for a sentence. The judges make certain that the failure to carry out is due to some fault.

⁹ *Dumoulin*, "Var. Quæst., d. v. o.," nos. 58 et seq.; *Pothier*, "Vente," no. 475; *Domat*, I, 2, 12, 13; *Ferrière*, see "Pacte com.," *Beaumanoir*, 24, 28; "T. A. C., Bret.," 326.

¹⁰ *Gavet*, "Thèse," 1879.

et necessaria." 2d. The rights of third parties continue to exist in case the rescission takes place "ex causa nova et voluntaria,"¹ that is to say, owing to a voluntary act on the part of the buyer, for it cannot be left to his option to plunder his assignees and to go back on his engagement. "This is a very fine theory," says Loysel, who is a partisan of it, as are a majority of our old authors; but as to the application of this theory there was a great deal of discussion. Bartolus was its inventor.

§ 405. **Civil and Commercial Partnerships.** — (A) *Companies*,² associations, communities, partnerships, in the old law, were constructed according to the same type as family communities.³ Such were especially those *secret communities* of villeins or serfs⁴ which are so well known by reason of the description which Guy Coquille gives of them in the sixteenth century in his Commentary on the Customs of the Nivernais, but which are very much older than this, for long before him Beaumanoir alluded to them and showed how they were formed. "The company is formed," he says, 21, 5, "simply for the purpose of living together at a common board for one year and one day, because the movables of one and of the other are mingled together." Community life was, in fact, the only condition required originally in order that the company might exist; whether they wished it or not, whether they were relatives or not,⁵ the fellow inhabitants found themselves associated together. But Beaumanoir maintains that by withdrawing their movables they could avoid this result; this is an expedient which does not at all correspond to the spirit of the old law, for it is almost impossible to live together a year without

¹ Cancellation "ex tunc" or "ex nunc": L. 3 Dig., "quib. mod. pig."; Loyseau, "Déguerp.," 4, 3, 6; Dumoulin, I, 33, 37. Interest, especially from the point of view of the seigniorial profits (transfer tax). Keeping of administrative deeds (leases): Dumoulin, "Reg. cancell.," no. 180; Coquille, "Quest.," II, 143; Pothier, "Fiefs," nos. 291, 330 ("Emptor non tenetur stare colono"). — Cf. the distinction made by the Glossators between the "verba directa" (returning, of absolute right, of the ownership) and the "verba obliqua" (necessary surrendering), abandoned in the sixteenth century; between the cancellation "ipso jure" and "per sententiam" (less important).

² "Cum-panis" ("compainz," "compagnon," company): see Diez; Du Cange, see "Companium," etc. We still say "Company of Jesus," "railroad companies," etc.

³ Gierke, "Genossenschaftsrecht," 1881; Ashley, I, 86; II, 79 (trades).

⁴ Cf. the servile communities; Customs in the "Confér. de Guenois." I, 599; Masuer, 28, 14; Lebrun, "Communauté," 709; see Guyot; Viollet, 751; Glasson, VII, 639; Larcher, "Thèse," 1875; Boucomont, Lassarre, Mohler, etc. — Cf. "consortium" at Rome: Poissnel, "N. R. H.," III, 431; Girard, 570; Athens, Beauchet, IV, 340.

⁵ Communities of brothers, relatives: Mont-de-Marsan, "Sociétés"; "A. C., Bord.," 44, etc.; sons-in-law and fathers-in-law: "Niv.," 23.

some of the movables becoming confused. Personal belongings which were not liable to such confusion stayed outside of the partnership; on the other hand, movables and acquets came under it. As a general rule, the community had, like the family, a head charged with administering it, whose powers remind one of those of the head of the family. This master, or "head of the loaf," who is the eldest of the members, is elected because of being the elder, or else he is one of the associates who is expressly appointed. He administers the community within and represents it without; he has extensive powers and binds his associates as far as their movables are concerned when he contracts for the benefit of the partnership. In important matters, such as the buying of immovables, he consults with his associates; "they all, eating of one bread, sleeping under one covering, and seeing each other every day, he is ill advised or too proud" if he does not consult with them. This artificial group is perpetuated in the same way as the natural group of the family, "owing to the subrogation of the persons who are born therein or are called into it from outside"; at the death of one of the associates there is no partition of the common lands; his relatives who are not members of the community cannot claim the undivided part which would have been his. The dissolution of the community takes place ordinarily by reason of the decision of the associates to live separately: "The loaf separates the villein; fire, salt and bread separate the man in mortmain." We have already seen the reasons why these associations were rarely found at the end of the Old Régime. They are already suspicious to Beaumanoir; he looks upon them as very dangerous and declares that many people were deceived by them; the rich man who takes in his poor relation "because of pity" finds him claiming half of his movables, and a man who came in not worth forty "sols" goes away taking with him two hundred livres. In the sixteenth century they are still numerous, but the disfavor with which they are looked upon increases, as Loysel's rules, 378 *et seq.*, bear witness: "If one goes, all go"¹ (which makes the partnership very fragile, whereas in other times the departure of one associate could not have had any more effect than the departure of one member of a family); "He who has a companion has a master"; "Out of community possessions one cannot make much." Jurisprudence is hostile to them, and the Ordinances

¹ "Excepting," says Guy Coquille, "if the man going out has mismanaged affairs."

require a written deed to establish the existence of every such partnership.¹

§ 406. **The Same.** — (B) *Commercial Partnerships.* They have a history which is very complex and has been very much disputed. The brief summary which is given here only serves to point this out. Our old law, here differing from the Roman law, considers the property brought in by the associates as forming a mass which is appropriated for the payment of the creditors of the partnership to the exclusion of the personal creditors of the associates. Must one conclude from this with Straccha that commercial partnerships form a “*corpus mysticum*,” and translate this expression by saying that they constitute legal persons? Scaccia and Emerigon express themselves in this way. However, it is not very certain that the idea of the civil personality of commercial partnerships was forced upon the old law with regard to its other consequences.² Perhaps the peculiarity which we have pointed out can be accounted for by a sort of implied engagement for the benefit of the creditors of the partnership.

1st. **Partnership in its collective name** is like joint and several ownership; the associates are held jointly and severally and without limit for the debts of the partnership. They act all together and all participate in partnership acts; or else, to make matters more simple, one of them acts as “*institor*” on behalf of the partnership and in the collective name of all of its members; he has the right to bind them without having called them together and consulted them; he signs with his name and with theirs; this signature or name of the partnership had to be shortened when the number of associates was too great; we say “*So and So & Co.*” Bartolus maintains already that the formula, “*Titius et socii*” was an old one in his time, and that its use had the effect of carrying with it the joint and several obligation of all the associates, even of those who were not mentioned in it; and this no doubt was for the good reason that their names are virtually included

¹ Ordinance of Moulins, 54 (100 pounds); 1667, 22, 2; 1673, 4, 1; Civil Code, 1834, 1837 (prohibition in the case of property to be acquired in the future). Cf. “Code de la Convention,” 5, 2, 22; “Orléans,” 217. — Discussion in *Lebrun, Ragueau, op. cit.*

² *Post*, “Legal persons.” The personality, which is not dealt with in the Ordinance of 1673, nor in its commentaries, makes its appearance in partnerships having shares by way of a privilege: *Isambert*, XVII, 319 (in 1656); XXVIII, 19 (in 1785). — “Dec. Rot. Gen.,” 7, 9, 10; 4, 13; *Scaccia*, “Qu.,” 450; *Emerigon*, “Assur.,” I, 324; *Casaregis*, III, 156; *Vighi*, “Person. Giur. d. Soc. Com.,” 1900.

within it.¹ If the partnership has a name of its own, then it has a distinct personality, which is independent from that of the associates; or, at least, if one does not go so far as this, one can conceive that it is possible to give a name to a collection of interests; it is difficult not to recognize the fact that the tendency of the partnership to form a civil person is admitted in this very fact. Frequently, and especially in order to plead, the associates, in their collective name, instead of acting themselves, have an agent invested with the power of making use of the partnership name.

2d. The **limited partnership** ("en commandite"), thus called from the word "commendare," to confide, to loan,² which is related to the lease of a farm and livestock, bottomry loan, to the loan for a seaman's venture, which is well known in sea trade on the Mediterranean in the tenth century, but which has precedents in the legislation of antiquity,³ involves both a loan and a partnership. It assumes, just as a loan does, that a capitalist furnishes value to a third party, and that this third party draws a portion of it at will (to carry out the object fixed by the charter of the partnership). Thenceforth this third party is the only one known to the public, and the capitalist is only responsible to the amount of his share of the capital, just as a lender would be.⁴ In other respects the limited partnership is like the ordinary partnership; the profits are divided, the losses are sustained by the silent partner and the capitalist: the one ventures his labor and his fortune; the other runs the risk of not regaining his capital (as every lender "ad risicum maris"). It is from this point of view that the formation of this sort of partnership escaped the prohibition which affected lending at interest in the Middle Ages, and it is because of this that it was possible for it to be developed later on. The Ordinances of 1673 accentuated the character of the partnership in the case of a limited partnership by compelling the publication of the articles of the partnership.

¹ *Goldschmidt*, p. 243 ("nome," "dita," "firma"), 273; *Balde*, "Cons.," II, 191, n. 2: "ex consuetudine mercatorum unus scribit nomen alterius."

² "L. Wis.," Index, see "Commendare"; *Du Cange*; *Ragueau*, see "Comm. de Bétail."

³ Texts in *Goldschmidt*. Cf. "Ass. de Jérus.," "C. des B.," 111; Statute of Marseilles (thirteenth century), III, 19; *Saleilles*, "Hist. des Sociétés de Commerce" ("Ann. de Dr. comm.," 1895); *Speck*, "Handelsges. d. Alterthums," 1900.

⁴ A thing which has contributed a great deal towards the introduction of the idea of a responsibility limited to the share of capital is just that very prohibition of lending at interest; the capitalist, not being able to lend, forms a partnership, but does not wish to incur any more risk than if he were lending.

3d. The name of **anonymous partnership**, which was given to a limited partnership, was also applied equally to another kind of secret partnership, the *joint account*, formed ordinarily for one transaction only; this transaction is personal to the one who acts, but after it has been carried out he divides the profits and losses with his associates. These partnerships have no partnership signature and no name; they do not constitute a civil person.

4th. **Partnerships with shares of stock**, or, rather, **companies**,¹ established with the object of developing colonies, endowed with special privileges and authorized by public authority (and hence to be regarded as a public rather than a private enterprise), were modeled after those great banks which existed at the end of the Middle Ages.² As in the latter, the capital was divided into parts, which could be transferred, or shares of stock; and the responsibility of each associate was limited to his share of the capital. These were true partnerships of capital, as is said, because the personality of the associates makes no difference and they are not under any personal responsibility; they are in contrast from every point of view to partnerships "*intuitu personæ*," and the "*consortia*" or "*fraternitates*" of the very old law.

¹ *Bonassieux*, "Les grandes Compagnies de Commerce," 1892. — "Monte," "Maona," in Italy; Bank of St. George at Genoa in the fifteenth century; the English East India Co., 1599, etc. Afterwards other enterprises: mines, canals, farms and public carriages, arming of ships, etc.; *Isambert*, see Table, *Lescœur*, "Soc. anon.," 1877; *Viollet*, p. 766; *Goldschmidt*, 290; *Lehmann*, "Gesch. u. Entwickl. d. Aktienr.," 1895.

² Various systems as to the origin of these partnerships. Cf. partnerships of publicans at Rome (to which the principle of limited responsibility is unknown). *Goldschmidt* connects them with the Italian partnerships for the farming out of taxes in the Middle Ages, partnerships that needed to put their capital together, and which divided them into "*partes*," "*loca*," in imitation of that which took place when States borrowed from individuals in the case of pressing necessity; the concessions of taxes or of monopolies were for them a means of paying their debts. Fourteenth century: "Maona dei Giustiniani" at Genoa.

TOPIC 7. MEANS OF ENFORCEMENT ON THE PERSON AND PERSONAL SURETY

§ 407. Voluntary Satisfaction.	§ 411. Imprisonment.
§ 408. Compulsory Satisfaction.	§ 412. The Surrender of Possessions.
§ 409. The Same: Execution upon the Person. (A) "Self-help."	§ 413. Suretyship.
§ 410. The Same: (B) Intervention of the Law.	§ 414. Hostage.
	§ 415. The "Fidejussio" or "Plégerie."
	§ 416. Modern Suretyship.

§ 407. **Voluntary Satisfaction.** — In the very old law the obligation is extinguished by means of a "solutio" or a "satisfactio," a direct payment, or some act which the creditor holds as being its equivalent. **Prescription which extinguishes or liberates** seems to have been unknown in matters relating to offenses; quarrels between one family and another were carried on indefinitely; the right of vengeance could not be lost by prescription, and the man who delayed in carrying it out did not give it up, but waited for a favorable occasion to take his enemy unawares. Prescriptions by rules of procedure began to make their appearance in proportion as the intervention of the State in the matter of justice became more active and more efficacious; in the end its system of prescription was borrowed from the Roman law,¹ just as, with many modifications, **set-off** and **cross-action**² were borrowed from it.

¹ **Releasing or Extinguishing Prescription.** *Loysel*, 713, 714; "Gr. Cout.," p. 198; *Boutaric*, I, 20, 27, 49; *Masuer*, 22. Cf. Dig. X, 2, 26. As a general thing, the rules and their duration (30 years) are drawn from the Roman law. Cf., however, short prescriptions: 10 years ("Ord." June, 1510, 71: actions for rescission); five years (*id.*; arrears of constituted rents; Decree of Aug. 20, 1792, rents on land; Decree of Aug. 24, 1793, life rents); one year and six months ("Ord." June, 1510, 67, 18), etc.; "Cout. de Paris," 126, 127; "Ord." of 1673, 1, 9; see *Ferrière*, *Guyot*; *Pothier*, I, 337; II, 374 (ed. B); *Pertile*, IV, 483 (texts). — Hebrews: Sabbatical year: *Dareste*, "Etudes," p. 48; "Ac. Sc. M.," 1894.

² **Set-off** (A owes B 100; B owes A 100; both debts are extinguished) and **Cross-action** (A sues B, and B in a cross-action demands from A what is due him, without bringing any special action against him, which would perhaps be brought before other judges, and which would at any rate necessitate a preliminary set of proceedings, delays, etc.). The Romanists admitted the cross-action (even "ex alia causa") and set-off, but were unsettled as to whether the set-off ought to be *legal* (extinction of absolute right of both the liquidated debts for things that could be restored in kind, simply because of the fact that they coexisted) or *judicial* (brought up in court and pronounced upon by the judge: Bartole and Doneau). Cujas caused the system of the legal set-off to prevail in France (cf. "ipso jure" in "Inst. Just.," 4, 6, 30): "Cout. de Milan," in 1396, Art. 117. Both the set-off and the cross-action were also accepted by the Canon law: Dig. X, 2, 4; *Lancelot*, "Inst.," 3, 9; *P. Fournier*, "Offic.," p. 111. — On the other

Upon principle, the debtor is held bound to pay or to give exactly what is promised, unless the creditor consents to receive something else or liberates him from his undertaking without demanding anything.¹ Distraint in kind is thus the rule; but it often happens that debts in money are paid in movables or in domestic animals, because movables are looked upon almost like things that may be restored in kind, and in the early social state the domestic animal serves as money.² If he fails to pay or to satisfy the creditor, the debtor "ex delicto" again exposes himself to private vengeance in the very early law; the failure to perform a contract is held as being itself an offense and carries with it the same consequences (slavery for debts, payment in services, see *infra*). In proportion as the old conception of an obligation being an offense disappears, the debtor who does not pay is held liable simply for damages, — the kind called **compensatory**.³ "In every transaction it is to one's interest to make restitution."⁴ In the same way in the case of delay in performance, the debtor who was liable to pay a fine during the barbarian period pays in later law only **damages**, the kind called **damages for delay**.⁵ To tell the

hand, the Customary law rejected both of these institutions; *Loysel*, 704: "One debt does not prevent the other from existing"; 703: "A cross-action cannot take place" (in the lay court). These rules are consistent with the formalistic systems and are to be found, for example, at Rome. Perhaps they are also due to the multiplicity of the old jurisdictions and their patrimonial character; the judges quarreled with one another over jurisdiction; now the cross-action allowed the ecclesiastical judges to bring before them cases which should have been submitted to the seigniorial judges; and, conversely, the seigniorial judges could by this same means pass upon religious actions or upon matters appertaining to the royal judges, etc.: *Beaumanoir*, 9, 47; *P. de Fontaines*, 29, 5 (mere defenses); "Ass. de Jér.," "C. des B.," 51; *Boutaric*, I, 60. In the fourteenth century set-off in the case of liquidated debts was allowed at the Châtelet of Paris: *Desmares*, 136, 137; "Cout. Not.," 111, 120. And later on in the seventeenth century the "C. de Paris" ("A. C.," 74; "N. C.," 75) was interpreted to mean that it admitted of the legal set-off. Under the rule of other Customs more faithful to the old law the set-off could only take effect by virtue of letters of the king. As to the cross-action, the "A. C., Paris," 75, still prohibited it; the "N. C.," Art. 106, only authorized it under certain conditions: some connection between the two claims, and that the later one must be a defense against the earlier. Court practice places a broad interpretation upon these provisions (controversy); *Pothier*, X, 51; II, 334 (ed. B.); *Lair*, "Compens.," 1862; *Desjardins*, *id.*, 1864 (lengthy details); *Chaisemartin*, p. 259.

¹ Payment of a debt, novation. Cf. *Gaudemet*, "Transport de Dette," 1898; *Stobbe*, § 181. — Real offers, "Arch. Giur.," LXVI, 322.

² Legal tariffs, — for example, "Rib.," 36, 11. — Money changing: "Tract. ill. Ict.," XII; *Loysel*, 680; "What is equal in value to gold is gold."

³ *Loening*, *Sickel*, *op. cit.*

⁴ *Loysel*, 414; *Daresté*, 7, 77, 79; *Ragueau*, see "Eramme."

⁵ *Endemann*, II, 243 (bibl.); *G. Durand*, "Spec.," II, 3; *Dumoulin*, "Tr. de eo quod. int. Op.," III, 67 *et seq.* (ed. B.); *Stobbe*, § 182. — The rule: "Dies interpellat pro homine" was sanctioned in Germany by the Imperial Chamber,

truth, during the barbarian period it is not distraint alone that extinguishes the obligation; owing to formalism, it is extinguished by means of a proceeding analogous to that which served to create it: the creditor who has acquired all his rights by means of the "festuca" gives them up by throwing the "festuca"; if he has acquired them by delivery of the "carta," he gives them up by restoring the "carta." The writing "evacuatoria" is equivalent to the giving of the "carta" when the latter has been lost.¹ It is not a rare thing to have drawn up, when the obligation is to be cancelled, an "epistola securitatis," or promise not to trouble the debtor any further, to hold him as discharged ("quietus") from an offense which he has committed and which laid him open to vengeance or composition.² From thence arose the employment of **releases**, a convenient means of establishing the release of the debtor when the giving of the paper or making use of the "festuca" had ceased to be required "ad solemnitatem."³

§ 408. **Compulsory Satisfaction.** — In the very old law it is the person of the debtor, his body, which is primarily responsible for the payment of his debt;⁴ by an extension, his movables are also made liable, for "mobilia ossibus inhaerent"; in this sense it is true to say "**he who binds himself binds what is his**"; but the immovables of the debtor are not sufficiently his own for the creditor to be able to reach them.⁵ The history of compulsory satisfaction may be summed up in the overthrow of these ideas. The creditor no longer pursues the person of the debtor, but pursues his belongings; in fact, the latter is no longer considered as a guilty

1595; it was looked upon as being in accord with the old Germanic law ("L. Sal.," 50); cf. *contra*, Romanists and Italian statutes; but see "Petrus," IV, 51; *Pothier, loc. cit.*: according to our customs a debtor is only considered as having a suit brought against him when he is summoned at law. *Loysel*, 679. — As to respites and excuses cf. "Procedure": *Beaumanoir*, 25. — "Siete Part.," 5, 1, 8; 14, 8. — Penal clause *ante*. Examples in *Thévenin*, "Textes," p. 260; *placing* (in arbitration). Cf. *Glasson*, "Procéd. Civ.," II, 123 ("astreinte"): to pay so much for each day of delay.

¹ *Rozière*, no. 378 *et seq.*; *Thévenin*, no. 33.

² "Form. Andec.," V, 39, 42 *et seq.*; "Tur.," 38; "Bign.," 8, 9; "Liut.," 19; *Marculfe*, II, 18. One also renounces vengeance "per festucam": "L. Rom. Cur.," 24, 2; *Thévenin*, no. 137; *Brunner*, II, 444; see *Ragueau*; *Du Cange*, see "Assicur.," *Loysel*, 821; "Gr. Cout.," p. 391, 867; *Esmein*, "Rev. trim. de Dr. Civ.," 1903; *Berryer*, "Thèse," 1903.

³ *Pertile*, IV, 478; *Beaumanoir*; letters of discharge (34, 21; 43, 39).

⁴ The debtor of old times had nothing before him but death or slavery; he was lucky if his creditors did not eat him up alive, as we hear of in certain legends. Compare in our time the American debtor, who grows rich by going through bankruptcy.

⁵ "Roisin," p. 48; "A. C., Anjou," ed. B.-B., II, 338; "Olim," IV, 1486; "Const. du Chât.," no. 73; *Kohler*, 65.

man upon whom one seeks to avenge oneself; value is claimed from him and his inheritance must furnish it. Thus execution on possessions passes into the foreground;¹ but it at first affects movables alone; immovables are available only as a last resort, for only as immovable property has come into the hands of individuals has it been possible to authorize creditors to pay themselves out of this sort of property.

To the means of constraint which we have just referred to were added proceedings of a spiritual nature, — **excommunication**,² for example, which frequently takes place in the Middle Ages, at least if there is "contumacia" or fraud;³ its consequence is the refusal of religious burial.⁴ By a reversion to pagan ideas, which very closely accords with this redoubtable result of ecclesiastical censure, the creditor **attaches the corpse** of the insolvent, whether he be excommunicated or not; or, at least, he offers opposition to its burial; thus, they are reduced to burying the body in a ditch, where it is a prey to the beasts. In the eyes of the people there is no more strict duty binding upon the relatives of the debtor than that of indemnifying the creditor so as to give to the dead the last rites; when performed by strangers, this is an act so praise-

¹ Unless the creditor should have reserved for himself the right of first of all carrying out execution upon the person: "Sachsensp.," III, 39.

² See *Du Cange*; *Pertile*, IV, 502; *Pasquier*, "Inst.," p. 540. We find formulæ of excommunication "ob debita" in a book of forms of deeds printed in Rome about 1479 or 1480 without date or title; in fact, debtors submitted in advance to excommunication in case they should not carry out their engagements; but the ecclesiastical judges could also excommunicate them, even if there were no clauses of this nature. It was also agreed that the excommunication should take place *ipso facto*: "Tr. Univ. jur.," XIV; *Ugolini*, "De Censuris," 1597; *Eveillon*, "Tr. des Excommunic.," 1672; *Kohler*, pp. 61, 69. We find them even among the Assyrians, thousands of years before Christ: *Kohler*, p. 64; *Osenbrüggen*, "Stud.," p. 333: adjournment until the Last Judgment in the Valley of Jehosaphat. — *Cf.*, conversely, the debtor who has sought sanctuary in a church: "Wis.," 9, 3, 4.

³ Dig. X, 5, 23, 3; *Hostiensis*, "De. Cess. bon. et. de sent. Excom.," "Bourges," 156; "Gr. Cout.," 611; *Beaumanoir*, 11, 32; "Reg. de Cerisy," no. 431, etc. Obligation of "nisi."

⁴ Other consequences: incapacity of appearing in court even before the lay tribunals: Dig. X, 5, 29; "in VI," V, 11; "Mém.," by *P. de Cugnères*, Arts. 1 and 12; "Songe du Verger," II, 203. (*Cf.*, however, "Gr. Cout.," 389. This custom was so well established that in the sixteenth century it had to be prohibited: "Ord." of Jan., 1560, 18; "N. C., Bret.," 9; *D'Argentré*, tit. "des just.," Art. 6; *Ferret*, "Abus," 7, 2. The secular judges first of all asked the ecclesiastical superior to absolve the imprudent debtor who had submitted himself to excommunication; if the superior refused to do so, he was then compelled to by distraining upon his secular possessions: "Libert. Egl. Gall.," 35. In order to simplify matters the Parliaments themselves legislated, dealing with the precautionary absolution; the latter fell into disuse and *Tiraqueau* tells us that persons who had been excommunicated had no difficulty in pleading before the lay tribunals ("de retr. gent.," 8, 1, 276). *Loysel*, 709. The same progress was made in the matter of oaths.

worthy that it blots out the very greatest crimes.¹ Outside of ancient France, religion furnished individuals with other weapons by means of which to overcome the resistance of their debtors: such as that strange procedure of **fasting**, which was practised in ancient Ireland and among the Persians. The creditor, standing before the door of his debtor, refused to take any nourishment so long as he was not paid, however weak he might be; thus he finally overcame the most powerful. India had perfected this custom; instead of fasting himself, the creditor sent a Brahmin to fast in his place; this fasting by procuration was still more efficacious.²

Taking satisfaction originally always assumed the form of the "captio," seizure, "nam," and hence was necessarily individual, even when there were several creditors;³ the one who distrained excluded all the others,⁴ excepting that when he had been paid off, they could in their turn seize whatever possessions of the debtor remained. This **system of individual prosecution** made payment the prize of the race and fostered fraudulent collusion between the debtor and certain of his creditors; he favored the most harsh and the most dishonest creditor and sacrificed without reason the bulk of the others. This was particularly revolting in case of **failure**,⁵ that is to say, when insolvency came to light

¹ As to the arrest of the corpse, cf. *Esmein*, "Mélanges," 245; *Justinian* alludes to it: "Cod. Just.," 9, 19, 6; "Nov.," 60 (in 537). *St. Ambroise*, "De Tobia," 10. Stories of the people, for example, John of Calais in *Balde*, "Contes pop. de la Gasc," etc.; *De Hinojosa*, "El Archivo," 1892; *Allamira*, "Hist. Esp.," II, 185 (Navarre, fifteenth century); *Kohler*, p. 19.

² If the debtor allows him to die of starvation ("a fortiori" if he kills him) he is responsible for his death; the spirit of the creditor will never leave that place, according to the old Animist beliefs, and will torment him and his eternally. Survivals of this in the Middle Ages: the "Lay of Ignaure," William of the Falcon, an Irish legend of the three clericals and the cat (to fast against the wishes of God); *Gaidoz* in "Mélusine," IV, 305, 406 (cf. VII, 55, 182, etc.); *W. Stockes*, "Academy," 1835, 169; *Sumner Maine*, "Inst. prim.," p. 370; *D'A. de Jubainville*, "Littérat. Celt.," VII, 245 (Christian origin in Ireland); *Dareste*, "Etudes," p. 84; *Kohler*, 15.

³ *Garraud*, "De la Déconfiture," 1880. Bibl. in *Camus and Dupin*, "Faillites." Cf. *Pertile*, VI, 384; *Seuffert*, "Concursr.," 1888; *Stobbe*, "Gesch. d. ält. D. Konkurspr.," 1888.

⁴ *Beaumanoir*, 34, 52; "Gr. Cout.," c. 10; "Artois," 115; "Ord. des Maiours" (of Metz), "N. R. H.," 1878; "Ass. de Jérus.," "C. des B.," 78.

⁵ *Beaumanoir*, 34, 52; 54, 6; *Boutaric*, I, 46; 27. "Paris," 1880: failure is when the possessions of the debtor are not sufficient to satisfy the apparent creditors; *Loyzel*, 685; "Ord." of 1629, 165; see *Ragueau*, *Ferrière*, etc.; *Du Cange*, see "Decotio." — In case of failure after death a rather rudimentary collective procedure is organized: "Ord." of 1396 (8, 95). Cf. *J. d'Ibelin*, 185; "Ord. des Maiours," I, 5; *post*, "Benefit of Inventory," "Separation of Inheritances"; "Norm.," 97; "Bret.," 513; "Lille," 14, 11; "Artois," 24. — One finds some agreements among creditors to unite in appointing assignees or directors, — that is to say, representatives: *Duparc-Poullain*, "Actes de Notoriété," p. 232.

unexpectedly, and the majority of the creditors presented themselves in court at the same time, in order to have distraint carried out.

Towards the end of the thirteenth century the privilege of the first one to distraint was no longer applied in such circumstances as these. The price of the possessions was then divided, in proportion to the amount of the claims, between all the creditors, by holding written proof, as though they had all carried out their distraint at one and the same time. They should have gone further than this; the debtor ought to be dispossessed of all his possessions, so as to prevent his liquidating them in an improvident manner and favoring one of the creditors at the expense of the others. It was necessary to summon the creditors by measures of publicity and to group them into a syndicate or union, so as to arrive at a distribution which was collective; and this procedure had to be regulated upon a basis of the strictest equality. This is what was done by the statutes of the Italian towns¹ when they borrowed the complex system of execution of the Roman law² in order to regulate **bankruptcy**.³ At the same time, severe penalties were the punishment for **fraudulent bankruptcy** ("banqueroute").⁴ The Italian customs for the most part passed into the old French law, but they were only applied to a certain category of persons, — merchants who had ceased to make payments ("Ord.," 1673, t. XI).⁵ Failure, or known insolvency, in the case of men who were not merchants, was not regulated, and, excepting for the lien of the first man distraining, which was not applied in these cases,

¹ Cf. the Italian authors: *Straccha*, "De Mercatura," I, 1; *Rocca*, "De Decoctione Mercatorum"; *Casaregis*, "De Commercio," etc. Order of the Council of July 7, 1667; Ordinance of 1673, Title XI, of March 12, 1678; Regulations, etc.; see *Guyot*, *Ferrière*, *Denisart*; Comment. on the Ordinance of 1673 (note); *Jousse*, *Bornier*, *Pertile*, VI, 391 *et seq.*

² Differences: (a) the mere fact of the cessation of payment is a presumption of insolvency and constitutes a state of failure; (b) the "decoctioni proximus" is treated like the "decoctus," in this way, that acts done a short time before the failure are treated as null and void; (c) a majority of the creditors may compel a minority to surrender their debts and to replace the debtor in charge of his affairs ("concordat"). Italy: special courts; *Pertile*, VI, 392.

³ *Straccha*, II, 1: "recentiores jurisconsulti fallitos et cessantes vocant."

⁴ "Banca rotta": the bench which the trader has on the principal square of the town is broken. Sometimes the penalty of death was inflicted upon the bankrupt whose guilty act involved the ruin of a great number of his fellow citizens and assumed the proportions of a public disaster. Public opinion could with difficulty distinguish between the unfortunate man who failed and the criminal bankrupt: "Decoctor ergo fraudator," says *Baldus*, who echoes the popular prejudice. — "Ord." of Oct. 15, 1536; August, 1561, 143 (death, etc.); *Isambert*, see Table; *Pertile*, § 203.

⁵ Cf., however, *Thaller*, "Faillites en Dr. Comp.," I, 145.

remained subject to the system of individual prosecution. The reason for this is that the majority of the creditors of the persons who had failed were furnished with notarial deeds, and thus general mortgage, liens, thanks to which they escaped the law of contribution, and they had the least possible interest in organizing a distribution which was collective.¹

§ 409. **The Same: Execution upon the Person.** — (A) *Self-help.* Under its most summary form execution consisted in the seizure by the injured person of the body of the wrong-doer who was taken in the act of offense, just as one would capture an animal which was taken damage-feasant.² In primitive legislations the insolvent is at the mercy of his creditors. His body belongs to them. "He who cannot pay with his purse pays with his skin," says the old proverb. The Irish law shows us the creditor himself taking possession of the person of the debtor; he places his fetters on the debtor's feet and a chain on his neck, takes him to his house and shuts him up in it, not giving him anything to eat excepting a dish of pap each day. If it were necessary, just as in Rome, the body of the debtor is divided among his creditors; the "partes secanto" of the Twelve Tables should be understood literally, for in the old law every debtor is a criminal, upon whom one should avenge oneself; the addition, "se plus minusve secuerint, se [sine] fraude esto," bears witness to the awakening of some scruples in the conscience of the old Romans.³ By comparison, the conduct

¹ For the same reason the Pauline action revoking the acts done by the debtor in fraud of the rights of his creditors had lost almost its entire usefulness. Nevertheless, it was extended to include renunciations of successions: "Ord." of 1747, 42. Cf. *R. de Lacombe*, see "Fraude"; *Louet*, R., 20; *Domat*, 2, 10, 1, 2; *Pothier*, "Oblig.," no. 153. The creditors could also exercise the rights and actions of their debtor who was negligent (Art. 1116, Civil Code). Our old authors derived this rule from the Roman laws: *Domat*, "Loix Civ.," II, 10; *Louet*, R., 20 (Order of the Parliament of Paris, July 9, 1698); *Lebrun*, "Succ.," 2, 2, 47. It is even a question whether a legal subrogation was required with this object, and even whether it was not necessary to have royal letters. *Labbé*, "R. Crit. de Lég.," 1856, maintains that subrogation, which was at first required, ceased to be necessary, and that the creditor could act "quasi ex jure cesso": *Basnage*, on 345 "Norm." But cf. to the contrary the same, on 278 "Norm"; *Lebrun*, *loc. cit.* Here we have a case of forced assignment which assumes the intervention of the courts: *Périer*, "Thèse," 1884; "Mél. P. Fabre," 1902, p. 416; "France judic.," 1880-1881, I, 73.

² "Liut.," 146 (a prohibition to bring the malefactor, having put him in chains); "Bal.," 3, 9; "Burg.," 19, 4. Cf. "Wis.," 8, 5, 1; *Beaumanoir*, 30, 31.

³ *Ihering*, "Scherz. u. Ernst," p. 223; *Kohler*, *op. cit.*, p. 831; "L. de Gulathing," 71; "L. de Frostathing," 10, 26. — We find people gambling their limbs, their life, their honor, their eternal salvation: *Kohler*, 60. William the Tyrant, 11, 11: "barbam suam hypothecaverat" (that is to say, that the cred-

of the usurer in the Middle Ages, of the character in the "Pecorone,"¹ from which Shakespeare created Shylock, the Jew, in his "Merchant of Venice," is humane enough. He is contented with the pound of flesh instead of taking the whole body of the debtor. The formalities demanded by the Customs for the taking of the body, the danger which the formal act offers for the one who wrongly makes use of it, were the first securities offered the debtor. But this could not be sufficient, and from a very early time one finds in the intervention of the law a much more efficacious means of ameliorating the condition of the insolvent.

§ 410. **The Same.** — (B) *Intervention of the Law.* (I) *Procedure based on a hearing of both parties: Death or slavery for debts.* Assuming that the responsibility of the family has in vain been brought into play by the procedure of the "chrenecruda," the Salic Law, t. 58, requires that the debtor of the "Wergeld" — that is to say, the insolvent murderer — should be presented before four successive sittings of the court; if no one promises to pay for him he shall pay with his life ("de sua vita componat"); he shall be delivered up to the creditor, and the latter shall exercise his right of vengeance by putting him to death.² It is obvi-

itor acquired the right of cutting it, which was a very great disgrace for the debtor in the East).

¹ A collection of tales written in Florence in 1358 by Giovanni. In Shakespeare's drama Portia disguised as a judge says to Shylock: "You have a right to a pound of flesh; the law gives it to you and the court adjudges it to you. But do not spill any blood. Take everything that is due you, neither less nor more. If you cut more or less than a pound, though the difference should be but the twentieth part of an atom, you shall die and your goods shall be confiscated." A good solution for a period when execution upon the body of the debtor was no longer understood.

² The ancient law of Gulathing (Norway), c. 71, contains provisions which have been likened to this passage of the Salic Law and the "partes secanto" of the Law of the Twelve Tables. The debtor who is not able to pay presents himself before the "thing" and offers his person and his relatives for the sum which is due from him, beginning with the nearest relative. If none of them consent to the bargain he belongs to the creditor until he has paid his debt. He is a slave with respect to the latter, for the creditor may strike him if he refuses to work; however, the creditor is not allowed to sell him unless he has escaped and been recaptured. With respect to third parties he preserves his quality of a free man; if he is struck, he has a right to the fine fixed by the law for blows dealt to free men, and the master on his part may demand the fine for blows given to a slave. The debtor who makes himself a slave may give his children into slavery with him, but only to the amount of 3 "marks." If he will not work for his master the latter takes him to the "thing" and places his relatives under the necessity of releasing him; if they refuse, he can kill him or mutilate him; the law says that "he can cut where he will, high or low": *Dareste*, "Etudes," p. 333. — As to the interpretations of these texts cf. *Kohler*, p. 30, and authors cited above. Cf. "Bjarkör, R.," II, 50, and especially the Law of Frostathing, 10, 26: the creditor estimates the value of the limbs of the debtor and can cut them off, beginning with the

ous, although the law does not say so, that the creditor can spare his life and sell him as a slave or keep him himself in this capacity.¹ If a third party, "redemptor," should present himself during the delay which we have just been dealing with, the debtor shall become the slave of the latter, and he will gain the advantage ordinarily of having a less severe master, because the latter has no vengeance to carry out. Slavery for debts² is the normal fate of the insolvent in the old law; sometimes this is as a result of the procedure which we have just described, and sometimes it results from an agreement between the parties.³ The clauses of this agreement and the moderation of customs resulted later in restricting the rights of creditors. Instead of being perpetual, slavery for debts then became temporary; it only lasts as long as is necessary for the debtor to pay his debt by means of his services; or else, the debtor gives himself as a pledge instead of surrendering his liberty in an absolute manner.⁴ In one way or another it becomes admitted at the end of the Frankish period that the debtor who is in the power of his creditor should neither be killed, nor mutilated, nor sold; the latter is only authorized to make him work for his, the creditor's profit, or else to keep him sequestered.⁵

(II) *Default.* Having been regularly summoned, the debtor smallest, in proportion to the amount of his debt. Cf., however, *Amira*, "Vultstreck," 262.

¹ Cf. Edict of Chilperic, 8: at the 4th "mallus" the king turns over to the creditor the "malus homo" who cannot pay the composition due by reason of his misdeeds: "faciat exinde quod voluerint;" "Pact. Childeb.," 2 (I, 5); "Roth.," 253 *et seq.*; "Liut.," 80, 152, 187; "Wis.," 5, 6, 5; "Capit.," I, 556; *Brunner*, II, 479; *Kohler*, p. 21.

² *Polgiesser*, "De cond. serv.," 1707; *Korn*, "De Obnoxiat.," 1863; *Kohler*, "Shakespeare," 1 *et seq.*; *Brunner*, *loc. cit.*; *Nägeli*, "Selbstpfändungs.," 1876; *Schroeder*, § 35. — Comparative jurisprudence: *Daresté*, "Études," pp. 83, 96, 333; *post*, 2, 285. — Cf. Roman "nexum," *Girard*, p. 477.

³ The debtor may pledge his liberty in advance in case he should not pay or when payment falls due give himself up as a slave. Symbolical forms for the carrying out of these agreements: one places a cord around his neck and puts his hands in those of the creditor, etc. Cf. "Obnoxiationes" in *Rozière*, "Form.," 43 *et seq.*; *Thévenin*, "Textes," see Table; "Cart. de Cluny," I, 30, etc.; also laws and Capitularies, especially: "Bai.," 1, 10; "Liut.," 15, 2; "L. Rom. Cur.," 27, 1; Capit. of 779, 19; of 803, 3 (I, 51, 117). As to "Wis.," 2, 5, 7, see *Zeumer*, "N. Arch.," XXIV, 112. Cf. also in 1285, Art. 115a of the "Coutume de Toulouse"; *Du Cange*, see "Obnoxiation"; *Horten*, I, 255.

⁴ "Form. Andeg.," 3; *Marculfé*, II, 28; "Ed. Pist.," 34; *Mansi*, "Concil.," X, 548, c. 14. — Capit. of 803, 3: "semetipsum in wadium dare." — "Sachsensp.," III, 39.

⁵ Later texts corresponding to this state of the law: Statute of Toulouse, 1197; "Fors de Béarn," ed. *Mazure*, pp. 26, 48, 50; of Lille, 1533, 18, Art. 3; of Perpignan, Art. 13 (twelfth century); see *Du Cange*: *J. d'Ibelin*, 116; "C. des Bourg.," 39, 57, 78; *Kohler*, pp. 23, 24 *et seq.*; *P. de Fontaines*, 17, 6. — Competition between several creditors, cf. Stat. of Toulouse, "C. des Bourg.," 66; *Pertile*, VI, 357.

does not appear in court, or else, sentenced to "fidem facere," he refuses to do so.¹ He is placed outside of the law,² or, following this, banished, and his possessions are confiscated.³

§ 411. **Imprisonment.** — The system of private imprisonment gave rise to too many abuses, although the creditor was forbidden by the Customs or by law to ill-treat his debtor.⁴ For this there had to be substituted the system of the public prison, which was a natural consequence of the intervention of the State in procedure against insolvents.⁵ There was no longer, properly speaking, satisfaction by seizing the body, but physical compulsion; because imprisonment for debts was especially looked upon as a means of getting the debtor to pay his creditor with the assistance of resources which were supposed to be hidden.⁶ The public prison was a protection for the debtor. However, he did not find that the treatment to which he was submitted immediately became milder; the Customs of the thirteenth century still show themselves to be very severe for insolvents who are confined in the public jail. Much time was to elapse before that half-serious, half-comic system which the readers of Dickens have not forgotten, and which made one foresee the abolition of physical compulsion as an institution.⁷ As a general rule, one can see that people who were

¹ As to the execution of the "fides facta" (for example, a promise to appear in court or to carry out a judgment), cf. *Horten*, "Personalexec.," p. 21 *et seq.*; *Kleinfeller*, "K. V. J.," 1894, 219.

² Cf. especially Edict of Chilperic, 9; *Kohler*, 51; *Horten*, I.

³ The debtor may cause the effects of the "bannitio" to cease by appearing in court. Cf. the Capitulary of 801, 13, c., 13 (I, 172). *Post*, "Distraint upon Immovables"; *Pertile*, § 185, VI, 335. Cf. *Esmein*, p. 157.

⁴ The "carcer privatus," which was prohibited under the Lower Empire, "Cod. Just.," 9, 5, had reappeared after the invasions, and during the feudal period debtors were held in private prisons, fed on bread and water, and sometimes placed in irons. For example, see the Statute of Toulouse of 1197; "Olim," I, 539 (in 1262): The parliament allows the citizens of Compiègne the right to arrest a debtor and detain him in their own houses, — a right the exercise of which was opposed by the bailiff of Vermandois.

⁵ *Leviell*, p. 270; *Kohler*, p. 39; "Schuldthürmer" in Germany. It was also an advantage for the creditor himself to make use of the public prison because he did not always have a place where he could keep his debtor shut up: *Pertile*, IV, 506. — Instead of imprisonment, exile or sending into the interior of the country: *Kohler*, 50; *Pertile*, VI, 335.

⁶ It also served as a means of compelling the debtor to alienate his immovables so long as the compulsory execution could not affect this sort of possessions. Finally, it was a punishment for the debtor in bad faith who had borrowed knowing perfectly well that he could not pay back, or who had through his own lack of foresight placed himself in a position where it was impossible for him to pay back; the creditor did not have to establish the fact that there had been marked fraud or an offense, such as swindling or abuse of confidence, etc. Cf. penalties against bankrupts; *Kohler*, 41.

⁷ English law: cf. *Pollock and Maitland*, II, 577 *et seq.*; "Fleta," II, 64, 12; *Blackstone*, III, 26.

detained for debts were treated like those who were detained for some crime, except that they had the right to be supplied with an allowance for food by the creditor¹ and they were set free when they yielded up their possessions. Saint Louis, in 1254, made provisions which should have made this form of compulsion disappear, but which had at least as their result the accentuating of its subsidiary character and the making of it an exceptional means of execution.² Under this form physical constraint was regulated; it was only authorized under certain conditions, certain persons were exempt, and its duration was limited. In order to be able to exercise it, it was necessary either that the debtor should have bound himself by means of his body,³ or that there should have been a judgment against him; this was possible in former times for every kind of debt. According to the Ordinance of 1667, 34, 1, physical compulsion was only allowed in a limited number of cases⁴ (for example, bills of exchange, letters of exchange, debts between merchants or the price of merchandise bought in fairs and markets, farm rent, money spent, recovery of possession, fraudulent sale). Even in these cases the tribunals were at liberty not to decree this sort of compulsion; and clericals and women and septuagenarians were exempt (with certain exceptions).⁵ The time of duration of this compulsion was limited in certain of the Cus-

¹ "Ass. de Jérus.," I, p. 301, ed. B.; *Beaumanoir*, 51, 7. But cf. *Kohler*, 40.

² The "Ord." of 1254, 19 (1256, 17), forbade the seneschals or bailiffs to seize or hold the body of the debtor for a civil debt, unless it were a matter of a debt to the treasurer: "Summa Norm.," 6, 7, 8; "Et. de St. Louis," II, 22; "Jostice," p. 111 *et seq.*; 303, 311. — The origin of this provision is in the Decretal, "Odoardus," Dig. X, 333, 3 (the insolvent cleric should not be excommunicated, but he should swear to pay his debts if his fortunes improved). According to the "Ord." of St. Louis, physical compulsion, like excommunication, would thus be a useless severity against the debtor who has nothing (or who has made an assignment of his property): *Paulin*, "Paris," "Gr. Chron.," IV, 345; it is especially undesirable that the officers of the king should exercise it arbitrarily without any formal proceedings. Practice interpreted the "Ord." of St. Louis in a restrictive manner; thus *Beaumanoir* (24, 12, 32; 43, 18, 24; 51, 7; cf. "Gr. Cout.," 162; "Ord." of 1303, 12) maintains that physical compulsion is possible if the debtor has pledged his body in writing or at law, or before worthy people. It was also permitted by virtue of a judgment: "Bergerac" (in 1322), art. 25. — Cf. "Siete Part.," 5, 14, 14; "Ass. de Jér.," I, 188.

³ *Beaumanoir*, 51, 7; "Bergerac," Art. 25 (in 1322); "Bord.," 79; "Paris," 160, etc.; "T. A. C., Bret.," 311; *Kohler*, p. 55; Reaction against these agreements, *ib.*, p. 68; "Const. Chât.," p. 80.

⁴ The "Ord." of Moulins authorized it for every kind of debt.

⁵ For reasons of humanity and of decency; privileges of the clergy: *Imbert*, I, 27; *Boutaric*, II, 20; "Gr. Cout.," p. 216; *Lecoq*, "Quest.," 392; "Roisin," no. 50. However, public tradeswomen can have their body distrained upon. *J. d'Ibelin*, 115, exempts knights. — It lasted for a long while against foreigners: *Pertile*, VI, 368. Places where one cannot arrest; *ibid.*, 361.

toms;¹ but, as a general thing, it could be prolonged indefinitely, because it was thought, and not without some reason, that the creditor would get tired of nourishing the debtor at his own expense.² Physical constraint was nothing more at the end of the Old Régime than a means of execution which had become more and more exceptional and was very often inefficacious. The Convention abolished it March 9, 1793, under the pretext that "it was a shame upon humanity and philosophy that a man when receiving money could mortgage his person and his personal security."³ In reality it took this step because of the hatred of riches, upon which at the same time it imposed a tax; thus, it did not hesitate a few days later, on the 30th of March, to revive it against debtors of the public funds. Under the Directory, it was re-established by the Law of the 24th Ventose, year V (March 14, 1797), organized by the Law of the 15th Germinal, year VI,⁴ and it existed in our legislation until 1867.⁵

§ 412. **The Surrender of Possessions**, borrowed from the Roman legislation and admitted at an early time in the Customs of the South, and practised in the North from the second half of the thirteenth century,⁶ permits the unfortunate but honest debtor to escape imprisonment for debts. This is an advantage, one may say, and that is true with regard to the old legislation; but it is a veritable right if one considers physical compulsion as a means of getting away from the debtor the possessions which he conceals.⁷ What is the use of tormenting him when it is certain

¹ Lille: six months ("Roisin," no. 16); *Beaumanoir*, 51, 7: 40 days, provided he makes an assignment of his goods (reason of humanity). Cf. the German proverb: "The prison does not pay." "St.-Omer," 1127.

² On the latest state of this law see the "Ord." of 1566, 1667; *Pothier*, "Procéd. Civ.," nos. 658 *et seq.* Cf. *Loysel*, 895, 896 (towns in which arrest can be made), 897 (fairs, "Ord." of 1343), 907, 908 (bibl.); *Isambert*, see Table.

³ *Linguet*, "Théorie des Lois Civ.," p. 392. Abolition in Tuscany, 1782: *Pertile*, VI, 366.

⁴ "Code civ. interm.," IV, p. 72; *Fournel*, "Contr. p. Corps," year IX; *Sagnac*, 203, 344.

⁵ Cf. Civil Code, 16, 3; Code Civil Proc., 5, 1, 15; Law of the 4th Flor., year VII, and Sept. 10, 1807 (against foreigners); especially Law of April 17, 1832; modifications in Law of Dec. 13, 1848; *Aubrey and Rau*, VIII, "R. Crit.," 1875, p. 791.

⁶ "Arles," etc.; *Giraud*, "Essai," II, 20, 23, 188, 235, 262. Cf. *J. d'Ibelin*, 116. A few Customs of the North rejected it, "Ord.," XI, 389, remaining faithful in this to the spirit of the old law. But the royal legislation authorizes it and *Beaumanoir*, 54, 6; 24, 12, shows it to us being actually applied. "Ord." of 1254, 19 (1256, 17); "Siete Part.," 5, 15, 4. In many places, however, giving up of possessions does not release the debtor; for example, Tournay, Marseilles, Geneva, etc.: *Kohler*, 44 (texts).

⁷ The Customs of the South allow the debtor to renounce beforehand the privilege of giving up of possessions; but the "Gr. Cout.," 2, 17, declares

that he has nothing left?¹ In order to escape physical compulsion it is necessary that he should strip himself of everything that he possesses,² "usque ad sacculum et perram," says the Commentary; he should only keep one garment and "pannicularia quæ nuditatem cooperiant"; he is not even allowed to keep his cloak. In the time of Beaumanoir this surrender affects immovables as well as movables. It takes place at law, and it is probable that this was so because the judges ought to make sure that they were not dealing with a rogue.³ Humiliating formalities often accompanied the giving up of possessions;⁴ the best known, and that which lasted the longest, consisted in being compelled to wear a green cap; in the eighteenth century this fell into disuse.⁵ But it was otherwise with the formalities of publicity destined to notify the public of the circumstances of the debtor.⁶ The Ordinance of 1673, Art. 10, enacted in the case of merchants that the surrender of possessions should be read and published, and also posted upon a public notice board. It is all the more necessary to notify third parties because the debtor is not freed by the surrender of his possessions; if he acquires any new possessions his creditors have a right to take them. Every debtor who has made an

that this renunciation is of no effect, even if the debtor has done it under oath; were it not for this, it would seem, it says, that he had pledged himself to die: *Loysel*, 682; *Beaumanoir*, 54, 6; *Boutaric*, II, 20; *Louet*, "C.," 14, 12; *Pasquier*, 539; *Tambour*, II, 397 *et seq.*, 157 *et seq.*

¹ *Châsemartin*, 268: "The dungeon causes suffering, but it does not pay the debt."

² Custom of throwing one's belt on the ground (*cf.* the wife's renunciation to the community): *Du Cange*, see "Cessio bon."; *Ragueau*, see "Ceinture"; *Pasquier*, *loc. cit.*, and "Rech.," IV, 10; *Fleury*, "Inst.," II, 68; *Köhler*, 46; *Ord.* of 1490, 44; 1510, 70; "Conf. des Ord. de Guénois," I, 523; *Britz*, 800. *Cf. post*, statutes according to which the debtor is deprived of his clothing: *Köhler*, 49. Italy: *Pertile*, VI, 391; *ibid.*, 347; *Wach*, "Z. R. G.," V, 439.

³ *Pasquier*, "Inst.," 537; *Argou*, IV, 6; *Pothier*, "Procéd.," no. 709; *Merlin*, "Contrat d'Abandonnement." As to the last state of the old law, see especially the "Ord." of 1667 and 1673; *Isamberti*, see Table.

⁴ At Salon in 1293 the debtor goes through the town in breeches and shirt, with his head bare, preceded by a crier who blows a trumpet and proclaims that no one must contract with him any more: *Giraud*, *loc. cit.*, "R. de Lég.," 1844, 428; "N. R. H.," 1878, 370; *Köhler*, *loc. cit.*; *Gui Pape*, "Quest.," 143; "de culo percussit supra lapidem" (at Lyons); *Pasquier*, 542; *Du Cange*, see "Cessio bon."; *Lattes*, "Dir. consuet. Lomb.," 122 (bibl.). — Flogging (*Avignon*), "N. R. H.," II, 371.

⁵ *U. Robert*, "Les Signes d'Infamie au Moyen Age," 1880; *Ragueau*, see "Bonnet vert"; *Fleury*, II, 168; *Louet*, "C.," 56. *Pasquier* declares that he never met anybody in the streets of Paris wearing a green cap, and *Pothier* assures us that, although the tribunals did not fail to condemn the man to wear the green cap, he never saw a creditor avail himself of this right to furnish the debtor with this disgraceful headgear: *Köhler*, 48; *Pertile*, VI, 387; "Stat. Romæ," I, 161.

⁶ *Cf. Argou*, *loc. cit.*; "Bretagne," 681, etc.

assignment at law can surrender his possessions (excepting in the case of an offense); as an exception, the surrender did not take place in the case of certain classes of debts, — classes which were so extensive that this surrender lost its importance after the enactment of the Ordinance of 1667. Instead of carrying out the surrender of their possessions, debtors could also apply to the king and obtain from him **respites** or “quinquenelles,” which, as this last term would indicate, were effective during five years.¹

§ 413. **Suretyship**, called “fidejussio” (as at Rome) during the early barbarian period,² and then “fermansa,”³ “garendia,”⁴ “plévine” or “plégerie,”⁵ during the feudal period, was, as one

¹ **Respite and Delay** (“atermoiements”). — (A) Respite: “respectus,” “répit”; *Du Cange*, see *Ragueau*, *ib.*; “Cod. Just.,” 7, 73, 8 (“quinquennial, inducia”); *Loysel*, 682 *et seq.* The king grants the unfortunate debtor a delay within which to pay his debt. “Ord.” of 1188. In the fourteenth century letters of rescission are commonly used: “Gr. Cout.,” 2, 17; *Boularic*, II, 22. They must be ratified at law in order to be effective. According to *Boutillier*, a majority of the creditors (in number and amount) had to give their consent to it; but this requirement seems not to have lasted very long. Respites are only granted for privileged debts (claims of the king, of minors, etc.) or in case of pledge-giving: *Loysel*, 683, 684. One cannot renounce a respite according to the “Stil. Parl., de foro compet.,” and the “Ord.” of 1669, 6, 12 (*Loysel*, 682 *contra.*). The effect of these letters, says *Pothier*, “Procéd. Civ.,” no. 723, is to prevent the creditors from carrying out execution on the body of the debtor or the movables which he uses; they are, however, permitted to distrain upon the other movables and immovables, but they cannot have them sold before the expiration of the delay granted by the letters. The “Ord.” of 1673, 9, 5, excludes debtors who have obtained letters of rescission from taking any public office; but if they pay their creditors off entirely, “letters of rehabilitation” cause this disability to cease. See *Ferrière*, who tells us that in the eighteenth century letters of rescission were not very much used; delay (“atermoiemement”) was preferred to them. — (B) Delay is not distinguished from respite in the old language; but in the end by this is meant a delay granted by the creditor to the debtor by virtue of a friendly agreement. It is customary to add to the delay of payment a reduction of the debt. This contract thus corresponds to that which to-day is called a composition. It assumes the consent of the creditors who represent three-quarters of the amount due: see *Merlin*. — Cf. Italy: *Pertile*, VI, 381 (“moratoria”); *Salvioli*, 388. Germany: *Schroeder*, 832. German proverb: “Quinquenellen in die Hölle gehören.”

² *Thévenin*, “Textes,” see Table; “Burg.,” 82; “Wis.,” 2, 1, 10, etc.; see *Du Cange*.

³ “F. de Béarn” and elsewhere; Customs of the South: “Bai.,” 15, 11; *Ratclis*, 5: “causa quæ per wadia firmatur”; *Franken*, p. 207; “F. de Navarre,” III, 16; “fidadores”; “Siete Part.,” V, 12: “fiadores”; *Du Cange*, see “Caplevator,” “Manvelator”; *Muñoz y R.*, “Fueros,” p. 542.

⁴ *Du Cange*, see “Garandia,” “Warrantus,” etc.; “Olim,” see Table, “Guadimonium” or “Vadimonium,” “Lombarda,” 2, 21.

⁵ In the North see *Godefroy*, “Chanson de Roland,” 3847. Its etymology is unknown. “Pleige” means surety. “Pleigerie,” “plévine,” mean suretyship, pledging. *Du Cange*, see “Plegius” and its derivatives: “Applègements,” “contre-plège,” “franc plège.” *Bracton*, 3, 10, 1: “Omnis homo debet esse in franco plegio” (responsibility of the members of the “decanie”; they are pledged to one another for the offenses which they commit); “aut in alicujus manupastu” (subject to some one). “Plegium” in the sense of gage;

has seen, of very great importance in the old law.¹ One can say that the more defective and the more embryonic the procedure was, the more extensive the part played by the surety became. The giving of surety was not, as it is to-day, a security which was accessory, occasional in the formation of contracts; it was necessary for their very existence.² At this time it was applied to the most diverse objects:³ surety is given in order to guarantee the payment of a debt or that one will appear in court,⁴ that one will furnish proofs or execute a judgment, that some one who is banished will not return, that such and such a man will not cause damage, that the sons of the vendor will not attack the sale, etc. When it ceased to be strictly indispensable the custom of joining this security to contracts was no less widespread; judges demanded from pleaders pledges that they would appear;⁵ custom

ibid., see, "plivium"; "F. de Bigorre," 37; *Ragueau*, see "Applègement," "Plège," etc.; *Pollock and Mailland*, II, 183 (really: "gage"). — German: "Bürge," cf. Anglo-Saxon: "borh." — *Loysel* calls it "réponse," 669.

¹ Sources: "Ass. de Jérus.," *J. d'Idelin*, 117 to 130; *Ph. de Navarre*, 78, 79; "C. des Bourg.," 67 to 86; *P. de Fontaines*, c. 7 et seq.; *Beaumanoir*, 43; "Et. de St. Louis," I, 108, 122; "Jostice," pp. 83, 87, 93, 105, 274; "T. A. C., Norm.," 52; "Summa Norm.," 59, 89; *Glanville*, 10; *Britton*, "C. V.," "Reg. maj.," 3, 1; "A. C., Anjou," Table, see "Plège"; "Gr. Cout.," 2, 7; *Boutaric*, I, 101; "Siete Part.," V, 11; "Petrus," II, 43.

² *Kovalevsky*, pp. 151, 507; *Daresté*, pp. 13, 57, 86, 97, 104, 113, 315. Cf. also *Horten*, "Die Langobard. Schuldverpflichtung," 1896 (II, 1896, "Personal execution").

³ Examples in *Huber*, IV, 875; "Burg.," 82, 1; "Alam.," 36, 3; "Capitul.," ed. *Boretius*, see Index. — Cf. the proxy, the responsible debtor in our law.

⁴ Cf. in modern law provisional liberty of the accused under bail. *Beaumanoir*, 53, 4: to deliver under surety with good pledges. Anglo-Norman sources: the surety is called "viva prisonia ducis Normanniæ"; and, conversely, it is said: the gaol of Fleet is the pledge (of such and such a man): "Summa Norm.," 75, 5; "Select. Pleas," p. 197.

⁵ We have seen how suretyship was an essential part of the mechanism of the old procedure. In Normandy the "querimonia" or complaint at law takes place "datis plegiis de la prosequenda" (the demandant should even bring with him witnesses in order to make his complaint seem probable: this is the "secta" of the English law: *Brunner*, "Entst. de Schwurg.," pp. 170, 428); both demandant and defendant give surety "de stando juri": "Summa Norm.," 56; 59, 10; see *Du Cange*, *Ragueau*, see "Ester." During the course of the proceedings, generally speaking, in the old law pledges are often required: *Franken*, § 17; "L. d. Droiz," Table, see "Plège"; *Ragueau*, see "Applègement"; *Beaumanoir*, 43, 33 et seq.: the surety "stare juri" is only furnished by the alien demandant; and if he is a poor man or a foreigner his word is deemed sufficient, 2, 14 (cf. "caution juratoire," see *Ferrière*, *Guyot*). According to *Beaumanoir*, *loc. cit.*, the pledge to abide by the law is held to apply to the entire proceedings. This is equivalent to the payment of the judgment, whereas the pledge to appear in court only applied to the appearance: *P. de Fontaines*, 8, 5; "Jostice," p. 87; "C. des Bourg.," 127; *Larroque-Timbaud*, 9. The tendency to do away with legal sureties made its appearance first of all, it would seem, in the canon law; thus the "Auth.," "Generaliter" was not applied within the ecclesiastical jurisdiction (*P. Fournier*, p. 146): *Tanon*, "N. R. H.," 1882, 497. Later on, *Loysel* was able to say, 858: "There

imposed in certain cases an obligation upon the debtor to furnish sureties.¹ For a long time it was a duty for relatives² (or for client and patron) mutually to serve each other as surety;³ the vassal is held bound in some of the Customs to act as surety for his lord.⁴ As a consequence, this becomes a favor which a friend will not refuse to grant, and which is not without dangers for him because of the severity with which sureties were formerly dealt with, — dangers which were all the more to be feared because they were hidden; the surety believes that he is brought in simply as a matter of form, he counts upon the solvency of the debtor, and nine times out of ten the burden of the debt falls entirely upon him. Certain legislators concerned themselves with this situation;⁵ thus, the Velleianum Senate Decree in Rome was enacted in order to warn women against imprudent undertakings; they were allowed to bind themselves, but not to act as surety for anybody else.⁶ In our day, when "pecuniary interest dominates the legal relations," suretyship has become more rare; it has taken on a

is no need for legal sureties between Frenchmen." By this he meant the "judicatum solvi," which was no longer required except from a foreign demandant, because in his case the particular facts that accounted for the necessity of his furnishing surety in the past had not changed; by returning to his native country he could escape from the consequences of the proceedings that he had begun in an offhand manner or with the object of annoying somebody. As to other legal sureties, *cf. Ferrière*; "Ord." of 1667, 38; "Tract. univ. juris," III (Schenek); *Pasquier*, "Inst.," 599. — Also: Scotch law "Quoniam attachamenta"; see *Du Cange*.

¹ "L. d. Droiz," 1008; "Arrestum Sane," at Toulouse, *cf. Tardif*, "Cout. de Toul., i. f.," "Le Droit privé au XIII^e siècle," p. 42.

² *Dareste*, pp. 113, 156 (pledge, remuneration given to the surety). *Cf.* p. 1367 (*contra*); *Beaumanoir*, 30, 59; *Glanville*, 11.

³ At this time a great deal of strictness is shown as to the capacity of the surety. *Dareste*, p. 376: those who cannot be sureties according to the "Senchus Môr," the canons of Ireland, and the laws of Gaul, are "servus," "peregrinus," "brutus," "monachus," "femina" (with the exception of the "domina," — that is to say, the woman who is at the head of the household because the share contributed by her is greater than that of her husband).

⁴ *J. d'Ibelin*, I, 196; "Summa Norm.," 59 10 ("homagiati," and even mere "residentes"); *Beaumanoir*, 43, 21; *Giraud*, "Essai," II, 136 (inhabitants subject to the consuls); "Constit. Sic.," III, 14; *Pertile*, IV, 512.

⁵ *Chaisemartin*, 11; *Huber*, IV, 855: precautions taken in Switzerland, for example, annulment of suretyships entered into in a tavern, prohibition of binding oneself beyond a certain sum, entering in a public register: *Beaumanoir*, 43, 2, 3.

⁶ *Stobbe*, § 192. Special capacity to bind themselves in the matter of giving surety. See as to feudal period: *Beaumanoir*, 43, 22, 26 *et seq.* (married woman), 23 (serfs) 38 (clericals), etc.; *P. de Fontaines*, 8. "Abiding" surety; that is to say, one who is domiciled within the jurisdiction, in order that the examination of the matter may not be too difficult: *P. de Fontaines*, 7. "Citizen" surety, meaning solvent, but originally it means that a citizen can only have surety given for him by another citizen of the same town. "Warranty" of a surety, insuring that the surety is solvent.

commercial character (indorsement of commercial paper); it is less in favor because modern law is based upon the idea, "plus cautionis est in re quam in persona." Loysel, 486, translates this idea as follows: "A surety pleads, a pledge pays, and to give surety is the occasion for a double action."¹

§ 414. **Hostage.** — The early surety was only a living pledge or a hostage;² it was his own person, his body, that was offered as a pledge to the creditor by the debtor, "loco wadii";³ he became a sort of slave (*cf.* a Roman "mancipium");⁴ also, he was ordinarily chosen among the persons who were dependent upon the debtor; it was some one of his household. The creditor kept him near himself, sometimes sequestered, or even in irons; he was authorized to take vengeance upon him if the debtor did not pay his debt at maturity, just as he would have taken vengeance upon the person of the debtor (it was death, mutilation, slavery for debts). Such a prospect as this must have led the hostage to neglect no means of getting the debtor to free himself of the obligation. Also, thenceforth one can account for two of the most remarkable characteristics of the primitive suretyship: 1st, in giving surety, the debtor frees himself; 2d, the death of the surety destroys the right of the creditor; the fact of being in his hands like a pledge could not be transmitted to the heirs of the hostage. Of course, moreover, the creditor had to feed his hostage,⁵ which gave rise to the gibe, "The banquet of a hos-

¹ Loysel, 669, 670. — *Cf.*, *Endemann, op. cit.*, II, 344.

² Terminology: "obstagium." German: "Einlager," meaning to send into the interior of the country; "Geisel," meaning hostage. — *Cf.*, in the Roman law: "Præs vas": Girard, "Manuel," p. 743. On the "vindex," *ibid.*, p. 874; Maria, "Thèse," 1896.

³ Capitulary of 803, 8 (I, 114); *Greg. Tours*, "H. Fr.," III, 15. Charter of 1198 (*Molinier, op. cit.*): "tenet obsidem vel in pignore" (difficulties among several creditors). A hostage is distrained upon in the same way as a pledge: *d'Arbois de Jubainville*, "Études de Dr. Celt.," p. 255; "F. de Béarn," 16; "thianssers" (pledge or hostage).

⁴ Huon of Bordeaux has killed the son of Charles; in order to obtain his pardon he must carry out certain exploits, and meanwhile he gives twelve hostages; Charles, believing that he has accomplished nothing, orders that these bondsmen be hung. Literature is in accord with the law; *cf.* freedom of accused persons who have given surety. The proverb: "Bürgen soll Man würgen" (sureties should be strangled): *Chaisemartin*, 11. In criminal matters the surety suffers the penalty which would have been incurred by the man whose appearance he guarantees if the latter should not present himself on the appointed day. *Cf.*, the surety of Schiller: "Sachensp.," 3, 9, 1. — The law changed upon this point (penalties became personal), and Loysel could say, 4, 5, 1 and 3: "He who answers for a criminal body for body, property for property, is however only civilly bound." *Cf.*, already, *Beaumanoir*, 43, 24, 25; "Roisin," 408.

⁵ At any rate, he advanced him sustenance. He is even responsible for torts that the hostage may commit.

tage is a costly banquet.”¹ In order to avoid these expenses, the creditor gave up the person of his hostage, or, rather, did not demand that the hostage should be handed over to him as soon as the contract was made. He contented himself with the promise that the hostage would present himself at the first summons at the place which was appointed beforehand, or which should be designated afterwards, — a town, a castle, or an inn, — and from which place he was forbidden to depart until the debt should be paid.² The laws seldom had to see to the carrying out of this promise, because it was made a point of honor to keep it; and, if necessary, excommunication would have had satisfaction from the recalcitrant hostage (perjury or quasi-perjury) or else he would have been taken by force (intervention of the magistrates).³ Shutting up in prison was the natural penalty for the infraction of this order; Beaumanoir recommended that one give the hostage who has suffered this punishment better nourishment than is furnished to prisoners for some crime.⁴ At the same time, the hostage, and, as a consequence, the debtor, was charged with the expenses occasioned by the sojourn of the former in prison.⁵ These were surely real improvements, but they were such that they could not preserve this superannuated institution from the disuse to which it was destined.⁶ There is scarcely any mention of it after the fifteenth century.⁷ But, if it disappeared from private law, it remained longer in the relations between one nation and another, and it is reverted to in times of crises; thus it is that the Commune had its hostages.

§ 415. The “*Fidejussio*” or “*Plégerie*,” which takes the place of

¹ *Chaisemartin*, p. 264: “Giselmahl köstlich Mahl.” They are often seen leading a gay life, — so much so that in 1577 in Germany, through the exercise of the police power, it was forbidden to have hostages: *Le Fort*, p. 429. Cf. *Beaumanoir*, 51, 7; 43, 32 *et seq.*

² He was confined a prisoner on parole: *Giraud*, “*Essai*,” II, 189 (Arles), 23 (Aix).

³ *Le Fort*, p. 431.

⁴ 51, 7; 43, 22 *et seq.* Cf. “*Const. du Châtelet*,” § 73. But, generally speaking, it was not allowed to throw him “in vincula et carcerem”; it was sufficient if he were prevented from taking flight: *Loening*, “*Vertragsbruch*,” p. 239.

⁵ An indirect means of compulsion in this case.

⁶ *Jean Faure*, “*Inst.*,” I, 3, asks if one can bind oneself “ad carcerem vel ad tenendum ostagia”; cf. 4, 6; *D’Argentré*, on “*Bret.*,” 117; *Beaumanoir*, 51, 7; forty days’ imprisonment at the most (cf. pledge); “*A. C., Bret.*,” 311, 312; Regulation of the Consuls of Toulouse, 1198, 1200; “*F. de Béarn*,” r. 16. — Prohibition in 1366; Frioul in 1396; Milan in 1577. — Germany: *Kohler*, pp. 67, 376.

⁷ At Bâle-Campagne, instances are found until the eighteenth century: *Huber*, IV, 880.

the "obstadium" or exists together with it, retained under its primitive form many of the former's characteristics; it differs in that bodily responsibility of the warrantor passes into the background; it is no longer anything but a satisfaction which is almost equivalent to a payment, and which consequently prevents the formation of the obligation rather than guarantees its carrying out. It is formed by way of "fides facta" at first, and then by faith-pledging or the blow with the palm of the hand. In the first case the debtor holds out the "festuca" or the "wadium" to the surety, and the latter in his turn gives the object which he has received to the "fidejussor";¹ in accepting it the "fidejussor" releases the principal debtor² and takes the debt upon himself.³ This is at least what seems to result from this obscure symbolism if it is interpreted with the assistance of the early system of suretyship, of which it thus reveals the characteristics within narrow limits.⁴ With the practice of faith-pledging or the blow with the palm of the hand the institution may have become more flexible; its effects are no longer imposed by the forms which it assumes; at the same time, the influence of the archaic "obstadium" is felt less; thus changes are facilitated.

In view of these formalities and the influence of the "obstadium," one has no difficulty in seeing that the early surety had neither the privilege of having the principal debtor pursued before himself nor the privilege of contribution, and that his obligation could not be transmitted to his heirs.⁵ (1) He does

¹ Frankish and Lombard practice: *Esmein*, pp. 47, 73; *Franken*, § 17; *Sohm*, *op. cit.*; *Val. de Lièvre*, "Launegild," pp. 184, 215. Cf. *Thévenin*, "N. R. H.," 1880, 456; *Thévenin*, "Textes," no. 109, etc.; *Rozière*, "Form.," no. 465; "Roth.," 182, 360; "Liut.," 32 et seq., 128; *Pardessus*, "Dip.," no. 424; "Bai.," app. 4; *D. Vaissette*, "Preuves," no. 109; "L. Fr. Cham.," 16; Edict of Chilperic, 6 (going surety for oneself); "Aripr. et Alb.," II, 21: within three days the debtor himself must liberate the "wadia" by furnishing "fidejussores"; if not, he has to pay 12 sous for each day he delays.

² The "wadia" is liberated: "Liut.," 37, 728; "Roth.," 360.

³ Thenceforth he has the debtor's pledge, and it is understood that he can realize upon it; but one thing that is not clearly explained in this act is the binding of himself towards the creditor; in order that this should happen it would have been necessary for him to have given the creditor his own "wadium." It has been maintained that the "festuca" that was given him ought to serve to carry out execution upon the debtor: "L. Sal.," 50, 3. Cf. *Schroeder*, p. 290.

⁴ "Jostice," 19, 38; *Esmein*, p. 107; "Cart. de St. Victor," no. 143; *D'Avenay*, no. 54. — Cf. Simple guaranty by verbal engagement in the "Summa Norm.," 89, 3.

⁵ *Esmein*, "N. R. H.," 1887, 48, by means of the general idea of the intransmissibility of debts, whether they be those of sureties or those of the principal debtors, explains various rules of the Roman law; namely, that one can neither stipulate nor promise anything to take effect after one's death. Passive intrans-

not have the privilege of having the principal debtor pursued first; his responsibility is not secondary, as in our day; he is kept in the foreground, just as is the principal obligor, and he covers the debtor.¹ One may even ask if the latter is not entirely freed, at least as regards the creditor, simply because he has furnished a surety; it is incumbent upon the surety to get the debtor to carry out his undertaking, but in no case would the creditor have the right of prosecuting the latter; he can only make application to the surety. In other words, the surety is responsible to the creditor and the debtor to the surety. Such is indeed the tendency of the old Germanic law,² and the documents of the Frankish period sometimes yield to this tendency by freeing the principal debtor ("is qui sub fide jussore discesserit")³ or even by permitting the debtor to act as surety for himself, which would have no meaning if the creditor had been able to attack him merely in his quality of debtor.⁴ In other cases, under the Roman influence, they permitted the creditor also to act against the debtor;⁵ but, as a general thing, if he proceeds in that way, the

missibility of penal actions, passive and active intransmissibility of the actions "vindictam spirantes," and "adstipulatio": *Pertile*, 130. Cf. the rule, "The living cannot distrain upon the dead"; *post*, "Distrain"; *Dareste*, pp. 77, 94, 95; *Argou*, II, 7. The king does not pay the debts of his predecessor: *Isambert*, I, 279.

¹ Explanation given by *Esmein*, p. 87: "One does not always choose one's debtor (for example, in the case of an offence); one chooses one's surety and takes care that he is solvent, so that it is more natural to pursue the surety than the debtor."

² Denmark: "Jüt. Lov.," 2, 62, 64; he who gives surety is not responsible to any other person excepting the surety: *Dareste*, pp. 113, 263; "Lib. Pap. Roth.," 178, 3.

³ "Burg.," 19, 5; 4, 7; 83, 1; "Sal. Extrav. B.," 6 (Hessels): the debtor is released if the "fidejussor" dies after having received the pledge: "L. Fr. Cham.," 16; "Roth.," 245, 366; "Ratch.," 8; "Aist.," 21; "Liut.," 36 *et seq.* A suit in 692: *Bethmann-Hollw.*, "Civilproz.," I, 558; *Geffcken*, "Sal.," p. 287 (bibl.).

⁴ Edict of Chilperic, 6. According to the common opinion pointed out above in the first place, the "festuca" passes through three hands, just as in the case of the giving of surety by a third party: *Geffcken*, "Sal.," 271; *Schroeder*, p. 291; *Sohm*, *loc. cit.*; "Eheschl.," p. 41; *Brunner*, II, 368; *Esmein*, p. 83; *Franken*, p. 234; *Heusler*, II, 242; *Huber*, IV, 875; "N. R. H.," 1879, 342; 1880, 77. Cf. "Jüt. Lov.," II, 104.

⁵ The privilege of exhausting the remedy against the principal debtor before proceeding against the surety did not exist—at least, on principle—before the time of Justinian, "Nov.," IV. We read in "L. Rom. Wis.," "Gaius," 2, 9, 2: the creditor has a right to pursue either the debtor or the "fidejussor" at his will: "Liut.," 108; "L. Sal.," *loc. cit.* (cf. t. 50) (*Geffcken*, 287); if they are both alive the debtor is first held liable to pay, "N. R. H.," 1880, 457; 1879, 336. Fine for the debtor who allows the surety to be distrained upon: "Burg.," 19, 8, 9; "Liut.," 40; "Et. de St. Louis," I, 122 (choice of a creditor). A triple summons of the debtor in the law of the Burgundians and the Lombards: "Roth.," 245. But it is not necessary for the

"fidejussor" is liberated,¹ and in any event, the surety who is prosecuted in the first place is under the necessity of giving satisfaction. This surety is not able to send the creditor away and tell him to first of all carry out his vengeance on the possessions of the debtor, which rule is still found in the thirteenth century in many of the books of Customs.² Thus, Beaumanoir, 43, 21, assumes that the creditor asks the surety to "act like a good surety" without the debtor being informed of it; the surety has the choice of paying at once or giving a sufficient pledge or nam so as to gain time, obtain enough to pay or to proceed against the debtor.³ This surety should do everything in his power to assure the payment of the debt;⁴ he must busy himself in order to make the debtor appear in court,⁵ and bear with the whole weight of his moral authority or physical authority so as to compel him to give satisfaction.⁶ Against the surety the creditor is armed with the forcible means of action of the old law, the physical constraint,⁷ and especially private distraint;⁸ and in his turn the surety makes use of them against the debtor,⁹ who is held liable towards

creditor to prove the insolvency of the debtor in order to pursue the surety: "Ratch," 8. Cf. *Petrus*, II, 27.

¹ "Faux Cap.," III, 334; "L. Rom. Cur.," 22, 12; *Esmein*, 86; *Baluze*, "Cap.," I, 154; *Paul*, "Sent.," II, 17 (effect of the "litis contestatio"). At Neufchâtel, Switzerland, until 1855, the creditor who in the first place pursues the debtor thereby loses all recourse against the surety: *Huber*, IV, 883; *Stobbe*, III, 308.

² "Et. de St. Louis," I, 122; "A. C., Bourg.," 5, 3; "Lille," 143; "Toulouse," 76; "Montpellier," 72; "Sachsensp.," III, 85, 1; "Schwabensp.," I, 6. No preliminary denunciation of the debtor: *Beaumanoir*, 43, 1. But the surety acts imprudently by not putting this point in issue: *ibid.*, 43, 10, 12; *Pasquier*, "Inst.," p. 585; the debtor and the surety can be prosecuted for debts owed to the king without any examination: "F. de Béarn," ed. *Mazure*, p. 294 (renunciation of the three Roman privileges of exhausting the remedy against the principal debtor before proceeding against the surety, contribution, and assignment of the deed).

³ "Summa Norm.," 59, 7. It is clear that by this means progress was being made towards the recognition of the subsidiary character of a surety.

⁴ Which is done, for example, by his seizing the possessions, or even the person of the debtor, and handing them over in payment to the creditor. Example in *Pertile*, *loc. cit.*; "Burg.," 19, 7.

⁵ *Beaumanoir*, 43, 25; *Glanville*, X, 5, 5.

⁶ *Pertile*, IV, 505.

⁷ "Ass. de Jérus.," "C. des B.," 39, 58, 80, 112; "Alais," 7 in "Olim," IV, 1486; "Const. du Châtelet," 71 (by virtue of a special clause). But according to *Beaumanoir*, 43, 18; 24, 30, the surety does not pledge his body; "T. A. C., Norm.," 52.

⁸ "Liut.," 108 *et seq.*; *Beaumanoir*, 43, 15; 30, 51 *et seq.* In the County of Clermont no one can have recourse to his surety by giving him up unless he makes a complaint at law, excepting at Creil and in a few other places: *Du Cange*, see "Abandum"; "Ass. de Jérus.," "C. des B.," 76, 77.

⁹ Even before he has been pursued: "Liut.," 39, 40; "Burg.," 19, 82, 96; "Extr.," 21, 8. But the "L. Burg.," does not make any mention of a distraint

him in double the amount.¹ It is even noticeable that in this matter the employment of distraint by self-help is maintained much longer than in the case of ordinary debts.² (2) Between fellow "fidejussors" there was neither contribution nor recourse.³ The creditor was authorized to reclaim the entire debt from either one he pleased;⁴ the others were then freed by one payment, and they neither had to contribute in advance to the "solutio" nor to indemnify the "solvens" afterwards.⁵ (3) Finally, as a last characteristic of the old "fidejussio," the obligation of the surety did not pass to his heirs⁶ but died with him,⁷ which made of it a very frail guarantee in one sense, while it was a very powerful one in another, owing to the rights which it gave to the creditor. It is probable that this risk was lessened by increasing the number of sureties.

§ 416. **Modern Suretyship** was developed, like the Roman "fidejussio," by way of a spontaneous progression in legal ideas; in proportion as the payment of debts became better assured by force of law and morals, sureties became less useful;⁸ they ceased to be so strictly held;⁹ their undertaking became entirely acces-

practised by the creditor upon the debtor; the only question dealt with is one relating to a summons made for the sake of form; the surety is responsible to the creditor and the debtor to the surety. — *Esmein*, p. 90; *Dareste*, p. 113 (preliminary pledge given to the surety); p. 198 (privilege); p. 156 (salary).

¹ "L. Fr. Cham.," 16; "Cap. de Parl. Sax.," 27; *Papien*, 14, 8; "Liut.," 108; *Sickel*, "Bestr. d. Vertragsbr.," 10; *Esmein*, 88, 97, 137. The same in Hindu law, Irish law, etc.: *Kowalewsky*, p. 153; *Dareste*, "Etudes," p. 77; *Collinet*, "N. R. H.," 1895, 653. "A. depensi" at Rome.

² *Beaumanoir*, 43, 15; "Et. de St. Louis," I, 122; "Jostice," 19, 26, 38, 47, 174; "L. d. Droiz," no. 194; "Ass. de Jérus.," "C. des B.," 74; "A. C., Artois," 22, 4; "A. C., Bayonne," 153.

³ *Glanville*, X, 5; "Ass. de Jér.," "C. des B.," 72, 78; "Const. du Chât.," 73, 76; *Beaumanoir*, 43, 7, 5; "Montpellier," 72; *Pasquier*, "Inst.," p. 589. — *Dareste*, p. 90.

⁴ He chose the one who appeared to be in the better position (the one who was apparently more solvent).

⁵ The "solvens" could only ask the others in a friendly manner for an immediate contribution or a promise to indemnify him; he was not sure of obtaining it unless it had been previously agreed upon.

⁶ *Gaius*, III, 120 ("sponsor," "fidepromissor"); "Burg.," 82, 2; *Capit. of 875*, c. 42; *Esmein*, 89. — For the Feudal Period cf. "Summa Norm.," 59; *J. d'Ibelin*, 129; "C. des Bourg.," 78; *P. de Fontaines*, 9, 5; *Beaumanoir*, 43, 4; "Jostice," II, 12, 3; *Boutaric*, I, 101; "Montpellier," 13; "A. C., Bourg.," 78. — Cf. *Dig. X*, 3, 22, and the Commentaries of *Hostiensis*, *G. Durand*, etc.

⁷ It has been said that a kind deed was personal. But it is just when it becomes a kind deed that suretyship becomes hereditary: *Esmein*, "N. R. H.," 1887, 51; *Dareste*, p. 76.

⁸ No forms for suretyship (cf. *Beaumanoir*, 39, 69; "Summa Norm.," 89, 3) no more than for ordinary contracts: "Roisin," 25, 47.

⁹ Joint debt or "solidarité" was not distinguished from the old suretyship: it only acquired a special existence when suretyship took on its new form and lost its harshness: *Argou*, book IV; *Glasson*, VII, 599.

sory;¹ it was their possessions, and not their persons, that the creditor attacked; also, the heirs of the surety had no right to try to escape from this burden.² By this means, what the creditor loses on one side he finds that he gains on another; if his remedy against the surety is less severe, it is the more certain. Already in the thirteenth century the "Grand Coutumier de Normandie"³ contrasts the simple surety, whose obligation is personal, with the surety who undertakes as a "surety and debtor," — that is to say, one who binds both himself and his heirs.⁴ Inheritability soon becomes the rule. For his part, the creditor, whose protection gathers strength and who seeks property rather than a person,⁵ is under the obligation to prosecute the debtor before doing anything else, and it is only when it is well proved that the latter is insolvent that the creditor can have recourse to the surety;⁶ the latter is only a secondary debtor, a "second detors," as the Assizes of Jerusalem say. Excepting in a few belated Customs, the surety has the Roman privilege of ranking in order of having the debtor's property pursued

¹ Consequences: *Pothier*, "Oblig.," 373 (delay, physical compulsion).

² The obligation of the pledge became hereditary sometimes as a consequence of a privilege (claims of the sovereign, *Beaumanoir*, 43, 9), sometimes as a consequence of a special clause or of the form which it took on ("pleigerie stipulaire": *Boutaric*, I, 101): *P. de Fontaines*, 9, 5; *Imbert*, III, 16; finally it passed to the heirs when the surety had been sued at law: *Beaumanoir*, 43, 4. Cf. "L. Rib.," 67, 1; *Dig.*, 50, 17, 139; *Esmein*, "N. R. H.," 1887, 57. According to the "Ass. de Jérus.," "C. des B.," 78, the possessions of the surety are seized and sold if the debtor is insolvent; in fact, assuming that he is not dead, he should have paid or given pledges. In a general way, one can say that the reasons in favor of intransmissibility no longer existed, and that the clause of heredity was implied. *Post*, "Inheritances." Cf. English law, clauses of this nature ("specialty binding the heir"); *Heusler*, II, 548. Heredity according to the "Schwabenspiegel," VII, 289 (*Stobbe*, 191).

³ "Summa," 59, 89; *Boutaric*, I, 101; "L. d. Droiz," 143.

⁴ The heirs are the pledges of chance: "Summa," 60, 12.

⁵ Provided that the pursuit of the debtor is not too difficult, and that it is not simply to avoid this pursuit that one has had recourse to the "fidejussio."

⁶ The surety pursued by the creditor had two means of defense in our old law, — one of Customary origin, and the other of Roman origin: 1st, the *defense of warranty* allowed him to interplead the principal debtor (or his fellow "fidejussors"): *J. d'Ibelin*, 124; *Beaumanoir*, 43, 21; "Gr. Cout. de Norm.," 60, 89. — 2d, the *privilege of having the remedy against the principal debtor exhausted before the surety was proceeded against* (*Glanville*, X, 3, 4; "A. C., Anjou," I, 328; cf. "Et. de St. Louis," I, 122; "L. des Droiz," 620; *Boutaric*, I, 120), by means of which the "fidejussor" makes the creditor pursue the principal debtor before proceeding against him: "Bret.," 150, 207; *Masuer*, II; *Imbert*, I, 20; *Rebuffe*, "De Litt. Obl.," I, 2, 88; *Pothier*, "Proc. civ.," no. 90. The defense of warranty is especially serviceable to the surety who has renounced the privilege of having the principal debtor pursued before himself or of contribution. This warranty in personal matters, or *simple warranty* (the surety not being put outside of the law) is contrasted with *formal warranty* (in real matters): *Esmein*, 148.

before himself.¹ With the ordinary surety, who is held secondarily and in default of the principal debtor, is contrasted² the surety who is jointly and severally liable, and who is looked upon, owing to a curious inversion of historical sequence, as having renounced the privilege of having the principal debtor pursued first,³ though it was the ordinary surety who acquired it. The privilege of contribution⁴ could not fail to be joined to the privilege of having the principal debtor pursued before the surety;⁵ the same reasons of equity caused it to be admitted in the fifteenth century by judicial practice, and a little later even the surety who had paid without asking for contribution in the payment of the debt obtained an action against his fellow "fidejussors."⁶ The recourse of the "fidejussor" against the principal debtor,⁷ instead of being carried out, as it was formerly, by means of private distraint, offered no other peculiarities excepting the possibility of making use of the rights and actions which belonged to the creditor⁸ ("benefit of the assignment of actions").⁹

¹ Italian statutes cited by *Pertile*, IV, 508.

² He who assumes the character of a surety and debtor binds his heirs and sometimes releases the principal debtor; then the clause means, the acceptance of a new debtor instead of the old one: "Gr. Cout. de Norm.," 60; "L. d. Droiz," 143.

³ *P. de la Janès*, II, 338, 345, states that it was customary to renounce the privileges of having the principal debtor pursued before the surety and of contribution. The legal surety did not enjoy these advantages (but it was otherwise with his warrantor), nor did jointly liable joint debtors (even in countries of written law, although they say the Novella, 99, seems to have granted them both these defenses). Cf. *Loysel*, 397; *L'Hommeau*, p. 312.

⁴ "Beneficium novæ constitutionis": "Nov.," 4; *Pertile*, IV, 510; "F. de Béarn," ed. *Mazure*, p. 294.

⁵ Right of interpleading his fellow sureties (warranty); also the Roman privilege of contribution: *Masuer*, 29, 23; "Roisin," p. 47; "A. C., Anjou," II, 441; IV, 252.

⁶ *D'Argentré*, on "Bret.," Art. 213. Cf. *Pasquier*, "Inst.," p. 599.

⁷ The liens which accompanied recourse of the "fidejussor" against the principal debtor disappeared from the Customs (cf., however, "Bret.," 204) at the same time as certain unfavorable rules which were, so to speak, its counterpart: no recourse if he denies his obligation and it is proved against him: *J. d'Ibelin*, 117, 126; "C. des Bourg.," 69 (loss of the right to reply in Court); "Toulouse," 75; *Beaumanoir*, 43, 6, 39; "Jostice," 18, 7, 3.

⁸ "Counter certificate of warranty" drawn up by the notary.

⁹ Italian statutes after the fourteenth century: *Pertile*, IV, 508; "Toulouse," 81. By his own act the creditor loses the securities of payment which he had at the time of the giving of surety; the surety is discharged: *P. de la Janès*, II, 342. — Novation: *Beaumanoir*, 43, 11, 12 (respice); "Ass. de Jér.," "C. des B.," 71, 73, 79; "Const. du Chât.," § 79 (granting of a term). — Case in which the surety can demand his release by the debtor: "Vergit ad inopiam." Statute of Trieste, 1550; at the end of a year, Ravenna, 1471; of ten years, Brescia, 1313; *Pasquier*, "Inst.," p. 595; "Siete Part.," V, 12.

TOPIC 8. EXECUTION UPON POSSESSIONS, AND REAL SECURITIES

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| <p>§ 417. Movables are the Seat of Debts.</p> <p>§ 418. Pledging of Movables based upon an Agreement.—(A) Early Conception.</p> <p>§ 419. The Same.—(B) The Pledge passes to the Condition of an Accessory Security.</p> <p>§ 420. Private Distrain (“Pignoratío”) upon Movables.</p> <p>§ 421. Pledge by Legal Process.—(A) Barbarian Laws.</p> <p>§ 422. The Same.—(B) Customary Law.</p> <p>§ 423. Execution upon Immovables. Origin of Distrain upon Immovables.</p> <p>§ 424. Land Distrain and Its Procedure.</p> <p>§ 425. The Same.—(A) Documentary Right.</p> <p>§ 426. The Same.—(B) The Distrain Proper.</p> <p>§ 427. The Same.—(C) Public Announcements and Award.</p> <p>§ 428. The Same.—(D) Preferences.</p> <p>§ 429. The Same: Later Law.</p> <p>§ 430. Forms of Realty-Mortgage.</p> <p>§ 431. The Same: (I) Sale with Redemption.</p> | <p>§ 432. The Same: (II) Land-Gage.</p> <p>§ 433. The Same: (III) “Bond.”</p> <p>§ 434. The Same.—(A) The General Bond.</p> <p>§ 435. The Same.—(B) The Special Bond.</p> <p>§ 436. The Same.—(C) Comparison of the General Bond and the Special Bond.</p> <p>§ 437. The Same: Hypothec-Mortgage. (1) Countries of Public Nam.</p> <p>§ 438. The Same: (2) The so-called “Customary Common Law.” Mortgage is Creatable only by Notarial Deed.</p> <p>§ 439. The Same: Every Notarial Deed Implies a General Mortgage.</p> <p>§ 440. The Same: Judgment Lien (“Judicial Hypothec”). Every Judgment Implies a General Mortgage-Lien.</p> <p>§ 441. Implied Liens (Hypothecs).</p> <p>§ 442. Consequences of the Mortgage.</p> <p>§ 443. “Clearance.”</p> <p>§ 444. Revolutionary Law.</p> |
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§ 417. **Movables are the Seat of Debts.**—In the old times it was the person of the debtor that answered for his debts. As a consequence, movables, which are a part of his person (“*ossibus inhærent*”) were made liable also. The debtor gave his movables as a pledge to the creditor, or else the latter distrained upon them, if payment were not made.¹ Immovables escaped creditors because they belonged to the family or to the tribe rather than to the individual: “He who has only immovables is insolvent.”² The feudal system strengthened this rule; in fact, the vassal and the copyholder were not permitted in incurring debts

¹ *Loysel*, 326; *Esmein*, p. 168. Difficulties in admitting of distrain upon immovables, and even when it was admitted, the subsidiary character which it always had: *Beaumanoir*, 54. “*L. Sal.*,” 50: the creditor can only distrain upon movables; 58: the insolvent debtor has given the creditor his “*facultas*”; that is to say, his movables. Cf. *Geffcken*, pp. 180, 218. English law: cf. *Esmein*, 164.

² A German axiom.

to involve the property right of the lord; it was also said that "Fiefs are not liable for any debt." This was in accord with the persistent tendency in the direction of the conserving of real property in families.¹ But we have already seen how these old ideas which were so contrary to the rules of the Roman law disappeared or became weakened. The consequence was that it became possible to distrain upon immovables, and that the entire inheritance, and not only a certain category of possessions, were liable for debts. Even although the principle of the very ancient law was completely abandoned from the fourteenth century in France, the heedlessness of the legislators has preserved traces of it, even in the Civil Code.² In England it has lasted almost to our own day.³

§ 418. **Pledging of Movables based upon an Agreement.** — (A) *Early Conception.* "Without possession there is no pledge," one can say, because the old law only recognized that which the Germans call the "Faustpfand,"⁴ pledge of the hand, pledge given

¹ Consequences of the rule: 1st. Only movables can be distrained upon in the very old law; in the later law immovables can only be distrained upon if there are no movables or if the latter are not sufficient to pay off the creditors. — 2d. In a succession only the heir of the movables has to pay the debts; the heir of the immovables, or, at least, of the personal belongings, receives them without contributing to the payment of the debts; the charge of the debts also falls, if there are no movables, upon the immovable acquets which belong to the heir of the movables: *Beaumanoir*, 12, 6. Cf. *P. de Fontaines*, p. 138. *Guy Coquille*, on "Niv.," 35, 4: "This article was passed at the time when the general opinion of the courts of the Customary countries of France was that the heir of the movables ought to pay the debts upon the movables of the deceased; since then, and with every reason, the other opinion has been accepted; that is to say, that debts should be paid by all kinds of heirs." According to this formula, the movable liabilities would have followed the movable assets and the immovable liabilities the immovable assets. But this is only one of the first steps towards the final giving up of the old principle. — 3d. The debts of each spouse fall into the conjugal community affecting movables; in the system without community the debts of the wife are charged upon the husband, because he takes the movables; the wife of a noble renounces the movables in order not to have any debts to pay. — 4th. Same charge for the guardian. — 5th. The testamentary executor has the seisin of the movables, and at the same time the obligation of paying the debts.

² Article 1409.

³ *Lehr*, "Dr. Anglais," p. 157.

⁴ Terminology (the same thing in general for pledge-giving of movables or immovables), "gage," "wage," "vadium," "guadium," "gaigium," "vadiumonium": *Thérénin*, "Textes," Table; *Ragueau*, see "Desgagement," "Contre-gage." To pledge a fine; that is to say, to furnish a pledge to guarantee its payment; to pledge the law, to pledge one's movables. Pledges in the sense of salary: *Giraud*, "Essai s. l'Hist. du Dr. Fr.," II, 28; "Bourg.," 125; *Bourdote de Rich.*, III, 234. Cf. the German, "Wette," "Gewette." — "Nans," "namps," "namium," cf. the German "nahme," "nehmen" (to take). Pledge-giving ("nantissement"), means putting in pledge. — "Phand" (German), "pant" ("L. Fris. Add.," 8, 2), "Pfand." "Contrepan," *Giraud*, II, 416; see *Ragueau*; "Hainaut," 95: rents compensated out of an inheritance. — "Pignus,"

from hand to hand.¹ We have already seen what part the pledge played in the formation of obligations which were established by agreements. By being given a pledge, the creditor received absolute satisfaction;² thenceforth there was nothing more for him to claim from the debtor; he had been paid in advance.³ The debtor simply had the power to demand the restitution of the pledge by giving what he had promised.⁴ The pledgee creditor thus acquired the ownership and the seisin of the pledge; he could hold it as against everybody, recover it if it were taken away from him, — at least in the case of theft or loss.⁵ He had the right to make use of it and to turn it to account⁶ on his own responsibility; for, if when the debt came due and the debtor asked the restitution of the pledge, the creditor found it impossible to carry out this restitution, his liability was enforced; he answered for the entire loss or for deterioration, without any distinction being drawn between cases of accident and cases where it was his fault or where fraud was present.⁷

"penh," "pignorare." — "Abotum," "about," "contrabout." — "Assignare," "assignat" (assignment), "assénement," "assiette" ("assignare pecuniam supera terram"). — "Obligare," obligation, "impedire," to encumber, "embargar" ("Béarn"), "thiansser" (*id.*), "poderium," "poderagium" ("Coutume de Toulouse"). — See *Du Cange, Ragueau; Brunner*, II, 445; *Franken, op. cit.* — "Fiducia" among the Lombards for the pledge given by agreement: *Pertile*, IV, 515. — "Toulouse," 131: "Ponere bannum in bonis."

¹ *Boutaric*, I, 64, 102.

² "Liut.," 108, however, allows the creditor to claim the payment of that which is due him when he acquires the ownership of the pledge.

³ *Daresté*, p. 57 (revocable contracts). On the question of the formation of obligations by agreements and on the point of knowing whether the responsibility can exist independently of a debt, *cf.* also *Horten*, "Personal execution," 1894, and *Von Schwind*, "Wesen u. Inhalt des Pfandrechts," 1899 (account given by *Pappenheim*, in "K. V. J.," XLII, 513); "Ord." of 1206, 7.

⁴ *Cf.* fiduciary alienation at Rome; "Cout. du Valais," 104.

⁵ *Cf.* binding of immovables. Movables are more liable to perish or to deteriorate than immovables. They will be better preserved if they are not made use of, whereas the creditor who has received an immovable as a pledge cannot help making some use of it; for example, in order to cultivate it. If the pledgee delivers the movable to a third party the latter becomes the owner "erga omnes"; it makes very little difference whether the act took place with the consent of the pledgor or in spite of him; in the matter of immovables, putting a third party in possession is not sufficient to deprive the owner of the right of reclaiming. As to this right of reclaiming in the matter of movables, *cf. herein loc. cit.* and in the existing law, "Saisie-Revendication": *Glasson*, "Procéd.," II, 436.

⁶ With regard to pledges that eat ("essende Pfänder"), it was natural to allow the pledgee to make use of them because he had to bear the expenses of keeping them. As to their accidental injury, *cf. Heusler*, II, 204; *Huber*, IV, 822, n. 21. *Cf.* "Wis.," 5, 6, 4.

⁷ If the pledge perished through some mischance the debtor did not claim its restitution and the creditor suffered the loss, — a rule which has been preserved even to our time in Schwyz: *Huber*, 817 (example in the fifteenth century), 822, n. 21. — "L. Lang. Car.," 108; *J. d'Ibelin*, 56; "Sachsensp.," 3,

§ 419. **The Same.** — (B) *The Pledge passes to the Condition of an Accessory Security.* For a long time after the idea of the obligation formed by consent came into existence a pledge was still demanded from the debtor, but the giving of the latter did not have the effect of freeing the debtor; he did not cease to be held personally liable.¹ Also, the creditor had only two essential rights, — that of holding the pledge so long as he was not paid, and that of having it sold if he was not paid, to realize the amount which was due him out of the price of the sale.² He was not allowed to make any use of the pledge. His responsibility was limited, and in case of total loss by accident of the object which was pledged the creditor could still demand of the debtor the performance of his promise. Thus a return was made to the Roman rules. The forfeiture clause was forbidden, as it had been by a law of Constantine.³ The Ordinances introduced a few rules relating to form,⁴ but the actual giving of the possession of the object which was pledged was always required, owing to the reasons which have already been pointed out.⁵ The rule thus being that the pledgee could keep the object with which he had been provided until he had been paid, he was recognized as having a lien upon the price of this object if he gave up its possession only in order to have it sold.⁶ Sometimes even the existence of an implied pledge is admitted, and, consequently, of a preference for

5, 4. — The responsibility of the pledgee existed in another sense: he was responsible for the damage caused by the object given as a pledge. (Cf., however, "L. Alam.," 86, 2; "Fris. add.," 8, 1; *Heusler*, II, 203. Distinction between the pledge given by agreement and the pledge taken by distraint. — "Sachsensp.," 3, 5, 4 and 5; *Boutaric*, I, 26; "A. C., Anjou," II, 412.

¹ Agreements by which the debtor promises to pay even if the pledge is not restored to him because it has perished through some accident. Example in *Heusler*.

² The Germans contrasted the "Verkaufspfand," pledge with the right of selling it, with the "Verfallspfand," pledge which becomes the property of the creditor if he is not paid when the debt matures: "Liut.," 108, 109; "Arip. et Alb.," 2, 21; *Beaumanoir*, 68, 10; "Montpellier," 49; "Jostice," p. 313.

³ Contrary to the tendencies of the old law: Civil Code, 2078; *Pertile*, IV, 541; *Pothier*, "Nantiss.," no. 19; "C. J.," 8, 35, 3.

⁴ Ordinance of 1673, 6, 8, 9: drawing up of a notarial deed naming the sum lent and the pledges delivered in order to avoid frauds and to fix the date of the pledge-giving in case of a failure. Cf. *Jousse* on this text (the notarial act is useless "inter partes"): Civil Code, 2074; "Co.," 446. — As to the pledge of claims, cf. Order of the Court of Aides of March 18, 1769 (transfer under the name of pledge-giving): *Tambour*, II, 162, 394; *Pothier*, "Hypoth.," no. 211.

⁵ Putting in pledge of the movables of another; the pledgee creditor is preferred to the owner, excepting in case of loss or theft: *Huber*, 822.

⁶ The "Ord." of 1667 compelled the pledgee to have the sale carried out by means of a bailiff, just as in the case of movables that had been distrained upon; but these formalities could be dispensed with in the contract of pledge-giving: *Pothier*, "Nantissement," no. 19 *et seq.*; "Hypoth.," no. 216.

the benefit of certain of the creditors.¹ But the mortgaging of movables retained by the debtor was never accepted in the French law:² "Movables cannot be followed by way of a hypothec" (Loysel, 487).

§ 420. **Private Distrain** ("Pigneratio")³ upon **Movables**.⁴ — This means of taking justice into one's own hands is naturally applied to obligations arising "ex delicto," in the case of which the giving of a pledge by means of an agreement cannot be conceived of.⁵ It was also allowable to practise this form of distraint for obligations which arose from the formal contract or "wadiatio," either as against the surety or as against the debtor.⁶ Sometimes the "pigneratio" even affected the relatives, or it was carried out under the form of reprisals against the neighbors, or inhabitants of the same locality, or the citizens of the same town.⁷ Originally, the creditor was authorized to take possession of the movables of the debtor without the permission of the judge,⁸ whatever their value might be.⁹ But the older documents show that distraint is subject to certain forms, such as a triple pre-

¹ Cf. existing law: *Valette*, "Privil. et Hyp.," 1846; *Planiol*, "Dr. Civ.," II, 763.

² In Switzerland a sort of mortgage on movables; for example, at Zurich in the fourteenth century, by making a declaration before the municipal council without any putting in possession. Cf. *Stobbe*, II, 686 (example of the giving of a pledge without any physical handing over, especially at Lübeck, at a fairly recent period).

³ Cf. "pignoris capio" of the Roman law. Besides the word "pignoratium," "pigneratio," they also say "captio," "districtio" (distress in English law), etc.: see *Du Cange*. The "Ord." of 1260 (I, 293) prohibits abandonment, "quidam captio," at Compiègne. Cf. the expression: "To take one's pledge by abandonment"; *P. de Fontaines*, 15, 29, p. 129; *Beaumanoir*, 43, 13. — To the French "saisie" (distrain) corresponds the German "Pfändung": *Collinet*, p. 94; "Toulouse," 108, 137.

⁴ Barbarian laws: "Burg.," 19; "Bai.," 12; "Roth.," 249 *et seq.*; "Liut.," 108 *et seq.*; "Wis.," 5, 6. Irish law, *D'Arbois de Jubainville*, *op. cit.*

⁵ "Sachsensp.," 2, 27, 4; 2, 28, 2; "Schwabensp.," 231 (280).

⁶ Which is readily understood if the "wadium" began by being a real pledge; the creditor who is satisfied with a nominal pledge has a right to distraint upon a real pledge if he is not paid when the debt matures: "Roth.," 235; "Liut.," 15. The jurisconsults of Pavia were unsettled as to whether "pigneratio" was applied outside of the "wadiatio": "Glos. Roth.," 235; "Expos. Liut.," 8, 6; 107; "Burg.," 19, 5 (giving of surety). *Heusler*, II, 241: distraint by an individual arose from the executory character of the "wadiatio"; *Pertile*, IV, 530 (texts).

⁷ "Roth.," 247; "Capitul.," II, 142 (c. 12); *Schmid*, "Ges. d. Angels.," p. 642; *Brunner*, II, 448. Right of marque or reprisals: "B. Ch.," II, 529; IV, 294, 612; *Pasquier*, "Inst.," 176. See "Suretyship," "Hostage." Reprisals persisted in the "jus gentium" just because of the difficulty in having obligations carried out.

⁸ Lombards ("Reg. Farfa.," 2, 44, 45), Sweden (*Amira*, "O. R.," I, 234), Saxony.

⁹ "Liut.," 108 (three times the amount of the debt).

liminary summons, the presence of witnesses, and perhaps the pronouncing of certain customary formulæ.¹ If the customary formalities are lacking, the distraint is irregular; it obliges the payment of a composition by the creditor, without taking into account the right which was given to the debtor of offering resistance.² After the Frankish period it is only authorized if carried out with the permission of the judge, according to the majority of the laws, a measure which lessens the abuses to which it gave rise.³

The pledge which had been distrained was treated, as a general rule, in the same way as a pledge given by agreement.⁴ Also, we believe that during the primitive period the creditor acquired at one and the same time both the possession and the ownership of the object distrained upon, saving the power of the debtor to redeem his goods. This appropriation is quite natural under an economic system where the payment of debts is readily accepted in movable objects. But the barbarian laws postponed it until the expiration of a fixed period in which to release the object which had been distrained; until this time the creditor has only the right of retaining, or, at the most, the right of enjoyment.⁵ The feudal Customs give him the right to sell, sometimes allowing him to carry out the sale himself; but more often the sale is carried out under the public authorities.⁶ After the barbarian period the abuses of methods of violence,

¹ "Sal.," 50, 2; 74; "Burg.," 19, 5; 107, 7; "Roth.," 249 *et seq.*; "Cnut," II, 19. Cf. *Brunner*, II, 447; *Collinet*, p. 113.

² "Burg.," "Bai.," *loc. cit.*; "Sal.," 75; "Roth.," 246; "Liut.," 41; "Ina.," 9. — "Rescousse" in the feudal period: *Esmein*, p. 122; *Collinet*, p. 125.

³ "Sal.," 50, 2; "Burg.," 19; 96; 107, 7; "Bai.," 13, 1, 3; cf. "Wis.," 5, 6, 1; *Brunner*, II, 447 (other laws); Cap. of 787, c. 14 (I, 200): prohibition "tollere" or "invadere" the property of another "sine iudicium"; cf. I, 192, c. 6; 330, c. 5; "Ina.," 9; "Cnut," 2, 19; "L. Henrici I.," 51, 3; "Const. pacis" of Frederick II, 1235, c. 10; *Pertile*, IV, 531. Cf. in the Anglo-Norman sources "liberatio namnorum, vetitum namii": necessity of restoring the pledges upon receiving surety ("replegiare," replevin): *Bracton*, 157 *et seq.*; "Summa Norm.," 7. Provisional possession with pledges: *Péronne*, 18. As to provisional possession see *Beaumanoir*, c. 53. Irish law, solvency of the person making the distraint.

⁴ Cf., however, the responsibility of the pledgee: "Fris. add.," 9, 2.

⁵ "Verfallspfand." On the responsibility of the pledgee: "Roth.," 252. According to "Liut.," *loc. cit.*, the creditor can retain the property twelve days, can have the enjoyment of it twenty or sixty days, and then the ownership: *Fr. Gaudenzi*, 12; Exp. on "Roth.," 247. — Reaction against the forfeiture clause: "Wis.," 5, 6, 3; "Capit.," VII, 299, 313; Dig. X, 3, 21, 7. — In the French Customs sale of the pledge and payment of the creditor out of the price: *Esmein*, p. 118 *et seq.*; *Collinet*, p. 124. English law: appraisement and conferring of the property upon the creditor: *Glasson*, "Inst. Angl.," III, 328. — Cf. Irish law.

⁶ "Verkaufspfand": *J. d'Ibelin*, 122; *Ph. de Navarre*, 78; "C. des Bourg.," 71, 76; *Beaumanoir*, 43, 16; *Pertile*, IV, 543; "A. C., Picardie," p. 41.

such as the "pigneratio," resulted in its being forbidden,¹ but customs are stronger than laws; it persisted and survived the proscription and was revived to a certain extent in feudal times under the rule of the "Faustrecht,"² and did not completely disappear until the monarchic period, as an accompaniment of the progress of public power.³ At any rate, before having arrived at this solution, the old institution had been altered and corrected on many points, and it had become an exception or a privilege, the maintaining of which was justified because of the status of the creditor (king, nobles),⁴ that of the debtor (alien) or, finally, owing to the nature of the debt (suretyship).⁵ We may note the principal changes to which it has been subjected, — prohibition of seizing as a pledge "alium pro alio,"⁶ of distraint on certain objects, such as those which are indispensable to the living of the debtor (clothing), and horses and cattle,⁷ of distraining in certain localities,⁸ and the tendency to prevent the creditor's acquiring

¹ "Wis.," 5, 6, 1; "Ed. Théod.," 123; "Capit. Sax.," 25; 787, c. 14 (I, 200); cf. *ibid.*, 782, 6 and 825, 5 (I, 192, 330). There are even many who think that the Salic Law no longer admitted of distraint by an individual: *Pertile*, IV, 531.

² *Collinet*, *op. cit.*; *Brunner*, II, 241. — *J. d'Ibelin*, 118–122; "C. des Bourg.," 71–83; "Summa Norm.," 59, 60, 89; "Jostice," pp. 174, 274, 313; *Beaumanoir*, 30, 81; "Olim," Table, see "Captio Bonorum," etc.; "Bergerac" (in 1337), 29; "Siete Part.," 5, 13, 11.

³ *Loysel*, 890: "Acts of violence are forbidden"; *P. de Fontaines*, XV, 29: privilege of nobles; *J. Le Cog*, "Q.," 223: "A nobleman himself cannot distrain where he has not jurisdiction"; *Viollet*, "Et. de St. Louis," I, 97, 329. The Books of Customs ("Artois," 30, 10; "Et. de St. Louis," I, 138) and municipal charters ("Soissons," 1; "Amiens," 4; "Verviens," 24, etc.; *Collinet*, p. 102) often forbade it. — Suspension of the carrying out of the distraint for a certain time: *Collinet*, p. 128.

⁴ Cf. **Writs of Arrest** formerly granted by the farmers and collectors of the king's taxes (see *Ferrière*), and still to-day by financial administrations (Revolutionary laws): *Haurion*, "Dr. Administr.," 3d ed., see Table.

⁵ Distraint upon the pledge: "Ord.," I, 9. On *Beaumanoir*, 43, 15, cf. *Viollet*, "Et. de St. Louis," I, 329, 187; "Jostice," 303, 313; "Et. de St. Louis," I, 122; "Gr. Cout. Norm.," 60; *Boutaric*, I, 101; "Ass. de Jérus.," "C. des Bourg.," 83; *Esmein*, p. 109 *et seq.*; *Collinet*, p. 153. Cf. as to this, "Suretyship." The "contre-brevet" of warranty allows the surety to dispense with using the individual distraint. In Switzerland individual distraint is only possible in the case of a "redliche," "kuntliche schuld" (a debt acknowledged at law); *Heusler*, II, 208; *Huber*, IV, 826. — "T. A. C., Bret.," 329; "Avignon," 23, 42.

⁶ "Roth.," 247; "Burg.," 19, 3; "Pactus Alam.," 3, 7; *Cassiod.*, "Var.," IV, 10. — "Soissons," 11; *Collinet*, p. 107; *A. Thierry*, "Mon. de l'Hist. du Tiers Etat," IV, 40. A subject is also arrested for the debt of his lord: *Tambour*, II, 48; "Troyes" (in 1230), Art. 23; "Fors de Bigorre," 9.

⁷ "Cod. Théod.," 2, 30, 1 (cattle, farm slaves: interests of agriculture and the treasurer); "Burg. add.," 1, 18; "Pactus Alam.," 5, 4; "L. Alam.," 67, 1; "Bai.," 13, 4, 5; "Roth.," 250 *et seq.*; "Capit.," I, 320; II, 134. — Customs of the South; for example, "Avignon," 41. — *Beaumanoir*, 54, 7. — "Ord." of 1319, 19; *Tambour*, II, 125; *Pertile*, IV, 538.

⁸ *Collinet*, p. 118.

ownership of the pledge without any other form of proceeding.¹ This institution often passes to the status of the privilege which has been agreed upon and stipulated for by the creditor,² but it is allowed without any agreement against strangers and aliens (towns where attachment was allowed).³ Where it persisted longest, outside of the case of distraint against aliens, was in the three following applications, which are especially remarkable because they do not assume a contract or judgment:⁴ 1st. **Distraint-pledge** levied by the lessor of a copyhold, or the lessor for a rent-charge, on the movables of the copyholder or lessee for non-payment of the rent.⁵ 2d. **Right of the innkeeper** to distraint upon the movables of the traveler who does not pay his

¹ *B. de Richeb.*, IV, 1067; II, 1009.

² A clause which is already frequent in Lombard deeds (*Pertile*, IV, 531; "Liut.," 109) and which is made use of until the eighteenth century in Switzerland and in Germany. — *Huber*, IV, 825. How are we to reconcile the existence of these clauses with the prohibition against individual distraint? *Heusler*, II, 208.

³ The **Privilege of Arrest** given to the inhabitants of Paris first of all over their fellow townsmen themselves, and later only over their alien debtors: "Louis le Gros," 1134 ("Ord.," I, 6; "Confirm.," II, 437; IX, 464); "Paris, A. C.," 192; "N. C.," 173; *Desmares*, 233; "Cout. Not.," 49; "Gr. Cout.," 219; *Collinet*, pp. 100, 135, 141; *Ferrière*, *Merlin*, see "Ville d'Arrêt"; "Avignon," 42, 44; "Montpellier," 32; "Arles," 165; "Martel," 18, 19. As to the distraint on aliens in the existing law: *Code Civ. Proc.*, 822; *Glasson*, "Procéd.," II, 433; *Heusler*, II, 208; *Tambour*, II, 51. — *Huvelin*, "Thèse" ("Exécution des Contrats en Foire"). — In the fourteenth century the distraint had to be carried out by the sergeant, and the privilege of the citizens was reduced to being able to have this distraint carried out without any written authority: "Ord." of 1351; "Const. Chât.," 9. — Abolition, Law of Sept. 7, 1790, art. 13.

⁴ "Cout. de Paris," tit. 8.

⁵ The lessor of a house had originally the right to distraint upon the movables which happened to be in the house let, to take them away and sell them for his own benefit: "Olim," III, p. 916, no. 77; p. 998, no. 60; p. 1007, no. 65 (in 1314-15); *Beaumanoir*, 34, 16; 38; 9 (but at the same time he states that the custom was "to take off the door of the house," that is to say, to render it untenable, in order to compel the lessee to pay what he owed or else to go away, 30, 39); *Boutaric*, I, 102; "Jostice," 9, 4, 1; 9, 9, 1; *P. de Fontaines*, p. 119; "Cout. des Bourg.," 96. — Afterwards the right of the lessor became weaker under the name of execution by way of security ("saisie-gagerie"); he only had a privileged distraint over movables without being able to take them away and also being compelled to have them sold by the authority of the law. Movables which had been taken out of the house could not be reclaimed; but the "N. C. de Paris," 171, allows of their being reclaimed under certain conditions (Order of 1367; *Lucius*, "Placit.," 10, 3, 1); "Cout. Not.," 3, 31, 39; "Gr. Cout.," 2, 15, 37; 3, 61 (pp. 126, 217 *et seq.*, 248, 429, etc.); "Roisin," p. 71; *Loysel*, 476, 890; *Buche*, "N. R. H.," 1884, 76; *Collinet*, p. 166. The person who takes them is obliged to leave the house sufficiently furnished. In Paris execution by way of security is only granted to the amount of three-fourths of the debt. Cf. *Glasson*, "Procéd. Civ.," II, 427. — *Huber*, IV, 824; *Pertile*, IV, 533, 538; *Pollock and Mailland*, II, 573. — Several of the Customs also allowed the lessor of a farm to distraint upon the products: "Paris," 161 *et seq.* — Also, "Const. Chât.," 62, 63; "L. d. Droiz," 913; *Tambour*, II, 365.

charges.¹ 3d. **Distraint on the domestic animal damage-feasant**; formerly they even had the right to kill it, or to appropriate it; the later law allows the one who has suffered the damage to distraint only; and moreover, certain animals are not subject to this distraint. The one distraining must take the animals distrained before the judge within twenty-four hours; they are sold if necessary, and the price obtained for them is used to make good the damage.² Sometimes the distraint is only carried out upon the hat of the shepherd.³

§ 421. **Pledge by Legal Process.** — (A) *Barbarian Laws.*⁴ Distraining at law⁵ is only a rounding out of private distraint;⁶ the intervention of the authorities avoids quarrels between individuals and prevents the creditor from abusing his rights, the debtor from offering opposition to the seizure. Already the barbarian laws had regulated it; thus the Salic Law, 50, 3,⁷ lays it down that the

¹ Retention and lien in the latest stage of the law, whereas formerly he sold the pledges distrained upon and paid himself back: "Paris," 175; cf. *Desmares*, 176, 191, 368. "Cout. Not.," 50; *Collinet*, p. 175. See also: "Jostice," 9, 9, 1; Art. 54; "Navarre," 3, 13; *Huber*, IV, 827.

² In the very old law vengeance is taken on the animals in the same way as upon persons: from this arose the right to kill them (formerly, "Sal.," 9, 1; "Wis.," 8, 3, 15; even at the present time, "Ina," 42; "Roth.," 350 *et seq.*; "Liut.," 151; "Burg.," 23, 89; "add.," 1, 2; "Bai.," 14, 7; in case of a recurrence, Norway). Of this there remained the permission for the owner of the land to kill hens and geese or poultry generally: *Grimm*, "R. A.," 595; *Guy Coquille*, on "Niv.," 15, 4; *Chaisemartin*, 225. But it was forbidden to kill cattle and horses. In the law of the second period animals taken damage-feasant are confined "in clausuram, in parcum" (German "schutten": cf. to impound); they are fed and kept there until their owner has paid the damage, and he is given notice by making known the distraint to the neighbors or to himself, if he is known. In case he does not come forward the animal belongs to the person who made the distraint: "Sal.," 9; "Rib.," 85; "Bai.," 14, 17; "Burg.," 23, 49; "Wis.," 8, 3, 13; "Roth.," 343 *et seq.*; "Liut.," 86. — Many of the Customs admit that "the stallion as well as the bull is free," because of their usefulness as animals capable of reproducing their kind; the owner upon whose land they trespass only has a right to drive them off: *Chaisemartin*, p. 228; "Fors de Bigorre," 11. — In the latest state of the law "he who finds animals doing damage cannot keep them; he must hand them over to the law within twenty-four hours"; they are sold at judicial sale, just as an ordinary pledge, and the price obtained serves to make good the damage: *Huber*, IV, 828.

³ *Ragueau*, see "Desgagement."

⁴ Cf. especially *Brunner*, II, 452 (bibl.).

⁵ "Strudis legitima," "Rib.," 32; Edict of Chilperic, 8 ("extrudere") applied in the case of "fides facta" and of refusal to carry out a judgment, at least at the end of the sixteenth century: "Sal.," 106 (*Hessels*); Edict of Chilperic, 7. Cf. administrative distraint for the payment of a fine for breaking the king's ban, and for taxes: "Capit.," I, 165, c. 6; *Greg. Tours*, 5, 26; 10, 7.

⁶ "Roth.," 251; *Fr. Gaudenzi*, 12, 13. Cf. "Friedlosigkeit": among the Scandinavians and the Anglo-Saxons the chief men of the judicial assembly distrained upon the movables of the man who refused to appear before them.

⁷ On this text see the bibl. in *Geffcken*, p. 197. — Irish law, "N. R. H.," 1888,

creditor, by virtue of the "fides facta," himself goes to the "grafio" of the place where the debtor lives, takes hold of the "festuca" and pronounces a formula which asserts that the debtor who has been regularly summoned has not carried out the promise which he made which affected such and such an object, and that therefore his possessions could be seized by the "grafio," for which the creditor would be responsible.¹ Upon which, the "grafio" took seven fit and proper "rachimbours" ² with him and went to the house of the debtor, where, after a last summons to pay, he took possession of the goods of the debtor to the extent of the sum which was due; the estimate was made by the "rachimbours"; the creditor kept two-thirds and the "grafio" took the other third by way of "fredus." If the "grafio" distrained on more than the law allowed, he had to pay the "wergeld" or else lose his life.³ The debtor among the Salian Franks had no right to offer any opposition to the distraint under the pretext that it was irregular; his only resource was to apply to the tribunal of the king. On the other hand, among the Ripuarians he might stop the man distraining by planting his sword before his door.⁴ The creditor became the owner of the movables which were distrained; otherwise, the law would not have failed to name a certain time of delay for their redeeming; but among the Visigoths and the Lombards he only had the enjoyment of them.

§ 422. **The Same.** — (B) *Customary Law*.⁵ The Customs and the Ordinances regulated distraint at law ⁶ in such a way that it

303; Law of Drenthe, 1608; *Seerp Gratama*, "Rechtsgesch. van Drenthe," 1883.

¹ "Tu, grafio, homo ille mihi fidem fecit quem legitime habeo jactivo" (according to *Brunner*, II, 368, the debtor who did not carry out his promise became "jektivus" by the throwing of the "festuca" on behalf of the creditor; bibl. in *Geffcken*, p. 198) "aut admallatum in hoc quod lex Salica continet" (the creditor has designated him in accordance with the Salic Law); "ego super me et fortuna mea pono" (movables only, cf. "Sal.," 45, 46; *Geffcken*, pp. 175, 180) "quod securus mitte in fortuna sua manum. Et dicat de qua causa" (thing? transaction?) "aut quantum ei fidem fecerat." Thus as a guarantee of the regularity of the execution he gives his person and his possessions. But it is difficult to classify this act: it is neither putting in pledge nor merely making a formal contract. At any rate, the effect of it was to allow the "grafio" to distrain upon his person and his possessions.

² As to the meaning of the word "idoneos" cf. *Geffcken*, p. 199.

³ "Sal.," 51, and with regard to it *Geffcken*, p. 201.

⁴ "Sal.," 51; "Rib.," 32.

⁵ *Tambour*, "Voies d'Exécution," II, 119, 226; *Collinet*, p. 115.

⁶ It is ordinarily termed distraint and execution: see *Ferrière*. — **Distrain-Writ:** *Boutaric*, I, 102. By means of a writ (garnishment) based on a permission granted by the judge or on a protected claim, the creditor prevents his debtor who is himself a creditor to a third party from having himself paid by this third party to the detriment of the first creditor's rights. The Code of

offered more protection for the creditor and the debtor at one and the same time.¹ It took place by virtue of a contractual right.² Following a command to bring suit against the debtor,³ a sergeant⁴ (sometimes, even, in the fourteenth century, the bailiff, like the "grafio" of the Salic Law) takes away the movables of the debtor⁵ in order to give them to the creditor or intrust them to the custody of a neighbor;⁶ if they were objects which could not be moved, the bailiff who was carrying out the distraint (or several of the bailiff's men) acted as a custodian⁷ so as to avoid misappropriation, without removing the objects which had been distrained. The Ordinances of 1667, t. 33, made this rule general and applied it to every form of movable.⁸ Opposition offered by the man against whom the distraint was carried out⁹ could only be heard upon condition of his paying a sufficient fee to have justice rendered him;¹⁰ even this did not prevent the distraint; it only had the effect of postponing the seizure and of not allowing

Procedure has combined these two methods into one called distraint-writ ("saisie-arrêt"), taking as the basis of its regulation the practice of the "Châtelet": *Ferrière*, see "Arrêt"; *Glasson*, "Procéd. civ.," II, 187 (exceptions from the time of the old law in the case of pensions, salary, legacies for support, etc.). — Offices, *cf. Ferrière*, see "Opposition au Sceau."

¹ *Beaumanoir*, 51, 6. *Cf.* sequestration, *ibid.*, 51, 8 *et seq.*, 51, 21. At Metz "estault" or distraint by one of the mayors assisted by an alderman: *Prost*, "Ord. des Maiours," § 32; *Loysel*, 890 *et seq.*; "Conf. des Ord. de Guénois" and "Conf. des Cout."; *Ferrière*, on "Paris"; *Pothier*, "Procéd.," 437; *Fleury*, II, 169, 309.

² *Post*, "Distraint of Immovables."

³ Fine for the man who does not pay upon demand at maturity: *Beaumanoir*, 30, 49; "Talion," *ibid.*, 50. The fine is avoided by offering sufficient pledges.

⁴ *Dangers*, "R. hist.," VI, 304.

⁵ Movables which are excepted for reasons of general interest or with a humanitarian motive: (a) horses, cattle, carts and agricultural implements; (b) 1 cow, 3 sheep or 2 goats, to help the debtor earn his living; (c) 1 bed and the coat he is wearing. — *Beaumanoir*, 54, 7; *Langlois*, "Textes rel. à Parl.," p. 152; "Fragm. d'un Répert. de Jurispr. Paris. au XV^e s.," no. 23 (edited by *Fagniez*). *Cf.* Civil Code, 592, 593; *Glasson*, VIII, 671; "Procéd. civ.," II, 153; *Tambour*, II, 236.

⁶ *Grenade*, 30 ("Ord.," IV, 18); "T. A. C., Bourg.," 212 (*Giraud*, II, 305); "T. A. C., Bret.," 302; "Châtillon," 1371, art. 71; "Orléans," 452; "Nivernais," 35, 14.

⁷ As to these custodians or "nans manjans," *cf. Beaumanoir*, 54, 9 *et seq.*

⁸ "Ord." of 1667, Title 33. The creditors could only have the seals put on; that is to say, a seal bearing the arms of the king, if the debtor was absent, had failed, or was imprisoned for debts.

⁹ Fine in case resistance was offered: *Beaumanoir*, 30, 54; 52, 6. If the "saisie" keeps his doors and his chests closed, the "keys of the king" must be made; that is to say, that the sergeant can and should break open anything which is closed: *ibid.*, 54, 8. As to provisional possession, *cf. Beaumanoir*, c. 52. As to claims, *ibid.*, c. 55.

¹⁰ *P. de Fontaines*, "App.," 10, 8. With regard to claims of the king the debtor cannot stop the execution, even by lining the hand of justice. "Ord." 7, 93, 371.

sale until after judgment had been rendered upon the ground of his objection.¹ The pledge distrained was sold² after a delay which varied according to the Customs, and which the Ordinances of 1667, 33, 12, fixed uniformly at eight days from the time when notice of the distraint was given to the debtor.³ The sale took place publicly, in the open market, ordinarily, and following announcements or publication.⁴ The price was distributed at so much in the pound among the creditors; they received a **distribution by shares**,⁵ but this was not done excepting in cases of notorious insolvency, because in cases of that sort the creditors acted collectively against the insolvent; whereas in the case of an ordinary debtor, practice recognized — at least, from the thirteenth century — the **preference of the first one to distraint**, a preference which is to be accounted for by the fact of the creditor physically seizing the object which was distrained and the old system of the possession of movables.⁶ The other preferences

¹ Other incidents: 1st. Demand for a **Separation** by third parties who say they are owners, — at least in a case where the reclaiming of the movables was possible: *Beaumanoir*, 54, 3; "Fors de Béarn," 134; "Orléans," 456; "Bourbon," 128; "Bretagne," 233; *Pothier*, no. 473. — 2d. Opposition on behalf of other creditors and **subrogation** in the prosecution. Once the distraint had taken place, the creditors of the person against whom it had operated could not carry it out a second time upon the same object; originally it was handed over to the person making the distraint, which prevented another distraint from being made, and afterwards the rule was kept up with the object of preventing useless expense. **Distraint upon distraint is invalid**. But the creditors had a right to offer opposition, that is to say, to have themselves joined with the person making the distraint, and to ask to be paid with him; by this means they could be brought in to the sale; the person making the distraint could not withdraw it to their detriment; were he negligent, the others had themselves subrogated to him by means of a judgment (to-day, subrogation of absolute right following a summons which has not been answered, which is more simple). The "Ord." of 1667 prescribed that the sale should be postponed until a final settlement of the rights of those persons offering opposition should have been made, — a thing which meant delays, increased expenses of the custodianship, and diminished the value of the pledge: *Tambour*, II, 243.

² *Fleury*, "Inst.," II, 189. — On the abandoned system of the acquiring of the pledge by the creditor, *cf.* still in the sixteenth century *Labourt*, 14, 1, 2, 6; previous to that "Arles," 1162-1202; "Provence," 1366; "Falaise," 20, etc. Conferring of the pledge upon the creditor based upon the appraisement of worthy people. *Post*, "Distraint upon Immovables"; *Pothier*, "Nant.," 19.

³ *Beaumanoir*, 30, 51: 40 days (nobles); 7 days (commoners). Immediate sale in some places, excepting that delivery was delayed: "Ord." of 1411; "T. A. C., Bret.," 322.

⁴ *Beaumanoir*, 30, 53 (sale by the creditor after having summoned the debtor); "Châtillon," 71, etc.; Declaration of Jan. 14, 1689 (silver vessels). — Auctioneers: Law of 27 Vent., year XI, 1; Law of July 21, 1790, 6; Sept. 17, 1793.

⁵ *Beaumanoir*, 34, 51; 54, 6; "Gr. Cout.," p. 233; *Boularic*, I, 46; *Tambour*, II, 154, 248.

⁶ *Beaumanoir*, 34, 52; "Gr. Cout.," 2, 17; "Paris, N. C.," 178; *Guy Coquille*,

connected with movables, which were made use of in cases of insolvency as well as in the case of an ordinary action, arose, as they do to-day: 1st, from the idea of an expressed or implied pledge of record; 2d, or else from special reasons ranking certain claims before others, but never causing them to be preferred to the lien of a record-mortgage (costs at law, funeral expenses, salaries, the treasurer).¹

§ 423. **Execution upon Immovables.**² **Origin of Distrainment upon Immovables.**³ — Distrainment of immovables was unknown in the old law.⁴ It was introduced into legislation in two ways: 1st. The harshness of execution carried out upon the person was such that the debtor did not hesitate at any means of escaping it; he was seen to set aside for his creditors the enjoyment of his land, and even its ownership.⁵ What he did by means of a private agreement and voluntarily could not fail to be imposed upon him by law. 2d. Procedure upon a default under the Carolingians had as its consequence the "missio in bannum," or confiscation of the possessions of the debtor;⁶ some outward symbol, such as a little straw or a glove, served to make the matter public;⁷ the debtor had a year and a day in which to obtain its removal upon condition of appearing in court; when the year and a day had elapsed the confiscation became absolute, the possessions became

"Inst.," 444. — In case of insolvency all the creditors were paid at so much in the pound: "Cout. Not.," 76, 153; "Gr. Cout.," 2, 27; *Loysele*, 185, 687; *Garraud*, "Déconfiture," 187.

¹ *Loysele*, 363, 683, 688, 897; *Pothier*, "Procéd.," 481; *Glasson*, VI, 606; VII, 673; *Daresté*, "Études," p. 90 (privileges). — Cf. *Planiol*, "Dr. Civil.," II, 754, 774.

² *Esméin*, p. 156; *Brunner*, § 112 *et seq.*; *Glasson*, III, 390; *Amira*, "Vollstreckungsverf.," "O. R.," I, 65; II, 89; *Schroeder*, 287, 396 (bibl.); *Pertile*, § 242.

³ At Rome the same means of execution with regard to all possessions.

⁴ "Sal.," 50, 58; "Edict of Chilperic," 7; *Marculte*, "App.," 51; "Bai.," 2, 1; 7, 4. — *Contra*: *Thonissen*, "Org. Jud. de la L. Sal.," 3, 2, 4 (the Salic Law represses attacks on the ownership of land and admits of their confiscation); *Nani*, "Stud.," II, 112 (extrajudicial distrainment of immovables among the Lombards).

⁵ *Rozière*, "Form.," 277, 374; *Muratori*, "Ant. it.," II, 237; "Ord." of 1234, 2.

⁶ As to the placing outside of the law, from whence is derived the "missio in bannum," cf. § 360, *supra*. The word banishment ("banniment") still signified distrainment in Languedoc in the eighteenth century: "Max. du Dr. Fr.," 1749, 72.

⁷ *Grimm*, "R. A.," 195, 941: "Wifa"; *Lattes*, "Parole e Simboli" ("wifa," standing crops); "Rendic. Inst. Lomb.," 1900. Distrainment upon standing crops is a reproduction of the old custom. "Wifatio" practised by the owner to forbid third parties from going upon his land (for example, even today one puts a little straw at the end of a stick stuck into the ground in order to notify the shepherds that they must not bring their flocks to pasture in a certain field) *Pertile*, *loc. cit.*: cross; *Brunner*, II, 459.

the property of the king; but the treasurer could not keep them without doing an injustice to the creditors who had been deprived of them; ordinarily, as a special favor, he gave up to them a portion of these possessions.¹ At the end of the Frankish period if the distraint upon immovables did not, properly speaking, exist, at the same time they had an indirect proceeding which had similar results:² restricted at first to cases of default, in the end it was applied in more and more numerous cases, and feudal practice made it general; confiscation, after having been an essential part, disappeared and left in its place only the distraint for the benefit of creditors alone. In spite of these modifications, the very old Customary law still sprang from the principle that immovables could not be distrained;³ and for a long time recourse was had to

¹ Capitulary of 782, 27 (I, 70): a debtor cannot furnish any surety; his possessions will be placed "in bannum" until he can find a "fidejussor." "Cap. miss." 802 (I, 97), 32, 36 *et seq.*: "missio in bannum" of those who owe certain compositions; Capitulary of 803, 6 (I, 118). Regulation by Louis the Debonair. Capitulary of 816, 5; 818-19, 11 (I, 268, 283). Cf. "Cap.," II, 75, c. 3; 273, 7; 307, 3; "Ed. Pist.," 864, c. 6 ("missio in bannum judicio scabinorum"), etc. Table, see "Bannus." — In 803 the king is consulted as to what shall be done with the goods which had been seized; later on, under Louis the Debonair he no longer proceeds to make a special decision in each case, but it becomes the rule that creditors shall be paid first of all, and after them the treasurer. Moreover, the property acquired by the treasurer only goes to the creditors by virtue of a "præceptum" of the king; *Brunner*, II, 74, 460.

² For cases where the "missio in bannum" applies, cf. *Brunner*, § 112. The provisions of the Capitularies are not general, and it is not possible to say, if one adheres to their texts, that the proceeding is a regular means of execution which can be made use of by every creditor. But the tendency to develop its application is manifest; practice had to round out legislation upon this point, — a thing which was all the more easy because the "missio in bannum" was pronounced by the count, whereas the placing outside of the law of which it is a modified form emanated from the king. Cf. *Esmein*, p. 157. In a procedure based upon a hearing of both parties the carrying out of the judgment was insured by sureties which the debtor had to provide; thus for a long time there was no need to be concerned with these cases.

³ Proofs. — 1st. Distraint upon immovables does not appear in certain texts of the feudal period, any more than it did in the barbarian laws. Thus at Metz until the middle of the fourteenth century "estault," which is the only procedure of execution recognized by the "Ord. des Maiours," only affects movables: "N. R. H.," II, 313; "F. de Béarn," p. 225. — 2d. Pledging of the immovables and distraint upon the income, especially in the case of fiefs: *Beaumanoir*, 17, 7; 35, 2; "Jostice," 12, 6, 38; "Ord." of 1218, 1234; 1314. "La Salle de Lille": sale of the right of user for a hundred years: *Boutaric*, I, 25. — 3d. Sometimes the consent of the debtor is still required for the sale of immovables. Privilege of the Duke of Burgundy at Rouvre in 1259 ("Ord.," IV, 389); "Hainaut," 74; "T. A. C. Bret.," 301; "Toulouse," 77; *Boutaric*, I, 69; *J. d'Ibelin*, 185 *et seq.*; *Beaumanoir*, 35, 2: the sovereign orders the debtor to sell his immovables within forty days, and it is only if he refuses to do so that the sovereign must proceed with the sale or leases the property to the creditor, having had it appraised by worthy people: *P. de Fontaines*, 21, 9; "Jostice," 3, 6, 2; *Boutaric*, I, 25. — 4th. Subsidiary character of distraint upon immovables; until the Edict of 1539, 74, preliminary seizure and sale of movables was

means which assumed this principle as being in force, — appropriation of revenues, binding immovables by an agreement, — which were indirect means of compulsion. Thus the “Etablissements de Saint Louis” lay it down that the debtor of the king shall not be imprisoned if he swears that he has no movables with which to pay, and if he sells his immovables within forty days.¹ There was another resource which was almost as forcible as physical compulsion: the law appointed **bailiff’s men** (“come-stores,” devourers) over the goods of the debtor, who lived at his expense.² These troublesome guests ruined the debtor without any advantage for the creditor. Often, even, the debtor had an understanding with the sergeant so that the occupation by the bailiff’s men was fictitious. By the thirteenth century Beaumanoir attacks this abuse,³ and in the fifteenth century the bailiff’s men have become the commissioners of land-distrain.⁴

§ 424. **Land Distrain and its Procedure.** — Distrain upon immovables having once been allowed, for the various local Customs⁵ there was substituted a regulation which was almost

absolutely necessary: *Beaumanoir*, 35, 2; 43, 18; 51, 9; “Gr. Cout.,” 2, 17, etc.; “Ord.,” I, 698; IX, 453, etc.; “Jostice,” 3, 6, 2; *Boutaric*, I, 5; II, 13; “A. C., Picardie” (*Marnier*), p. 90 *et seq.*; “Summa Norm.,” 6. — 5th. Formalities: for example, summons to the debtor to sell his immovables: “Châtillon,” 72, etc.; *Loyseau*, “Déguerp.,” 3, 7, 16. The debtor was entitled to take back his immovables within a certain time: *Boutaric*, I, 69. — Furthermore, several of these peculiarities are also to be accounted for because of the relative value of immovables (for example, the subsidiary character of real distrain): Dig., 42, 1, 15, 2; Dig. X, 6, 5, 5, 8. — The evolution is perhaps still more striking in the English law. Although the quality of not being distrainable is a consequence of the quality of being inalienable, immovables became alienable in England long before they could be distrained upon, — a thing which gave rise to frauds; in fact, according to the common law, the creditor had a right to distrain upon the body of the debtor, upon his movables, and upon the income of his immovables; if the latter were distrained upon, the debtor had a very simple means of taking away the benefit of them from the creditor; it was sufficient if he sold the land; the Statute of Westminster II, under Edward I, allowed not only the distrain of the income, but the land itself, up to the amount of half of the immovables of the debtor; the creditor held them until he was entirely paid (tenant by elegit): *Glasson*, “Inst. Anglet.,” III, 238.

¹ II, 22.

² See *Du Cange*, *Ragueau*; *Beaumanoir*, 53; 54, 9; 51, 5; *Glasson*, VI, 615.

³ *Op. cit.*; “Olim,” II, 241; *Tambour*, II, 148 (local privileges). Privileges granted by the kings in Languedoc; in Périgord: “quod non ponantur come-stores”: “Ord.,” I, 399, 694, etc. — Cf. “Dragonnades” (prosecution of Protestants in France).

⁴ See *Ferrière*, *Masuer*, *loc. cit.*

⁵ Analysis in *Tambour*, II, 131, 253; “Ass. de Jér.,” “C. des Bourg.,” 26, 27; “Châtillon,” 72 (in 1371); *Beaumanoir*, 34, 51; 35, 6, etc.; “Gr. Cout.,” 2, 17, 24, 33; 3, 25; *Boutaric*, I, 16, 69; “Ord.” of 1411; 1424; *Masuer*, 30. Customs according to which the immovable of the debtor is given to the creditor: *Tambour*, II, 143. — Fiefs (if there are no other possessions): *J. d’Ibelin*, 185 *et seq.*; *Ph. de Navarre*, 27; “T. A. C., Bret.,” 295 *et seq.*

uniform by virtue of the Ordinance of 1551, better known under the name of the "Edict of Public Announcements."¹ We may say that in a general way the carrying out of execution upon immovables was loaded down with formalities; "We have," said Loysel, "a great deal more affectation and ceremony than there was in the Roman law." This refers to the importance which holdings in immovables had assumed; but the expenses of dispossessing diminished the creditor's security, and its long delays discouraged him; through a wish to protect the debtor, his credit was entirely removed.

§ 425. **The Same.** — (A) *Documentary Right.* One cannot proceed with the distraint² excepting by virtue of some documentary right, that is to say, a judgment or a notarial deed.³ An executory force is naturally attached to judgments. As to the notarial deeds, it is said that they signify a **confession of judgment** ("paratam executionem"),⁴ thus differing from deeds under private seal;

¹ *Isambert*, Table, see "Saisie réelle" ("Ord." of 1539, etc.). The uniformity was entirely relative, because the Edict was not applied in many provinces (Flanders, Artois, Normandy, Lorraine, Bresse, Buguey, Franche-Comté, Dauphiné, Provence, Languedoc, Guyenne, Béarn and Navarre): *Tambour*, II, 281; *Glasson*, "Procéd.," II, 248. — Distraint upon rents and upon offices, Edicts of 1583, 1669, 1683; *Tambour*, II, 171, 318. Cf. *Basnage*, "Hypoth.," p. 87.

² Obviously, the right must be one which has matured. Delay of four months in the Roman law and in the canon law: Dig. X, 1, 29, 26; 2, 26, 15. Texts dealing with the Customs: *Tambour*, II, 113.

³ *Loysel*, 890: "One never gives up execution or distraint unless it is by virtue of a contract protected by warranty, a judgment, or a privileged cause of action (for example, a debt due the king), for acts of violence are prohibited." Cf. exceptional cases under the heads, distraint-writ, seizure, alien distraint, etc. *Beaumanoir*, 24, 13; "Const. Chât.," 8. — For quite a long time even the executory right is not sufficient, and the creditor has still to provide himself with **letters of claim**, the use of which is very limited during the monarchic period; these letters consisted of an order to the sergeant to enforce the rights of the creditor: *Tambour*, II, 95, 184; "Ord." of 1667, 27, 6. — Various judgments, cf. *Tambour*, II, 72, 172. — No defense is possible against this executory right unless the condition of "lining the hand of justice" be complied with (pledges, sureties): see *Ragueau*; *Loysel*, 892. — Time: *Loysel*, 894.

⁴ "Parée," from "parare" (primitive meaning). One must take care not to confuse the confession of judgment with the **clause called by way of avoidance**, by means of which the debtor authorizes the creditor to have the immovables that are the pledge for his debt sold at public auction before notaries upon default of payment at maturity. By this means the creditor may dispense with the formalities of distraint and forced dispossession, which is an advantage for him, because he thus avoids many expenses and delays, but which can be very prejudicial to the debtor, because he loses valuable guaranties (for example, publicity) of such a nature as would cause his property to be sold at a higher price. The Law of June 2, 1841, prohibited this in the case of immovables. Our old law allowed a friendly sale of the immovable distrainted upon (see *Ferrière*). A debtor could also appoint his creditor "procurator in rem suam" with power to sell his property (*Daresté*, p. 456). Although the forfeiture clause was prohibited, contrary to the spirit of our old legal ideas and

whereas the creditor with a deed under private seal can only obtain execution after having obtained a judgment of conviction, the creditor under a notarial deed has the right to act directly against the debtor through a distraint. This likening of the notarial deed to the judgment was devised by the practitioners; resorting to the Roman rule "*confessus in jure pro judicato habetur*," their method was to compel the parties to appear before the judge at the time when the debt was contracted; the debtor acknowledged his debt, and this admission made in the presence of the judge and established in writing had the same force as a judgment; in this way the creditor found that he could avoid incurring the risk of an action and did not have to fear the chicanery and bad faith of the debtor. This custom appears first in the writings of the Glossators and in the Italian practice ("*instrumenta guarentigiata*");¹ after this it spread throughout Western Europe. In France the acknowledgment was made before the judge, who delivered a sealed charter setting forth the debt and the acknowledgment; the affixing of the seal, which was a mark of public authority, made the deed authentic and carried with it the obligation to perform in the name of the State. The notaries who were charged with drawing up in writing the acknowledgment made to the magistrates soon took this acknowledgment themselves, at first in the name of the magistrates and then in their own name, because of an expressed or understood delegation of authority.² During the feudal period the principle of seigniorial independence had the effect of limiting the executory force of a judgment to the jurisdiction of the judge who had pronounced it. In order to have it carried out elsewhere it was necessary to obtain an order from the local judge, — an order which was scarcely ever made without a

the texts of the thirteenth century ("*Ord.*," I, 506, n. b.; *Giraud*, "*Essai*," II, 188, 212; "*T. A. C., Bret.*," 296 *et seq.*), yet a clause was authorized by virtue of which, if the debtor did not pay at maturity, the object given as a pledge was acquired by the creditor, after an appraisal by persons agreed upon by the parties: *Beaumanoir*, 43, 3; *Pothier*, "*Nant.*," no. 19. Now, the clause by way of avoidance did not offer any greater dangers than this clause: *Serrigny*, "*R. étr. et Fr. de lég.*," 1850, 257; *Garsonnet*, "*Procédure*," III, 467; *Briegleb*, "*Gesch. d. Executivprocess*," 1845; *Pertile*, VI, 349.

¹ *Viollet*, *loc. cit.*, seems to think that this practice is derived from the ecclesiastical courts.

² *Loysel*, 890; *Du Cange*, see "*Garentigia*"; *Ragueau*, see "*Garantie*"; *Loyseau*, "*Garantie des Rentes*," 12; *Pothier*, "*Procéd.*," no. 438. — Customs of the South, for example "*Ord.*," 3, 205; 4, 8, etc. — *Beaumanoir*, 35, 6; "*Gr. Cout.*," 2, 17; *Boutaric*, II, 13, etc.; *Tambour*, II, 82, 171, 181 (obligations passed at law).

new examination of the entire matter, so that the whole question was again opened.¹ The monarchic law did not break entirely with this traditional rule, as logic and the good administration of justice would have required. But by a rather singular inconsistency, notarial deeds had executory force in the entire kingdom, even when they did not have an indorsement, "placet" or "pareatis" ("Ord." 1539, 5, 65).² It was otherwise with judgments (in spite of the "Ord." of 1560, 46, and 1579, 172); the rivalry between the judicial bodies was strong enough to uphold the tradition, and their judgments could not be executed outside of the jurisdiction of the judge who had pronounced them without letters of "pareatis"³ delivered by the Keeper of the Great Seal or by the Chancellors of the Parliaments, nor also without the permission of the local judge. This was a rather idle formality, because these letters were delivered without jurisdiction being taken of the matter they dealt with ("Ord." 1629, 119, and 1667, 27, 6).⁴ "If the executory force of judgments was thus limited in the interior of the kingdom, all the more should this force be refused to judgments which were rendered abroad"; in this respect notarial deeds were similar to judgments, in conformity with the oldest practice.⁵—Finally, it is to be noticed that execution was especially directed against the person, at least according to the traditional notions; the executory right given against the debtor remained without any effect as against his heirs; it was necessary to obtain a new one. On the other hand, the executory right which was obtained by the creditor could be made

¹ "Gr. Cout.," p. 214.

² Cf., however, "Paris," 164, 165; *Pothier*, no. 442 (it is no longer customary to place a seal upon notarial deeds, although one still pays the fee for the seal); *id.*, no. 439; Civil Code, 547; Law of 25 Vent., year XI, Art. 28 (authentication, which is not required for the signature of the clerk of the court).

³ *Tambour*, II, 197. "Pareatis" (obey) is a word derived from the context of the letters. Sentences of the ecclesiastical judges and arbitrators, etc. Cf. *Tambour*, II, 172 *et seq.*

⁴ The Revolution gave deeds and judgments executory force throughout the whole of France; Constitution of 1791, 3, 5, 24 (uniform executory formula); Law of Sept. 29, 1791 (engrossed copies of deeds entitled in the name of the king and not in the name of the judge, and ending with a command as to who should have them carried out); Law of Sept. 6, 11, 1790, 20, 21.

⁵ Cf. Civil Code, 2123, 2128; *Brodeau*, on "Paris," 165 (II, 390): one must petition by means of a new action before the local judge. Art. 121 of the "Ord." of 1629 merely sanctioned rules which had been admitted in practice without difficulty; *Édict* of 1778, 2; *Boulleuois*, "Personn. et Réalité des Lois," p. 646; *Julien*, "Statuts de Prov.," II, 442; *Pothier*, no. 441; *Glasson*, "Procéd.," II, 142.

use of by his heirs: "the dead carried out execution upon the living, and not the living upon the dead."¹

§ 426. **The Same.** — (B) *The Distraint Proper.*² The creditor who possesses an executory instrument sends by the bailiff to the debtor a summons to pay the sum due.³ If this cannot be done, the bailiff goes upon the land with two witnesses,⁴ puts the land under the hand of the king by placing upon it a wisp of straw or an escutcheon bearing the arms of the king,⁵ places commissioners there, publishes the distraint by means of posting up notices before the main gate in the parish where the land is situated, and then draws up a report of the whole ("return of land distraint").⁶ The commissioners left in possession by the bailiffs were originally poor people, whose responsibility was imaginary; afterwards they were officers who had given surety;⁷ it was their duty to have the distraint registered and to proceed with the judicial lease of the possessions distrained upon, — a lease which has been done away with in our law because of the expense and the delays which it gave rise to.⁸ In this way the debtor found himself dispossessed of his property; any act of disposal over the land or the income was forbidden him.⁹ Thus it was use-

¹ *Loysel*, 891 (*cf.* 864). Other motives: to notify the heirs; debts are not incumbent upon all without any distinction: *Tambour*, II, 106, 197 (details). *Cf.*, assignment of claims, *ibid.*

² *Cf. feudal distraint*, which was originally rather a restoration of the fief to the lord's list because of his lord's right of ownership; the lord takes back his property, but there is a tendency to confuse this right of reversion with the real distraint carried out by the creditor upon the land of his debtor, in proportion as the right of the vassal over the fief increases. However, a few peculiarities still existed even after the old law had died out, whereas copyhold distraint became an ordinary distraint: *Tambour*, II, 340, 349. — As to the confiscation of the property which the vassal holds from his sovereign, *cf.* "Ass. de Jéru.," I, 304; trial of John Lackland; and the recent works of *Bémont*, *Luchaire*, *Guilhiermoz*.

³ *Boutaric*, II, 36; "Ord." of 1539, 74; "Ord." of Blois, 175.

⁴ As to possessions which cannot be distrained upon, *cf. Glasson*, "Procéd.," II, 153; *Pertile*, VI, 348. — As to distraint upon fiefs, *cf. Pertile*, VI, 346; *Guyot*, *loc. cit.*

⁵ "Cout. Not.," 118. Escutcheon, a little banner of cloth or linen bearing the arms of the king: *Pothier*, no. 544 (not in use); *Pertile*, I, 339.

⁶ Registration in the office of the commissioner of land distraint. *Cf.* the existing form of publication by means of the transcription of the minutes of the proceeding of distraint.

⁷ Edict of February, 1626.

⁸ This lease, which was practiced under some of the Customs, was given a general effect by the "Ord." of 1539, 82, and the Edict of 1551, 41, with the object of preventing the commissioners who formerly administered property that had been distrained upon, from appropriating the issues for themselves under pretext that they were for disbursements and the expenses of administration. As to these disadvantages, *cf. Glasson*, II, 242.

⁹ Encumbrances of the issues also.

less, and even impossible, for other creditors to distrain upon the property, which had already been placed under the hand of the law; all they could do was to offer objection in a petition; "**distrainment upon distraint is invalid.**"¹

§ 427. **The Same.** — (C) *Public Announcements and Award.* Public announcements or proclamations were made after the parochial mass, in order to announce to the public that the inheritance which had been distrained upon was to be sold and awarded by decree, and to allow opposition to be offered by any parties who were interested (creditors, mortgagees, etc.). Following this, notices were posted and a judgment certifying to the public announcement established the carrying out of these formalities.² It was the duty of the court to pronounce upon the various **objections** offered, e.g., petitions to annul the distraint of the land belonging to some one else, to exclude certain property, to make an award only under the charge of a quit-rent, or to include some one else among the creditors. After having adjusted these details, it enters an order of judgment.³ More notices are posted up, and forty days after this order has been made the man who has distrained places a bid in the clerk's office; this corresponds to fixing a price. Within the forty days anyone can make other **bids**; they are read in court, and there is a provisional award to the highest bidder; but it is only after it has been put off for a fortnight three times that the final **judgment** takes place.⁴ The judgment vendee must pay the price of the sale within a week, and if he does not do this the land can again be subjected to the public announcement and sold at his expense as having made an excessive bid.⁵ The final order makes the judgment vendee the owner without delivery;⁶ it even extinguishes interests of which notice was not filed; so that the judgment vendee can acquire more rights than the judgment

¹ *Loysel*, 899, 758.

² Edict of 1582. Control of distraint, Edicts of 1639, 1693, 1775.

³ Opposition could no longer be received after the adjudication: *Desmares*, 272, 54, 188; "Cout. Not.," 121; "Gr. Cout.," p. 263; *Loysel*, 906; "Paris," 354-359 (after a copy of the decree had been made and sealed). "Ord." of 1629, 161: registration of objections; *Tambour*, II, 295.

⁴ "Tiercement" at "Orléans," 476 (outbidding of the third party within a week). Code of Civil Procedure, 708 *et seq.* Elsewhere the debtor himself can take back his property within a year and a day ("suppression of decree" in Languedoc, etc.). Cf. "Fragm. d'une Répert. de Jurispr. Paris. au XV^e s.," pp. 25, 90; *Pertile*, VI, 343; *Petiet*, "Thèse," 1884.

⁵ See *Denisart*.

⁶ This was a judgment. As to the voluntary decree, *post*, "Clearing Off." In Hainaut seisin must be taken by the purchaser. Cf. *Loysel*, 203.

debtor had. There is an exception only in the case of the lord's feudal right and the lord's copyhold right, real servitudes, the dower of the wife of the judgment debtor, an entail not yet matured, and life rents.¹ In case he is evicted, the judgment vendee has only the right to demand the restitution of the price.²

§ 428. **The Same.** — (D) *Preferences*.³ The price of the sale was not ordinarily distributed by way of equal shares; the court must first settle the order of preference as between the privileged, mortgage, or simple contract creditors,⁴ which prolongs a procedure already very lengthy and overburdened with incidents.⁵

§ 429. **The Same: Later Law.** — The law of the 9th Messidor, year III, and especially a law of the 11th Brumaire, year VII (not the one relating to the system of mortgages), simplified the procedure which was then called that of "forced expropriation"; this last law did away with the rule that the decree clears off mortgages; the judgment vendee did not acquire any rights other than those which the judgment debtor had.⁶

§ 430. **Forms of Realty-Mortgage.** — The establishment of immovable security met with obstacles, as did all alienation, in the higher law of the family and in that of the lord. By the Frankish period lands were, however, given as a pledge by debtors to their creditors to answer for the payment of their debts, sometimes the absolute ownership (**pignorative contract, sale with redemption**) and sometimes only the enjoyment (**land-gage**). In both cases the land passed into the hands of the creditor. Often, however, the possession of the land was an embarrassment for him, and the debtor had an interest in not giving up possession. In various ways they succeeded in reconciling these needs with the necessity of an effective security for the creditor; thus, in France,

¹ *Desmares*, 220, 390; "Cout. Not.," 121, 127; "Paris," 354 *et seq.*; *Loysel*, 904; *Glasson*, VI, 612; *Petiet*, "Thèse," 1884. Cf. "Voluntary Decree," *post*, "Clearing Off." This consequence had its origin in the form of the distraint: "Olim," III, 557; "Jostice," 16, 2, 1; *Desmares*, 413; *Glasson*, "Proc.," II, 245 (numerous local peculiarities); *Petiet*, *op. cit.* Did confiscation clear off the rights of third parties? "Cout. Not.," 35; *Desmares*, 174.

² *Loysel*, 905. Cf. *Beaumanoir*, 43, 3.

³ *Fleury*, "Inst.," II, 198. — *Post*, "Sub-orders"; *Tambour*, II, 155.

⁴ The privilege of the first one to distraint is absorbed by the legal mortgage in the case of immovables: *Beaumanoir*, 34, 52; 24, 2; 55, 1; "A. C., Picardie," ed. *Marnier*, p. 91; *Esmein*, p. 164; *Tambour*, II, 311.

⁵ The Law of the 11th Brum., year VII, reduces the delays to 50 days. Cf. *Glasson*, "Proc.," II, 247 (simplification under the old system).

⁶ Intermediate law, *Tambour*, II, 433; Civil Code, 2204; Code of Civil Procedure, 613, 749; Law of June 2, 1841, which simplified the matter.

during the feudal period,¹ when execution upon real property came into common usage, there was developed a new kind of security, giving the creditor the same advantages as he would have had by land-gage, but without the debtor's giving up possession. Known first under the name of the **bond**,² in the end it became confused with a Roman institution, the **hypothec**, for which analogous precedents can be found, such as fiduciary alienation and the "pignus."

§ 431. **The Same: (I) Sale with Redemption.** — In the old legislation the pledge of a piece of land is often met with under the form of true alienation: the creditor receives the full ownership of a piece of land, just as he is given a movable pledge; he will restore it if the debt is paid when due; if not, he shall have the absolute ownership of it.³ During the Frankish period,⁴ and even sometimes after it, this transaction was frequently met with. The ownership of the land was conferred upon the creditor by means of a conditional investiture; most frequently the condition is a condition subsequent, that is to say, the creditor becomes the owner "hic et nunc," but ceases to be so if the debt is paid.⁵ It

¹ As to the order in which these various assurances made their appearance and their coexistence, cf. *Heusler*, § 101.

² German law: the "ältere Satzung" corresponds to the land-gage of the French law; the later or "neue Satzung" (of the thirteenth century), to the bond; it is a copy of the procedure of execution upon immovables, and, consequently, is derived from the process of outlawry. Actually, "Satzung" means statute, regulation; "versetzen" means to put in pledge. Cf. *post*, "History of the English Mortgage."

³ If the object perishes or deteriorates the loss falls upon the creditor, for if it no longer exists or loses in value the debtor will not claim its restitution: "Soest," in 1120; "Sachsensp.," 3, 5, 5. It is for this reason that "Liut.," 108, allows the creditor to demand the payment of the debt although he may have become the owner of the pledge. — A creditor who is the owner of the pledge alienates it or pledges it, which may make its recovery difficult for the debtor; the alienation subject to a suspensive condition does not present this difficulty.

⁴ "Cart. de Redon," nos. 34, 35, 133, 135, 200; "de Cluny," II, 21, etc.; *Thévenin*, no. 120; *Rozière*, "Form.," nos. 374 *et seq.*; texts in *Heusler*, especially *Muratori*, "Ant. Ital.," III, 116; "Cod. Cav.," I, nos. 70, 73; "Cart. Langob.," no. 9, etc. Persistence of the pledge with ownership in English law (*Glanville*, X, 6; *post*, "Mortgage"), in German law (*Meibom*, 273; *Franken*, § 13). Cf. *Boutaric*, I, 103, 3; "Ass. de Jérus.," "C. des B.," 32; *Franken*, p. 148. — Cf. theory of rents: the assignment of rents meant their alienation. *Britz*, p. 890: confusion of pledging of immovables ("engagères") with sales with the power of buying back, which are made use of in case of a borrowing upon an immovable pledge (Luxembourg).

⁵ A new transfer of the ownership was absolutely necessary; it is hardly credible that the ownership returned of absolute right to the debtor. But the texts are not very explicit: *Heusler*, §§ 93, 102, 103 (II, 138): transfer without "resignatio" or "Auflassung," in such a way as to leave the debtor a real right over the land; in this case the "resignatio" ought to take place after the transaction is completed for the benefit of the creditor who has not been

may also happen that the condition is a suspensory one;¹ the creditor only becomes proprietor when the debt is due, if he is not paid. But in either case he possesses the land; he has the enjoyment of it without deducting from the debt the fruits which he takes;² he acquires the absolute ownership in default of payment (contrary to the Roman law, which forbids the "*lex commissoria*");³ and he would not have the right to sue the debtor by at the same time offering to restore the pledge to him. This transaction, which was a dangerous one for the debtor, because the creditor never failed to demand a pledge which was of greater value than the amount of the sum due, struck at the rights of the family, and in the feudal period struck at those of the lord;⁴ ordinarily it gave way to the land-gage. However, it did not disappear entirely. This is one of the numerous means made use of to avoid the prohibition against lending at interest; the casuists forbade it under the name of *pignorative contract*;⁵ it is to be distinguished from sale with redemption, which is lawful, by two characteristics, — the low price, and the immediate reletting of the land to the seller.⁶

§ 432. **The Same: (II) Land-Gage.** — To evade the need for the paid. This ingenious system does not seem to us to have a sufficient foundation in the texts.

¹ *Rozière*, no. 377. In Lombard law the debtor carries out the "*traditio cartæ*" with the creditor and the latter binds himself in writing to restore the "*carta*"; the debtor keeps the land.

² The liquidation of the debt by means of the revenues from the pledge was opposed to the spirit of the old law, according to which the pledge was the provisional property of the creditor, and the expenses of cultivating it and maintaining it, and its loss even, were chargeable to him.

³ *Pertile*, IV, 541. Cf. "*Liut.*," 147; "*Roth.*," 247; *Du Cange*, see "*Transactum.*"

⁴ Consent of the heirs, repurchase: "*L. Feud.*," 2, 55; "*Schwabensp.*," 32, 6; 72, 2. Fief given by way of pledge, "*Pfandlehn*"; *Homeyer*, "*Sachsensp.*," II, 345; *Kohler*, "*Pfandr. F.*," 291.

⁵ *Endemann*, *loc. cit.*, *Neumann*, "*Wucher*," p. 197; *Laurière*, "*Tén. de 5 Ans.*," c. 5, 6; *Franken*, pp. 155, 178, 183.

⁶ A borrows 100 from B, at the same time giving him the piece of land C as a pledge; this is the same thing as though he sold C to B for 100 with the power of getting back C for this price; for in both cases A only recovers C by paying 100 to B. From the economic point of view the sale with redemption is merged with borrowing upon a pledge, for the owner who sells his land and keeps the power of buying it back only does this because he has need of money. From the juridical point of view the distinction is a very subtle one. The borrower upon a pledge can, they say, be compelled to pay in the same way as any debtor, whereas nothing compels the vendor with power of redemption to buy back his property. The former keeps the ownership of the land pledged, whereas the owner no longer has it. Neither of these differences existed in the very old law. Afterwards these two transactions having become separated from each other, their distinctive marks were seen in the characteristics pointed out in the text: "*Olim*," III, 1, 107; *Loysel*, 484; *Laurière*, on "*Paris*," I, 273; *Guyot*, see "*Contrat pign.*"

consent of his relatives or of the lord, the debtor gave his lands as a pledge to his creditors in such a way that they only had the possession and enjoyment thereof;¹ in fact, he only thereby disposed of the profits and income, the *issues* or *crops*; and this was within his rights.² In the same way, when the inalienability of the domains of the crown had been proclaimed, the kings gave them in gage to their creditors.³ The land-gage is created by means of the seigniorial giving of seisin, like any other alienation,⁴ and when these forms fell into disuse the gage took place by means of a physical delivery. In every case the debtor was dispossessed; the creditor acquired the seisin by way of pledge; consequently, he was protected in his possession against third parties, and even against the pledgor.⁵ The profits and income belonged to him, sometimes upon condition of deducting them from the capital, "**viſ-gage**" (live pledge), sometimes without any credit, as an absolute loss for the debtor, "**mort-gage**" (dead

¹ He did not cease to be a vassal, etc. Cf. German and English law. As to freeholds, cf. the authors cited. Conditions for validity: *Franken*, p. 191; *contra*, *Glasson*, *loc. cit.*; "Cart. de N.-D. de Chartres," no. 265. But cf. *Britz*, p. 928 ("pignus stabile").

² This is called a sale of the revenues, of the "poil" (the crops), a granting of the usufruct: "Cart. de Cluny," no. 908; "Ord." of 1204 (crusaders), 1208 (Christian debtors of Jews); *Beaumanoir*, 38; 35, 2 (fief); 17, 7; 24, 4; 34, 13; 44, 52; 68, 11; "A. C., Champ," 4; "St. Dizier," 164; "Jostice," 8, 3, 5; 12, 6, 38 (minor debtor); "Olim," I, 690; II, 369, etc.; "T. A. C., Bret.," 296 (not bound at the age of twelve); *Boularic*, I, 35, 78 (*Esmein*, p. 165, cites ed. of 1486); "N. R. H.," 1880, 375 (immovables pledged at Metz: sale of the land to a fictitious grantee who pledged it to the creditor); "A. C., Artois," 22; "A. C., Bourg.," 33 (*Giraud*, II, 275): sale for three years "without the consent of the lord"; "Us. de Guisnes," ed. *Tailliar*, p. 343. The repurchase by a person of the same lineage was only allowed in the case of a perpetual pledge, a true alienation in disguise: *Beaumanoir*, 44, 52; "Bergerac," 49; "T. A. C., Bret.," 220; "A. C., Anjou," II, 239. — Incorporeal immovables: *Pertile*, IV, 520; *Peltier*, 188. — "Pfandschilling," sort of fictitious purchase price: *Franken*, 108, etc.; *Werminghoff*, p. 13 *et seq.* — Warranty due from the seller.

³ Revolutionary period, cf. Law of Nov. 22, 1790, of the 10th Frim., year II, 14th Vent., year VII; "Code civil interm.," Table, see "Domaine engagé"; *Dalloz*, "Répert.," *id.*

⁴ Conflict between two pledgees and one pledgee and a purchaser; the priority of taking of seisin will determine the matter: *Beaumanoir*, 34, 13, 14, 15 (*Peltier*, p. 184); 52; 51, 20; "L. d. Droiz," 852; "Cout. d'Anjou," XIX, 632 (ed. B.-B.); "Montpellier," 41; "Toulouse," 109 *et seq.*, 142 *et seq.*; *Franken*, p. 116; "N. R. H.," 1885, 206 (pledging of immovables by a clod of turf at Metz). When the debt is extinguished the debtor has a right to take possession of his property without having the seisin conferred upon him by the lord. Counter-prestation: *Beaumanoir*, 34, 58 *et seq.*; *Franken*, p. 103 *et seq.* — The lord could not evade the giving of seisin acquired by virtue of a pledge: he could oppose the alienation by means of a repurchase.

⁵ *Beaumanoir*, 32, 30, 13; "L. d. Droiz," 124, 630, 637; *Desmares*, 34, 108, 177; *Glanville*, 13, 28 ("seisina ut de vadio"; it has but few consequences in his eyes). As to the "Gewere" in Germany, difficulties: *Pertile*, IV, 518; *Franken*, p. 110.

pledge):¹ "The 'vif-gage' is one which is paid off out of the issues, the 'mort-gage' is one which is not paid off out of anything."² In the case of the "mort-gage" the profits were the same as interest paid to the creditor, at least in proportion to the amount that their value exceeded the expense of keeping up and cultivating the land. There was in this a form of usury which had entered so much into the customs that it remained there for a long while unperceived; in the twelfth century the Church decided to forbid it, with all the more strictness as it appears to have been practised especially

¹ **English Law:** At the time of *Bracton* the pledge of lands seems to have been in common use upon the Continent; but the practice described by *Glanville* is different, and perhaps it is in the pledge of ownership that the latter tells us about that we must seek the origin of the "**mort-gage**" of the Common Law. By this name is designated a true alienation of the land to the creditor with the reservation that it will be annulled if the debtor pays at maturity; in case he does not pay at this time the land is irrevocably lost to him. The first tempering of this severe law consisted in the clause by virtue of which the debtor kept the enjoyment under the status of a tenant at will. The judicial law of the courts of equity destroyed the common-law mortgage by recognizing the mortgagee as only having a security for the paying back of his claim, and by allowing the debtor to have all the rights of an owner; even maturity did not mean for him the irrevocable loss of the property, as would have happened at law, but he had a right to take it back upon condition of paying within a reasonable time. Under this form the English mortgage offers the greatest analogy to the French mortgage ("**hypothèque**"). The mere delivery to the creditor of the title deeds of ownership constitutes a mortgage in equity. In general the mortgage is no longer formed in the feudal manner by investiture, long since abandoned, but by means of a simple deed. "Since a law of Aug. 22, 1881, the creditor, instead of paying himself in kind out of the immovable which has been pledged, may, if he prefers, sell it and pay himself out of the price": *Lehr*, p. 157; *Glasson*, "*Inst. d'Angl.*," III, 238; II, 310; *Pollock and Maitland*, *loc. cit.*

² *Loysel*, 485; *Du Cange*, see "*Pignus*," etc.; *Glanville*, 10, 6, 8; "*Reg. Maj.*," 3, 5; *J. d'Ibelin*, 32; *Beaumanoir*, 68, 11; "*Summa Norm.*," 111, 11; *P. de Fontaines*, pp. 115, 119; *Boutaric*, I, 72; *Blackstone*, II, 441; *Toustain*, "*Le Mortgage de Norm.*," 1577; *Thellier de Poncheville*, "*Vente à T. de Mortgage*," 1879 (p. 17); *Huber*, IV, 786; *Pertile*, IV, 518; *Franken*, p. 123. — In German law the live pledge ("**vif-gage**") is called "*Todsate*" or "*Todsatzung*," — that is to say, mortgage, because he *liquidates* ("*amortit*") the debt. For example, "*ältere Satzung*" in general, "*Reichspfandschaft*." Cf. pledgee of the domain in France: enjoyment until he is paid back. — As to the assignment of the revenue of immovables for the payment of a debt (illegal in the old law) cf. *Pothier*, "*Hypoth.*," no. 229.

[On the history of the English mortgage, see now the essay of *Dr. Harold D. Hazeltine*, of Cambridge University, England, first printed in the "*Harvard Law Review*," Vol. XVII, p. 549, and Vol. XVIII, p. 36, and later reprinted in Vol. III of "*Select Essays in Anglo-American Legal History*." This essay is an abridgment of the author's longer monograph, entitled "*Englische Pfandrechts-geschichte*," being No. 92 in the series "*Untersuchungen zur deutschen Staats- und Rechtsgeschichte*," edited by Prof. *Otto Gierke*.

On the general history of the pledge and the mortgage in France and in various systems of law, see the essay by *John H. Wigmore*, "*The Pledge-Idea; a Study in Comparative Legal Ideas*," "*Harvard Law Review*," Vol. II, p. 29. — TRANSL.]

by religious establishments.¹ From this time on the "mort-gage" disappeared from French practice, save only in a few exceptional cases (portion of younger children or marriage portion of daughters; gifts, and alms given to the Church).² The canon law also forbade the forfeit-clause, that is to say, the agreement by virtue of which the creditor retained the property pledged as a payment if the debt were not paid at maturity.³ Land-gage never gave the creditor the ownership however long it lasted.⁴

§ 433. **The Same: (III) "Bond."**—The foregoing two kinds of security had the disadvantage of putting the debtor out of possession,⁵ whereas the Roman hypothec allowed him to keep his lands without decreasing the security of the creditor. The Customary law reverted to the Roman institution by making use of the *bond*⁶ ("obligation") by which the debtor appropriates *beforehand* his

¹ In 1164, Dig. X, 5, 19; *Beaumanoir*, 68, 11; *Glanville*, 10, 8; "Gr. Cout. Norm.," 20. The transaction is not annulled, but it is reduced to a live pledge. In Germany the granting of a fief joined to a pledge in order to avoid being accused of usury. Why the English mortgage has been tolerated, cf. *Franken*, p. 189.—In 1199, example of a "mortgage" in the South: *Pasquier*, "Doc. rel. à la Seigneurie de Boussagues," p. 50; *Viollet*, p. 734; "Cart. de St.-Victor," no. 1117; *Endemann*, II, 337.

² *Loyse*, 485; *Boutaric*, I, 25; *Beaumanoir*, 22, 2; "Olim," I, 449; no. 8; *P. de Fontaines*, 15, 14; *Laurière*, "Tén. de 5 Ans.," 4; *Franken*, p. 130; *Peltier*, p. 203.

³ Already during the barbarian period the reaction against the acquiring of the ownership of the pledge by the creditor who was not paid comes to light in the "L. Wis.," 5, 6, 3, and in the "Faux Capit.," VII, 299, 313; "L. Feud.," I, 27; II, 51; "Ordo judic." ("incerti auct."), 2, 11; Dig. X, "de pign.," 7; *Beaumanoir*, 54, 6; *Ragueau*, see "Tresfoncer." The "Verfallspfand" becomes the "Verkaufspfand," but first of all the sale is frequently made by the pledgee himself: "Milan" (in 1216), 15, and not as in the prevailing law, by the law and by means of public sales. The law sells as well as guarantees, says *Beaumanoir*, 51, 1. At Lille, "mort-gage" during two years and two days, after which the land is forfeited: "Roisin," p. 61. Intermediate system of the handing over to the creditor of the property distrained upon after appraisal until the amount of the debt is paid: *Beaumanoir*, 43, 3; 54, 8; "T. A. C., Bret.," 296; "Metz," "N. R. H.," IV, 342; "Arles," 8. Cf. *Franken*, pp. 136, 148; "Ass. de Jérus.," "C. des B.," 32; "Montpellier," 40; "Alais," 6; *Endemann*, II, 341.

⁴ *Beaumanoir*, 24, 4. Cf. English law: "Once a mortgage, always a mortgage."

⁵ The same piece of land may be bonded with regard to several persons, but it can only be gaged to one. The primitive pledge frees the debtor (as to-day, surrender releases a wrongful holder); the bond or hypothec ("hypothèque") is an accessory of the present debt; and the debtor remains bound if the land mortgaged is not sufficient to pay off the creditor. This land is sold by judicial sale, whereas the primitive pledge becomes the property of the creditor. Let us observe that these characteristics of the modern hypothec were only created with difficulty; originally, or in the conservative Customs, the same piece of land can only be bonded for the benefit of one creditor; if it is destroyed a creditor only has a right to the remains, etc.: *Stobbe*, § 107; *Huber*, IV, 793, 21; *Britz*, p. 924. The warranty due from the man giving the pledge may be equivalent to a personal obligation.

⁶ Bond still has the meaning of hypothec in practice (they say to contract a bond).

immovable property for the payment of his debts.¹ Individual ownership having gained strength, and a debtor being now able to alienate his property thus, when he found it was impossible for him to meet his obligations, it was perfectly natural that he should allow them to be distrained upon and sold, by a clause in the promise itself. The debtor kept his lands,² but at maturity the creditor who was not paid found himself in about the same situation as though he had received them as a gage.³

From early times the bond could be general or special.

§ 434. **The Same.** — (A) *The General Bond* affects all the possessions of the debtor, movables and inheritances, present possessions or those to come;⁴ it confers neither a *right against third persons*, so that conveyances, at least those for a consideration, made by the debtor can be set up against the creditor,⁵ nor a *right of lien*, for in this matter it is only the priority of actions

¹ The bond differs too much from the Roman hypothec for one to be able to see in it a resurrection of this forgotten institution. Cf. "Liut.," 67. Its formation seems to us rather to be accounted for by reason of custom, in the same way as it would seem that the "Jüngere Satzung" of the German law is to be accounted for (Franken, Brunner); the latter grew out of the procedure of distraint upon immovables; it gives the creditor neither the ownership nor the enjoyment of the immovables of the debtor; but it places him beforehand, with respect to the time of maturity, in the position of one who had obtained a judgment condemning the debtor and pronouncing the "missio in bannum" of his property. The effect of the bond in French law is analogous. According to the general opinion, the "Jüngere Satzung" made its appearance in the towns in the thirteenth century (peculiar position of urban property, such as houses, which the debtor cannot abandon). *Heusler*, II, 135, and § 104, maintains that the "Jüngere Satzung" is as old as the "ält. Satz.," for example, for a loan, the creditor wishing to have a pledge in his hands; the other was applied to future obligations that were uncertain, such as warranty or suretyship, with regard to which there was no occasion to dispossess oneself "hic" and "nunc" (for example, p. 147: "Furpfand," "subpignus" in the South).

² Forms of transition: the pledgee retransfers the possession of the land to the debtor, who will thenceforth be his tenant, his vassal, etc.: *Huber*, IV, 788, 8. Pledging of immovables ("engagère") at Neufchâtel until 1850: this was a sale for a term or with the power of repurchase, the creditor being able to leave the debtor in possession of the land: *Ostervald*, "Lois, us. et cout. de Neufchâtel," p. 230. Cf. also the English mortgage; *G. Durand* (tenure at will); *Viollet*, p. 672.

³ The relationship between the judicial pledge and the hypothec comes out very clearly in the exposition of the Belgian law given by *Britz*, p. 927: the hypothec is formed by acts of law, when an order to convert into money has been given, by distraint or attachment, carried out in fact, and complaint at law, taking possession, and other similar ways (judicial hypothec); in Hainaut, real distraint led to the same result as the hypothec. Cf. p. 931 (privilege of the person carrying out the distraint).

⁴ "Siete Part.," 5, 13, 5: it does not cover the concubine ("barragana"), her children, her servants, etc.; "Wis.," 2, 5, 7.

⁵ *Beaumanoir*, 70, 10; "Artois," 5, 1; *Boutaric*, I, 25; *Viollet*, 737. Cf. "jüng. Satz." in German law (*id.*); *Britz*, p. 925.

which gives the preference.¹ What good is it then? It serves to do away with the old principle that immovables could not be distrained upon,² and to make the heir of the immovables himself responsible for the debts of the debtor at a period when debts were only paid out of movables.³

§ 435. **The Same.** — (B) *The Special Bond*, instead of affecting the entire inheritance of the debtor, only affected a particular immovable; but it gained in strength what it lost in extent. Already in the thirteenth century it carried with it a right *against third persons*⁴ and a *lien*,⁵ and, consequently, had precedence over the general bond.⁶

§ 436. **The Same.** — (C) *Comparison of the General Bond and the Special Bond*. From the time when it was admitted that immovables were subject to execution the general bond should have disappeared. The practitioners preserved it by giving it all the effects of the special bond (fourteenth and fifteenth centuries).⁷ We may say that from this time on the bond becomes like the Roman mortgage (*hypothec*) and should rather be so called.⁸ However

¹ *Beaumanoir*, 35, 20; 34, 52; 54, 6.

² It allows of distraint where it would be prohibited: "A. C., Picardie," p. 90, and where it is possible it facilitates the procedure: *Beaumanoir*, 35, 2; "Olim," 3, 158, 3.

³ Ordinarily the debtor binds himself and his heirs: *Beaumanoir*, 35, 19, etc.; "Gr. Cout.," p. 217. Cf. *Loysel*, 329; *Huber*, IV, 789. In England these clauses were indispensable until 1833 (specialty binding the heir). — The more recent law is stated by *Masuer*, 30, 2: the coercion of "nisi" (excommunication) and physical compulsion no longer existed against the heir, but this is not so with the bond, for the heir and the deceased are one.

⁴ *Beaumanoir*, 34, 52; 38, 11; 54, 5; 70, 11 *et seq.*; "A. C., Artois," 5, 2. — One finds written bonds in which the debtor promises not to alienate the lands which he binds: *Stobbe*, II, 309 (difficulties before the fourteenth and fifteenth centuries); *Pertile*, IV, 721 (Act of the year 777); *Huber*, IV, 788, 9. But this promise could not be set up in opposition to a third party who acquired and was duly given the seisin. How was the creditor recognized as having a right of pursuit? This right belonged to the pledgee who had surrendered the land pledge, — for example, by way of a lease. It may happen that this complicated transaction was implied, and that the influence of the Roman hypothec worked in the same direction.

⁵ This right exists if the land has been alienated, for no one but the creditor can take it back from a third party who has acquired it. When the immovable which has been alienated is still in the hands of the debtor it is more doubtful: *Boutaric*, p. 386 (ed. *Char.*, 1606); *Esmein*, p. 186.

⁶ *Boutaric*, I, 25; "T. A. C., Bret.," 308; "A. C., Bourges" 185; "L. d. Dr.," 321; *L'Hommeau*, III, 327 *et seq.* Later on, liens: *Britz* (warranty of Brussels).

⁷ The tie existing between the executory force and the obligatory form of deeds must have contributed towards this result, just as did the existence of the general hypothec in the Roman law. — *Fleury*, "Inst.," II, 16; the typical clause: the special hypothec does not derogate from the general hypothec, nor the general hypothec from the special one; *Esmein*, p. 190.

⁸ The Roman influence merely hastened and facilitated a spontaneous

important the differences which are raised between them may be, they do not prevent the Roman theory of the mortgage as a whole from being adopted by our old law. Let us observe the principal points upon which they differed from the Roman mortgage: (a) the mortgage over movables, admitted at Rome, was rejected as a general thing;¹ (b) whereas in Rome the mortgage was formed by a simple agreement, the old French law demanded formalities; (c) the judgment-hypothec is a creation of the French law; (d) as also the "clearance."

§ 437. **The Same: Hypothec-Mortgage.**² (1) **Countries of Public Nam.**³ — In the North of France the bond could not be made use of unless it were accompanied by formal acts in the same way as conveyance;⁴ upon this condition alone did it confer a right *against third persons* and a *lien*. The debtor had to give up possession into the hands of the lord, who in his turn gave the seisin to the creditor; and the judge, as we have seen, stepped into the place of the lord.⁵ The effect of the intervention of the court

evolution of the customary law. — Cf. as to the mortgage: *Paul*, 5, 28, 4; "L. Rom. Wis.," p. 438; "Wis.," 5, 6; "Petrus," II, 47 *et seq.* "Hypotheca": "Montpellier," 38. "Ponderagium": "Toulouse," 109; elsewhere, assignment, to encumber, to hinder.

¹ *Esmein*, p. 198; *Viollot*, 740. Cf. *Fleury*, II, 20; *Britz*, p. 960; *Argou*, 4, 3 (where it is admitted, as it is in the countries of written law, it only gives a right of preference). Cf. mortgage of movables in England.

² [The French term "hypothèque" will here be translated "mortgage," for the two terms represent the single institution which serves the same purpose in the modern law of both countries. The essential thing about the "hypothèque," so far as the historical contrast with the mortgage goes, is that in the "hypothèque" neither title nor possession is in the creditor. — TRANSL.]

³ [For the term "public nam," see *ante*, page 380, note 6. — TRANSL.]

⁴ Seisin giving Customs ("Valois," etc.): endowed rents are always preferred to those which are not endowed; rents which are not endowed are preferred to debts which are not privileged: *Argou*, IV, 3.

⁵ The bond covering ownership was only possible in the case of feudal possessions if given by means of the formalities of disseisin-seisin; it consisted in fact of a true alienation, and the latter assumed the consent and the intervention of the lord. Cf. the English mortgage, and the German "ältere Satzung." This was not the case with regard to the giving of a bond for the enjoyment which did not involve the rights of the lord; but in this case, in order to acquire the right to sell the immovable the creditor had to obtain seisin from the lord, — that is, to do some formal act. This last proceeding was applied to the bond: "A. C., Picardie," p. 91 (the debtor specially binds his house; he gives up the seisin of it to the lord and then causes the creditor to have the seisin given him). *Beaumanoir*, 54, 5, mentions the consent of the lord and the formation of a special bond: *Boutaric*, I, 25. In the common law the necessity for the consent of the lord and for the intervention of the lord was done away with, just as in the case of the transfer of ownership: *Beaumanoir*, 27, 8 and 9; *Desmares*, 274; "Toulouse," 109, 111a, 131, 142: "ponderagium" established by a public act, with the intervention of the magistrate in the case of freeholds and of the lord in the case of fiefs and copyholds. — Cf. the German "jüngere Satzung": declaration before the court or the town

was to make known the mortgage to everybody; **publicity**, one of the essential bases of a rational system of mortgages, was introduced under cover of feudal customs.¹ The **specific lien** of the gage, another principle which is no less important, was equally implied in the public nam system, because the debtor must give possession into the hands of the lord of only a certain piece of land, and not all the land which one had or might have, in a vague manner. The writing on the registers of the clerk's office, in which the entire transaction was set forth, was thus both public and specific, — specific because the land which was mortgaged was designated in the most exact way, public because the registers were open to everybody.² The Edict of 1771 did away with these methods, and instead placed countries of public nam under the rule of the common law in matters relating to the system of mortgages.³

§ 438. **The Same:** (2) **The so-called "Customary Common Law." Mortgage is Creatable only by Notarial Deed.**⁴ — No consensus has been reached either as to the date of or the reason for this rule. Our old authors offered two explanations, both of which still have their partisans. — 1st. *The mortgage is a result of the power of execution in the notarial deed and arises from the affixing of the public seal.* Originally, the bond was strictly connected with

council, entering upon public registers. The influence of the Roman law often caused these forms to be abandoned.

¹ Publication in Italy, in Venice in 1288 (registers in which are entered all contracts relating to land), etc.; *Pertile*, IV, 523 (bibl.); in Germany, Hamburg and Lübeck, in the thirteenth and fourteenth centuries; in the Prussian towns: Law of Sept. 28, 1693; Prussia, Law of Feb. 4, 1722, Dec. 20, 1783, Code 1794.

² "A. C., Artois," 22; *Boutaric*, I, 25; "Verm.," no. 77 (ed. B.-B.). The old forms persisted in certain Customs, — for example, "Péronne," 260; elsewhere everything is reduced to a question of an entry in a register: "Cambrai," 5, 11. Ordinarily there is a register for pledge transactions. A regulating order of July 27, 1673, allows the wife's mortgage to dispense with the public nam as well as the minor's mortgage and the judicial mortgage. Cf. details in *Britz*, pp. 939, 957 (Hainaut: "refunding of inheritance": the debtor disinherits himself of the land without appointing the creditor as his heir, but it is understood that the land can be sold at the request of the creditor who has not been paid; and, if this is done, the judge confers the inheritance upon the purchaser).

³ The Edict was not everywhere put in force; the Decree of Sept. 19, 1790, declares that thenceforth the registration of the contract constituting a mortgage will take the place of public nam.

⁴ "Toulouse," 109 (public deed); "Sassari," in 1316, I, 46 (*id.*); "A. C., Anjou," II, 414; "Paris," 164, 165; *Planiol*, "Dr. Civil," II, 792, n. 3, cites an unpublished act of the "Cart. de Ste.-Melaine," at Rennes in 1293; we find closely connected in it the admission of the debtor, the sentence pronounced by the notary, who is a delegate of the judge, and the bond agreed to by the debtor. Cf. "Tract. univ. jur.," VI. Furthermore, A. Favre and d'Argentré still maintain that this rule is a mistake on the part of the practitioners.

legal execution on immovables; the execution itself took place either by virtue of a judgment or by virtue of an agreement furnished with a seal of the public authority; the bond, which was the first form of the mortgage, was thus derived from the affixing of the seal, which gave to deeds their executory force. Neither the deed under a private seal nor the ordinary verbal agreement could give a mortgage. If there was some hesitation with regard to this doctrine, it was because of the influence of the Roman rules, according to which the mortgage resulted from a mere contract; but from the sixteenth century on, the Roman theory was finally rejected as a consequence of the vogue of a system of proofs wherein the notarial deed occupies the most important position.¹ — 2d. *The mortgage is only the result of the will of the parties*; it does not in any way derive its executory force from the deeds and the affixing of the seal; if the notarial deed possesses executory force and the effect of a mortgage at one and the same time, it is a remarkable coincidence, and nothing more.² For a long time no special form was required for the formation of a mortgage; thus it could be created by a deed under private seal³ or a verbal agreement.⁴ But from the sixteenth century on, the necessity of a notarial deed was introduced as a consequence of the modifications introduced in the theory of proofs; and out of what was only a question of proof, the courts made a substantial element and a necessity. A deed under private seal⁵ was only effec-

¹ *Viollet*, p. 743, no. 1 (texts); *Masuer*, 18, 6; *Brodeau on Louet*, II, 15; "Cout. de Paris," II, 201 (on Art. 107); *L'Hommeau*, 315: "The mortgage does not arise from the agreement of the parties, but from the authority of the king"; *Bourdin* on "Ord." of 1539, Art. 65: "ob sigilli regii auctoritatem"; *Pothier*, no. 9; *Valin*, on "La Rochelle," III, 318, etc.; *Fleury*, "Inst.," II, 11; *Davot*, "Tr. de Dr. Fr.," VII, 573; *Loysel*, 504, note; *Britz*, p. 927. — Deeds drawn up in the administrative form, especially leases of the property of the State, imply a mortgage according to the law of Oct. 28-Nov. 5, 1790, 2, 13 and 14.

² This is the opinion held by *Esmein*, *loc. cit.*: *Guyot*, see "Hypoth.," *Denisart*, ed. 1768, see "Hyp.," nos. 14 *et seq.*; *Basnage*, p. 110.

³ "A. C., Picardie," p. 90; *Boutaric*, I, 25, 106; "A. C., Bourges," 27; *Beaumanoir*, 35, 3; *G. Durand*, "Specul.," II, 2, 298; "Gr. Cout.," p. 222; *A. Farre*, "De Error pragmat.," 6; *Imbert*, "Prat.," I, 69, 3; *Esmein*, p. 216; *Viollet*, p. 742. (In the States General of 1614 the Third Estate asked that the mortgage should only be created by means of a notarial deed: "Rec. de Lalourcé," XVI, 362); *Nic. de Passeribus*, "De Script. priv.," 1712, p. 99; "Encycl. méth.," see "Hyp.," V, 100.

⁴ "Bret. A. C.," 192; "N. C.," 176 *et seq.*; *Imbert*, *loc. cit.*

⁵ Danger of antedating in the case of deeds under private seal. It is true that the deed under private seal acquired a settled date by means of the counter register, but the mortgage has superseded this institution (established in 1553, done away with in 1588, and re-established in 1693): *Viollet*, p. 738. Cf. *Dumoulin*, on "Paris," 8, 1, 16. — The counter reg-

tive if it were acknowledged in court, and in this case it imported the mortgage, according to a judicial decision which the Ordinance of Villers-Cotterets, 1539, 91, 92, sanctioned. Proof by means of witnesses was not admitted where sums of more than one hundred livres were involved, after the passing of the Ordinance of Moulins, 1566. Under these circumstances one can understand that practice caused the mortgage to be formed exclusively by means of the notarial deed.¹

As to these two views: it is quite certain that during the late stages of our old law the power of execution and the mortgage were to be distinguished from each other; execution was obtained from the court, the mortgage depended upon the agreement. But originally the mortgage was, if one may say so, only a transposition of compulsory execution; it has the same source; thus, a notarial deed which had been drawn up abroad could not give a mortgage upon property situated in France, because executory force was not attached thereto.² Nevertheless the will of the parties is established in a very exact way by virtue of a deed of this nature; the same observation may be made with regard to contracts drawn up before ecclesiastical notaries.³ One is tempted to offer as an objection to this that judgments must have carried with them a mortgage-lien, because they were furnished with executory force, but that this judgment lien did not always exist; it seems to date only from the Ordinance of Moulins. This argument does not seem decisive to us; in fact, the judgment imported from the first a general bond, — that is to say, the power of carrying out execution against the debtor even upon his immovables. When for the bond, properly so called, was substituted the mortgage with the right of levy and of preference, they hesitated to derive it from a judgment; it was necessary in order that it should come into existence that the creditor should have been given the seisin by the lord, and the judgment did not give the seisin; it is only on the day when the system of “public nam”

ister continued to exist in Normandy: *Perrin*, “Orig. des Dr. d'Actes,” 1901.

¹ The bond under seigniorial seal implied a mortgage throughout the kingdom and could not have executory force outside of the lord's domain: *Laurière*, on “Paris,” 164 *et seq.*

² Civil Code, 2128. Nor did judgments rendered by foreign tribunals result in a legal mortgage. As to their executory force, *cf.* “Ord.” of 1629, Art. 121; *L'Hommeau*, 315; *Guyot*, *op. cit.*; *Louet*, II, 15.

³ *Fleury*, “Inst.,” II, 11; *Loyse*, 496. It was the same with judgments of ecclesiastical tribunals.

had been abandoned by the Customary common law that the judgment lien was arrived at.

§ 439. **The Same: Every Notarial Deed Implies a General Mortgage.** — The co-relation between the power of execution and the mortgage naturally led to this result. Moreover, notaries inserted in their deeds the clause by virtue of which the debtor bound all his goods, owned in the present or to be owned in the future. This clause became the rule, and from the sixteenth century on it was implied in every notarial deed.¹

§ 440. **The Same: Judgment Lien (Judicial Hypothec). Every Judgment Implies a General Mortgage-Lien.** — Formerly the creditor who was armed with a judgment was similarly situated to the man who had obtained a general bond. But, when this bond became transformed into a mortgage with rights against third persons and a lien, the judgment no longer produced it, as we believe, because the seigniorial giving of seisin was lacking;² the only lien which the creditor was recognized as having by virtue of a judicial sentence was that which resulted from priority of actions.³ Nevertheless, there was something repugnant in not giving a judgment as much effect as a notarial deed. They began by giving a mortgage-lien to a deed under a private seal which was acknowledged, or even proved, in court, as if it were acknowledged before a notary.⁴ After which the Ordinance of Moulins, 1566, Art. 53, decided that the lien would result from the judg-

¹ *Esmein*, p. 202; *Loyseau*, "Déguerp.," III, 1, 5; *A. Favre*, "De Err. pragm.," I, 3. — Observe a confusion of the personal bond and the mortgage that is due to the archaic conception of the bond: "T. A. C., Bret.," 367, 194; *Boutaric*, I, 25: as soon as the man is bound the mortgage is placed. Cf. the formula, "He who binds himself binds what is his."

² Also the legal mortgage was introduced with difficulty into the countries of public nams: *Louet*, II, 25; Regulating Order of July 29, 1623; "Reims," 180; *Ferrière*, see "Hyp." Cf. *Britz*, *loc. cit.*

³ *Beaumanoir*, 34, 52; "Gr. Cout.," p. 203; "T. A. C., Bret.," 306; *D'Argentré*, on "Bret., A. C.," 188. There was a disagreement as to the fact upon which depended the priority of actions: was it the demand of payment or was it the judgment of condemnation or the execution of the sentence (distrain)? The placing of property under the protection of the law should have been decisive ("Cout. Not.," 5; cf. *Britz*, *loc. cit.*); but during the interval between the sentence and the distrain there was the chance that the debtor might dispose of his property in fraud of the rights of the creditor. Furthermore, the preference which was given the most diligent one had scarcely any reason for existing in equity. After the "Ord." of 1666, *Lemaistre*, "Criées," 32, still maintains that preference should be admitted: *Imbert*, "Prat.," ed. 1625, p. 346. — "Siete Part.," 5, 13, 13: the "pignus giudiciale" is only effective through delivery, thus differing from the "pignus" made by agreement.

⁴ "A. C., Paris," 78 (voluntary recognizance); "Ord." of Villers-Cotterets, 1539, 92, 93 (recognizance or verification); "N. C., Paris," 107 (mortgage of the day of denial); *Imbert*, p. 378. Cf., however, *Favre*, "De Err. pragm.," I, 2; *Pothier*, no. 11; Civil Code, 2123; *Planiol*, "Dr. Civ.," II, 849.

ment itself. This solution was justified by saying that, according to the terms of the Roman laws, the judgment was a quasi-contract between the pleaders; reference was made to the institutions of the "pignus prætorium" and the "pignus ex causa judicati captum"; it was also argued that this would insure the carrying out of judgments.¹ In one sense we may say that the judgment-lien is derived from the mortgage-lien which was connected with notarial deeds; in another sense, it seems that it also had its origin in the lien of the first one to distrain, which disappeared with relation to immovables, being absorbed to a certain extent by the judgment-lien.²

§ 441. **Implied Liens (Hypothecs).** — The old law borrowed from the Roman legislation the principal cases of implied hypothecs;³ certain of them which were given the right of preference have become our liens on immovables.⁴ Although general and

¹ Judgment-lien in the Italian practice in criminal matters in the fourteenth century. It was the same in France, Edict of 1553, 17; "T. A. C., Bret.," 307; *Esmein*, p. 226. Cf. *Imbert*, p. 378 (consequently, in civil matters it is reasonable that such a lien should also come into existence at the time of the contest or of the judgment; this note written before the "Ord." of 1566 proves that the judgment-lien did not yet exist in civil matters). *Ferrière*, see "Hyp.": formerly the judgment only implied a lien from the time of the execution and putting in possession; after the Ord. of Moulins it comes into existence the day the judgment is pronounced.

² There is a great deal of discussion as to the worth of the judgment-lien in the existing law (cf. the Belgian system, Prussian system, etc., in *Planio*, "Dr. Civil," II, 848), but it is unanimously recognized that the framers of the Civil Code were lacking in logic when they attached a mortgage to private deeds acknowledged at law, while at the same time they did not admit the old mortgage arising from notarial deeds.

³ Some are general, others are special or limited to certain property. The majority of them have been borrowed from the Roman law. Lien of the wife over the possessions of her husband, of the minor or of the man deprived of civil rights over those of the guardian or the custodian, of communities, etc., over the possessions of their assignees or administrators (Civil Code, 2121), of the treasurer over the possessions of his debtors (liable for taxes, contract debtors and accountable agents: "Cout. Not.," 131; *Desmares*, 191, etc.; cf. Law of Sept. 5, 1807, privilege of the treasury, etc.), of the vendor over the property sold, of the coparcener, of the architect (liens, Civil Code, 2103), and of a legatee (Civil Code, 1017). — There is already some question of them in the texts of the fourteenth century: "Montpellier," 12; "Cout. Not.," 20, 62; *Desmares*, 94, etc.; "Gr. Cout.," 2, 17. — In the case of the Sale for a Term of immovables, *Ferrière*, on "Paris," II, 1331, remarks that jurisprudence changed in 1628; the Romanists maintained that by giving credit the vendor renounced every right over the land sold unless a special agreement were made to the contrary; this agreement, which became very common, must in the end have been implied: "Cout. Not.," 141, 159; *Pasquier*, "Inst.," p. 256. In 1207, in the South, the vendor's "obligatio" on lands sold to cover the unpaid purchase price: *Pasquier*, "Doc. rel. à la Seign. de Boussagues," p. 59 (1901).

⁴ As to Liens in general, see *Ferrière*, *Guyot*; *Pothier*, 26; *Domat*, 3, 1, 5; "Code civ. interm." At Rome liens assumed a competition between contract creditors (Dig., 42, 5, 32: "privilegia . . . ex causa"). Our old

secret, implied liens were admitted in countries of public nam, where their validity was not subjected to any formalities.¹

§ 442. **Consequences of the Mortgage.** — These are ordinarily reduced to three: the right to realize by a *sale*, the right against *third persons* taking under the debtor, and the *right of lien* against other creditors. — (A) In default of payment the mortgage creditor does not acquire the ownership of the land mortgaged; as a general rule, he does not even sell it through a friendly transaction;² he finds himself under the necessity of having a **land distraint** or **judicial sale** carried out just as though he were a creditor by simple contract. Under this early form of the bond, the mortgage only conferred upon him, in fact, the right to distraint, and the practices of the expropriation of the pledge or the friendly sale did not offer sufficient securities for the debtor. Thenceforth the **debtor's surrender** of the immovable loses its usefulness; the third party in possession may surrender in order to escape from the annoyance of the procedure to remove encumbrances.³ — (B) When the creditor proceeds against a third party in possession, the latter can ordinarily set up the **plea of seizure and sale** against the creditor, — that is to say, he can oblige the creditor to distraint and to sell the possessions of the debtor. But, as during the delays necessary for this operation the mortgage may be barred by prescription, he is allowed to sue on a "declaration of mortgage," so as to stop the running of the prescription. The latter takes

authors, when they borrowed from the Roman law the majority of its reasons for preference, qualified them as liens without concerning themselves as to the basis of these preferences: "A. C., Anjou," II, 514; "Toulouse," 111; "Siete Part.," 5, 13. (Cf. liens of the English law.) They distinguished between: (a) special liens over immovables, true privileged mortgages; *Pothier*, no. 33; "Proc. Civ.," no. 648; (b) special liens over movables based upon the idea of an expressed or implied pledge; the right of **Detainer** may be likened to them ("Ord." of 1539, 97; 1566, 52; 1667, 27, 9), although the Roman traces of the defense of fraud here prevented the formation of a very clearly defined theory ("N. R. H.," 1884, 351); (c) general liens bearing at one and the same time upon movables and immovables (costs, funeral expenses, salaries, claims of the treasurer); they depended upon the nature of the claim. Cf. *Planiol*, "Dr. civ.," II, 753 *et seq.*

¹ *Loysel*, 498.

² The early relinquishment released the debtor just as giving up released the copyholder. Cf. exceptional cases in which the old law was kept up: *Argou*, 4, 3. Clause of avoidance: *Stobbe*, II, 311. English mortgage: 1st. The creditor keeps the property bound by means of an action of foreclosure; 2d. The tribunal may, if it prefers, order the sale of the property; 3d. The creditor may be authorized by a clause in the deed to sell the property himself without further formality. In all cases the intervention of the law is required in order that the creditor may keep the property: "Once a mortgage, always a mortgage."

³ *Ferrière*, see "Hyp.," *Britz*, p. 953. Cf. *Kohler*, "Pfandr. Forsch.," p. 22.

place at a period of from ten to twenty years for the benefit of the third party in possession. — (C) Between mortgage creditors **preference** is regulated according to the date of the mortgages: *The first come first* (excepting for special liens).¹ The transfer of claims or payment with subrogation can give a third party the rights of the original creditor.² It may also happen that his own mortgage is encumbered with other mortgages, and this frequently takes place with a system of general mortgages like that of the old law; the **rank** then becomes complicated with **sub-ranks**, that is to say, that the sum for which the creditor has been marshaled is distributed between his own creditors according to the date of their mortgages.³

§ 443. "**Clearance.**" — Most lands were encumbered with mortgages, because every notarial deed implied a general mortgage over the possessions of the debtor, and, as there was nothing which told of its existence, the most careful purchaser ran the risk of finding himself evicted by a mortgage creditor who was unknown even to the vendor; and this might happen after a long period. Under these circumstances dealings in immovables became almost impossible. The evil was remedied by the *clearance*, or power of the purchaser of a piece of property which had been mortgaged to free it from the mortgages which encumbered it by paying the purchase price to the creditors, after having put them in default by giving them notice; this was done by means of certain formalities, and foreclosed them if they did not present their claims at this specified time. They were reimbursed in spite of themselves, but general expediency required this sacrifice on the part of private interests. This clearance was invented by the practitioners. Having found that the compulsory decree cleared off the mortgages, they contrived a feigned proceeding of distraint in order to obtain this same result: the purchaser had an understanding with a third party, who presented himself as a creditor and dispossessed him from the land which he had purchased. This resulted in the **voluntary decree**, so called because the parties both

¹ Roman rule: "Prior tempore potior jure"; *Loysel*, 492, 686. The same in English law (excepting "soudure" or consolidation of mortgages).

² As to subrogation except in the case of the married woman's mortgage, *cf. Beudant*, "R. crit.," XXVIII, 30.

³ The sub-ranks were abolished because of the expenses and the delays to which they gave rise (Code of Civil Procedure, 775), but if a mortgaging of the mortgage is no longer admitted in our law, practice has introduced assignments or subrogations of mortgages which have pretty nearly the same result with this slight difference, that they do not give rise to the proceedings of sub-orders.

agreed to obtain it.¹ The procedure there employed did not differ from that of the compulsory decree (excepting in what concerned the judicial lease, which obviously did not apply); it produced the same effects. But it was only at the price of excessive delays and great expense that the clearance was arrived at in this roundabout way. Once the institution had been accepted, the interminable preliminaries of land distraint were gotten rid of, and in their place was substituted the more simple procedure of **letters of ratification**.² The Edict of June, 1771, which regulated this procedure, gave the purchaser a means of causing the expiration of the mortgages by obtaining from the Chancery letters which ratified the purchase; the creditors who thought that the price was lower than the value of the property were given an opportunity to offer opposition by means of certain formalities and to outbid this price; if this were not done, the letters were delivered, and then their mortgages were cleared off.³ It is this Edict of 1771 which created the "conservators of mortgages," whose duty it was to hear these objections.⁴

§ 444. **Revolutionary Law.** — There are two principal defects for which the system of mortgages of the old law may be reproached: the secret character of the mortgage, and the great number of general mortgages. Colbert, in an Edict of March, 1673, which was repealed almost as soon as it was passed (April, 1674) attempted to introduce publicity, — that is to say, light, into the chaos which the old system of security on real property presented. The nobility, fearing to lose its prestige, was opposed to this useful reform; families did not, any more than the State, wish to have their income and expenses known.⁵ That which royalty had not

¹ "Ord." of November, 1441 (*Isambert*, IV, 86): clearing off of rents on houses in Paris.

² Origin (see *Ferrière*): rents on the Hotel de Ville in Paris could be mortgaged; he who bought them paid them off first of all by means of a forced decree and by virtue of an Edict of March, 1673, by obtaining letters of ratification under the Great Seal (that is to say, from the Chancery, and not from the Parliament).

³ As to the procedure, cf. Civil Code, 2193 *et seq.*; Law of the 11th Brum., year VII.

⁴ Bibl. in *Camus*, No. 1665; Commentaries or Questions upon the Edict: *Masuer*, "Obs.," 1779; *Brohard*, 1780; *Grenier*, 1787; *R.*, 1785; *Corail de Ste.-Foy*, 1785.

⁵ Previous to this, cf. Ord. of 1424 of Henry VI (*Isambert*, VIII, 693, Art. 6), Edicts of 1553, 1581, 1606 (fiscal measures). Cf. The Edict of August, 1626, with regard to Brittany: *Girard de Joly*, "Offices," I, 212 (registration clerks). The "Ord." of 1673 created in the principal bailiwicks a registry office where creditors should make themselves known by bringing forward claims; persons setting up claims were preferred to those who did not do so.

had the courage to do, the Revolution found itself under the necessity of carrying out as a consequence of the disturbance of business caused by political events.¹ By means of two celebrated laws it attempted to establish a rational system of mortgages. The first, and the most original, the **Law of the 9th Messidor, year III**, allowed the owner of a piece of land to take a mortgage on himself, for ten years at the most, and up to the amount of three-quarters of the merchantable value of the land; the deed drawn up by the conservator of mortgages was called an **acknowledgment of mortgage**; this could be transmitted by way of endorsement and constituted an executory title for the benefit of the bearer. This law remained a dead letter.² The **Law of the 11th Brumaire, year VII**, did away with this institution, the prime feature of which sprang from the theory of rent-charge and the custom of "assignats" which was so greatly condemned.³ It gave as the bases of security on real property the two principles of publicity and specialty. The publicity took place, not by the copying of the deed, as in the case of the transfer of ownership, but by the entry upon a public register. The entry, which was necessary for every mortgage without any exception, had to be specific with relation to the debt and specific with relation to the immovable which was mortgaged, — that is to say, it had to indicate in a precise manner the amount of the debt and it had to specify the immovable, so that the real credit of the owner could be exactly calculated. The Civil Code made the mistake of not strictly upholding the logical unity of this system, so much so that during the entire nineteenth century it has been necessary to contemplate a recasting of the title on Liens and Mortgages; this was only partially realized by the Law of March 23, 1855. — Abroad, the very best result has come from the **German system of mortgages**,⁴

¹ As to the cadastral survey, cf. Declaration of Nov. 23, 1765: *Béquet*, "Rép. de Dr. adm."; see "Gr. Encycl." In our own time there has been some thought of making use of the cadastral survey, not only for the laying of taxes, but for the strengthening of ownership (cf. *Flammer, Besson, op. cit.*). The Convention had contemplated creating a Great Book of territorial ownership: Declaration of the 8th Pluv., year II (not carried out).

² Prorogued by the Laws of the 26th Frim., 19th Vent., 19th Prair., 24th Therm., year IV; finally suspended by the Law of the 28th Vend., year V. — "Codes Tripiet," ed. *Monnier*, under Art. 2124 of the Civil Code, see a model for an acknowledgment of mortgage.

³ One read, for example, on an assignment: "Assignment for 50 livres. Mortgage on the national domains." — As to rents and the mortgage, cf. *Heusler*, II, 151; *Stobbe*, § 104.

⁴ *Sohm, op. cit.*; *Viollet*, p. 747 (bibl.); *Huber*, § 157; *Besson*, "Livres fonciers," 1891. — Cf. pledge letters of credit on land in France.

with its principle of legality; its conservator, who is a true judge, and who passes upon the declarations which are made to him; its land registers ("Grundbücher") kept by parcels, and not, as ours are, by names of persons; its letters or acknowledgments of mortgages; its notes on real property; and its negotiable drafts on real property, which are like commercial goods. It had its origin in the "neue Satzung," and in the theory of rent-charges; in various ways it recalls the Law of Messidor, year III.¹

¹ Law of May 5, 1872; German Civil Code, 1113.

CHAPTER FOUR

INTESTATE SUCCESSION AND GRATUITOUS CONVEYANCES

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TOPIC 1. GENERAL IDEAS

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cession.

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§ 445. **Preference for Intestate Succession.** — Intestate succession was the only one known to the old Germanic law, and if the will has come to take a place beside it, it has not ceased throughout the Middle Ages, and even until our day, to have a certain superiority over the will. This Germanic trait had struck Tacitus ("Germ.," 20) by its contrast to the Roman habits; at Rome no honorable citizen dies without having made his will. In Germania the free man has no conception of this act. The formulæ of the Middle Ages, "The appointment of an heir cannot be done," and "Deus solus heredes facere potest," attack the Roman principles scarcely less, because the will in Rome is before everything else a means of creating heirs for oneself. Whence comes this lack of wills in the Germanic custom, and in the later law the disfavor for an act which is so natural in our eyes? It is because it was incompatible with the old ideas of family joint ownership, and of the preservation of possessions in the family. The will substitutes the wish, or even the caprice, of the individual for the traditional usage, and the shortsightedness of a man for the wisdom of generations. By choosing his successor to please his fancy

the head of the family runs the risk of upsetting the formation of this group, which existed before him, and whose stability in the primitive social state is a question of life and death for the individuals who go to make it up. Privileges, such as the preference of males, and, to a lesser degree, the right of primogeniture, have their "raison d'être" in the superior interest of the group.

§ 446. **Various Kinds of Succession.** — Succession under its primitive form is limited to that narrow circle of persons who constitute a household, to those relatives who have lived with the deceased under the same roof, at the same table, and who can be likened to the Roman "sui heredes." If there were not any of these, the possessions of the deceased returned originally perhaps to the community of the village ("vicini"); following this, to the relatives who did not live in a state of community with the deceased, to the lineage, to the "Sippe"; in this case they devolved not exactly by taking into account the nearness of the relationship, but by way of *consanguinity*. By this is understood groups of relatives who have a common ancestor. Thus the deceased and his descendants form a first degree of consanguinity; the father of the deceased, and all those who descended from him (consequently, the brothers of the deceased, etc.), a second degree; the grandfather and his posterity, a third degree; and so on and so forth. To relationship through the males (or agnatic) was contrasted relationship through the women (or cognatic); under the system which excluded women from inheriting, the mother did not transmit anything to her son, and the maternal relatives or cognates could not set up any claim to the succession of the latter. From the day when women inherited it was possible to distinguish in the patrimony of every decedent between two masses, — the mass of possessions coming from the father or from the paternal line, and the mass of possessions coming from the mother or from the maternal line. The majority of the Customs practised what is called "division" in the succession of the deceased, and conferred the paternal possessions on his paternal relatives and the maternal possessions on his maternal relatives, "paterna paternis, materna maternis." Some of them went even further and proceeded to a redivision in each one of the successions which were thus established; for example, the paternal possessions were subdivided among the paternal relatives and the maternal relatives of the father of the deceased.

§ 447. **Plurality of Successions.** — The old law, as we have seen, sought for the origin of possessions in order to regulate their

devolution by way of inheritance; it also depended upon their character in such a way that each category of possessions gave rise to a distinct succession; at the death of a person his patrimony was disintegrated, and each fragment followed its own law: fiefs, copyholds, servile tenures, allodial tenures, movables and immovables, personal belongings and acquests, homestead ("lar" in the Pyrenees or "Hantgemal" in Germany), clothing and ornaments of the women ("rhedo" in the barbarian laws, "Gerade" in the German law), arms and military equipment ("Heergewäte," German). All these possessions had their particular destination and were subject to rules which conformed with it. The unity of the patrimony and the perpetuity of the person of the deceased by the heir, — these fundamental principles of the Roman system of succession were with great difficulty introduced into our old legislation; and, moreover, they were never entirely admitted; the possessions of noble families had always their own special system, even in the countries of written law; and in the countries of Customs, besides this, the succession of personal belongings is contrasted with that of acquests and movables. Loysel could still say while alluding to the Roman distinction between the "pagani" and the "milites," "The French, like warriors, have received various patrimonies and various sorts of heirs from the same person."

§ 448. **Countries of Written Law.** — Apart from the exception which we have mentioned with relation to the possessions of the nobility, community of succession is the rule in countries of written law, and possessions devolve upon the relatives in conformity with the probable intention of the deceased. It is the nearest relative who receives them on principle, because it is he for whom the deceased had the most lively affection. Privileges in the interest of the family were effaced because of this new consideration. The very simple system which was organized by Justinian in the celebrated "Novella," 118, is applied. In countries of Customs the tendency to follow the principle of presumed affection makes itself felt only in the case of succession to movables and acquests. As far as the other possessions are concerned, which are often the most important of all, the guiding principle is the keeping of property in the family. The Revolutionary legislation unified the system of successions by establishing the equality of all possessions and the equality of persons; distinct masses were no longer separated according to their nature and their origin; they were all made alike, and privileges such as the right of primo-

geniture or the right of the male line were abolished. However, one can say that the system of succession under the Revolution was frankly individualistic; the traditional right of the family is shown in the classification of heirs and in the tremendous restrictions upon the right of making gratuitous conveyances.

§ 449. **Reservation and Legal Share.** — The right of the relatives over the family possessions is not only shown by the power to collect them by means of intestate succession, that is to say, after the death of their actual owner; it is also shown during the lifetime of the latter. Thus, certain barbarian laws recognized the partition of the community inheritance between the father and the children during their lifetime, — a partition a curious example of which is furnished by the parable of the prodigal son. Another application of this is found in the giving up of possessions of which the German “Evelganc” seems to be a very old form, and which the Civil Code has disguised under the name of “partition among ascendants.” The family communities, or “Ganerbschaften,” the carrying on of the conjugal community between the surviving spouse and the children born of the marriage, the rights of the children over the dower of their mother, and entails in trust, also bear witness in various ways to the power of the old idea with relation to the formation of the family. But it is especially in the institution of the repurchase by a person of the same lineage and the hereditary reservation, which are so widespread, that the rights of the relatives come to light. By these means the possessions of the family become almost incapable of being disposed of to the advantage of the family. The Roman legal share, which took its place alongside of the reservation in countries of Customs, and which alone obtained in countries of written law, has an entirely different object; it is established “by reason of compassion,” it is a kind of provision for support left to the very near relatives.

§ 450. **Gratuitous Conveyances.** — In the old Germanic law adoption was undoubtedly the only means at the disposal of individuals for transmitting their patrimony at their decease to people other than their relatives; nevertheless, it was possible only for a person who had no posterity to do this. From this arose the appointment of an heir in the Salic Law, which was already no longer an adoption, but which produced analogous results. It seems as though it had been supplanted by “*donationes post obitum*,” which were very frequent after the seventh century, especially in favor of the Church. To these institutions are re-

lated the covenants on a future succession of the feudal and customary periods. They operate especially in contracts of marriage, where they have served until our day to facilitate family arrangements. Everywhere else the will has replaced them. It came into practice under cover of and in order to assist religious ideas. The archaic "share of the dead" of pagan times, consisting of horses and arms, which were closed up in his tomb, or were cremated with him, has its counterpart in the disposals "*pro remedio animæ*" of the Christian period. These pious legacies or charges of a religious character constituted at first the entire will. As it was to be feared that the natural heirs would not show a very great zeal in carrying out the last wishes of the dead, because these wishes would result in depriving the heirs of the property on which they had counted, the execution of these wishes was confided to third parties who were disinterested, "*erogatores*," "*eleemosynarii*," and, finally, to testamentary executors, in whom are ordinarily seen the successors of the intermediaries who were charged with a similar rôle in the appointing of an heir. The Roman will marks the last stage of evolution; it includes disposals of every kind, and charges "*pro remedio animæ*" have lost a good deal of their importance. One can say that this act, which was formerly entirely religious, tends to become secularized. But, although the use of the will was widespread, the legatee could not be compared with the heir at law, — at least, in countries of Customary law: the former was only a legatee, a successor to the property, whereas the latter perpetuated the person of the deceased. These formulæ are significant in spite of their exaggeration. They help us in understanding the small degree of favor which the right of disposal by will met with in the Revolutionary legislation, and certain superannuated provisions of the Civil Code have no other derivation. This did not prevent the theorists of natural law, such as Grotius, following the example of the Romans, from looking upon an intestate succession as the will of a person who had not made one. On this point, as on a multitude of others, they took the opposite view from the historic truth.¹

¹ Variations and controversies abound in the history of the law of succession; the work of criticism is not yet sufficiently far advanced for one to be able to trace its design from the origin up to our time in exact and certain characteristics. We are not attempting to conceal from ourselves either the imperfections or the gaps in the outline which we here give. One will only too often find in it the reflection of the uncertainties that are presented by the origin of the family and that of ownership; for the system of succession has especially depended upon the formation of the family and the organization of ownership.

TOPIC 2. INTTESTATE SUCCESSION. VARIOUS KINDS OF HEIRS

§ 451. The House and the Lineage.	§ 460. The Same.—(A) Nearest in Degree.
§ 452. (I) The House.	§ 461. The Same.—(B) Privilege of the Double Tie.
§ 453. (A) Privilege of the Male Line.	§ 462. The Same.—(C) Representation.
§ 454. (B) The Right of Primogeniture.	§ 463. The Same.—(D) Devolution.
§ 455. Lack of Representation.	§ 464. The Surviving Spouse.—(A) Countries of Written Law.
§ 456. (II) Lineage (Ascendants and Collaterals).	§ 465. The Same.—(B) Countries of Customs.
§ 457. Succession to Personal Belongings.	§ 466. Irregular Successions.
§ 458. Ascendants.	§ 467. The Revolutionary Law.
§ 459. Collaterals.	

§ 451. **The House and the Lineage.**¹—The French law in its last stages distinguishes between three kinds of heirs: descendants, ascendants, and collaterals. If these are all lacking, then the inheritance passes to the surviving spouse and to the Treasury. But this classification of heirs-at-law is borrowed from the Roman law; it does not conform with the old Customary law and with the law of the barbarian period. As to this archaic legislation, in which the idea of presumed affection plays no part, one can say that the right of inheriting belongs: 1st. Primarily, to those who form a part of the same family community, that is to say, as a general rule, only to the descendants of the deceased (*heirs of the body*) upon the condition that they live with him.² 2d. Secondarily, to

¹ Cf. *Beaumanoir*, "Assises," etc.: (a) descent in the direct line; (b) escheat in the collateral line: "Const. Chât.," p. 43; *Du Cange*, see "Escæta"; *Pollock and Maitland*, I, 332.

² To the family community belong above all others sons and daughters and generally descendants of the head of the house; but it may also include his mother, his wife, his sisters, sometimes even the sisters of his father or those of his mother; the presence of brothers or uncles in it is rare, for most of the time they leave the paternal house in order to establish themselves elsewhere. The group of women occupies a peculiar position. As to male descendants, they may be qualified as "*sui heredes*" in the Roman sense; in fact, they derive their right of succeeding less from their quality of relatives than from that of being members of the community. This is so true that they no longer inherit if they have been emancipated or expelled from the house, "*foris familiati*"; that certain legislations call the brothers of the deceased to the inheritance to the exclusion of his sons, — no doubt because these brothers belonged, at least in the old times, to the same household and occupied because of their age a higher position (Ottomans, Irish "*tanistry*"; *post*, "*Representation*"); again, this is so true that in certain legal systems, — for example, among the "*Burgundians*," I, 24, 51 (cf. India, Hungary: "*N. R. H.*," III, 445; parable of the Prodigal Son), the sons have a right to demand partition of the family patrimony during the lifetime of their father: *Schroeder*, pp. 324, 326.

his lineage, that is to say, to his ascendants and collaterals,¹ to those who form a part of the same league organized for mutual defense, but who do not live in the same house.² Such is the ordinary system of succession according to the Germanic and Customary law.³ But its application was often impeded by the feudal theories. Thus, the succession to fiefs was not freely admitted from the very beginning; it was only with difficulty that descendants (other than sons) or collaterals were allowed to partake of it;⁴ the wishes of the lord imposed special rules upon it. In case of lands in servile tenure, mortmain was for a long time a great obstacle to the right of the family. This right was not finally exercised with its full freedom excepting over villein tenures; moreover, some exceptions must be made to this.⁵

§ 452. (I) **The House.**—**The** (lawful) **Descendants**⁶ of the deceased inherited in preference to all other relatives. The family of which he was the head was perpetuated by them, sometimes by forming a more extended community with more members, sometimes by being divided up into colonies surrounding the homestead, which was ordinarily given to the eldest son.⁷ Equality between descendants of all ages and of both sexes,—such could be the formula

¹ It is not without difficulty that the lineage has come to be preferred to the "vicini" or to the treasurer: Edict of Chilperic, "Fris.," 19, 2; *Schroeder*, p. 324; *Ficker*, II, 375; *Geffcken*, p. 270.

² Cf. the part played by the family in private vengeance, or the payment of the "Wergeld" and its rights in matters of succession: *Heusler*, II, 522; *Brunner*, "Sippe u. Werg. Add.," *Gierke*, "Genossenschaftsr.," I and II.

³ Right of succession of the barbarian period: "Sal.," 59 and "Cap. extr.," 7; "Rib.," 56; "Fr. Cham.," 42; "Alam.," 57, 95; "Fris.," 19; "Sax.," 41 *et seq.*; "Thur.," 26-34; "Burg.," 14; 24; 51; 53; 75; 78; "Roth.," 158, 181, etc.; "Liut.," I, 65; "Roth.," 153; "Quæst. et Monita," § 4 (Salic Law) and § 31 (Lombard Law); "Tract. de Ord. Success. ab int. sec. Jus. Langobard." ("M. G. H., L. L.," IV, 605).

⁴ The Constitution of Conrad II, 1037, for Italy, which was the point of departure for the theories of succession of the "L. Feudorum," secured the fief to the posterity of the vassal: *Heusler*, II, 613.

⁵ Details in the Commentaries on the "Libri Feudorum." Numerous treatises on feudal law, cf. *Camus and Dupin*, "Tract. jur. univ.," X; *Struwe*, *Rosenthal*, *Goetzman*, *Lünig*, etc.; *Pfiser*, "Lehensfolge," 1818; *Michaelis*, "De Ord. succed.," 1818; *Homeyer*, "Sachsensp.," II, 2, 444; *Heusler*, II, 610; *Stobbe*, § 315; *Pertile*, § 131; *Brünneck*, "Z. Gesch. d. Grundeig. i. Preussen," 1895; "Z. S. S., G. A.," 1898, 210; *Pollock and Mailland*, I, 228; *Glasson*, VII, 463.

⁶ See Chapter I, Topic XI, § 169 *ante*. See especially Lombard and Wisigothic laws; *Pertile*, 4, 65 (Italy); *Dahn*, "Westg. St.," 131; *Stobbe*, § 295; *Schroeder*, 302. Succession to estates of intestate bastards, cf. *Beaumanoir*, 18; "Glossaires" and "Répertoires"; *Loysel*, see Table. Treatises upon the Domain, etc.: *Viollot*, 844 (the mother's succession: "Cout. loc. d'Arras," 1744, p. 196, etc.); *Britz*, 687; *Kowalewsky*, p. 219; *Chaisemartin*, p. 413 ("ebenbürtig"); *Thévenin*, "Textes," no. 35a; "Siete Part.," Table, see "Spurius."

⁷ Cf. the "stock-family" of Lavedan: "N. R. H.," 1900, 601.

of modern law, which was in harmony with the foundation of the modern system of inheritance and with the idea of the presumed affection of the deceased. The old law is, on the contrary, a system of inequalities and privileges, which are not arbitrary, as is sometimes said, but which are necessary because of the superior interest of the family. The principal ones are, (A) privilege of the male line, (B) right of primogeniture, and (C) exclusion of the grandsons (all of which were done away with by the Revolution).

§ 453. (A) **Privilege of the Male Line.** — In an age of violence like the barbarian period, the physical weakness of women had the consequence of making them incapable of inheriting; to inherit was a privilege (if one can call a privilege the right to pay with one's blood), for those who fought and who alone were fit, with the lance or the sword, to protect the property of the family.¹ If women, when they married, passed into another family, they could not take with them any portion of the paternal patrimony, and, as the ties which united them to their natural family were broken, their descendants found that they had no more rights than these women. — Such must have been the old Germanic law, at least under the system of the patriarchal family.² Tacitus does not mention the succession of women. Certain barbarian laws, like the one called that of the Chamavian Franks, 42, and the Law of the Thuringians, 6, refused to give the daughters any right over the land as well as over the domestic animals and the slaves which should naturally have belonged to them; their brothers excluded them, — even, according to this latter law, the family relatives to the fifth degree. After this degree was passed the inheritance fell into the female line.³ Women were left, as though by a kindness, their clothing and their ornaments, which could not be of any use to the men ("rhedo," "gerade").⁴ If there were no

¹ Cf. other persons under a disability, — the infirm, monks.

² Cf. other legislations: *Post*, I, 222; *Simon*, "La Cité Chinoise," p. 48 (1891); *Paturet*, "Cond. de la Femme dans l'anc. Egypte"; *Daresté*, pp. 62, 74, 112, 227, 258, 273, 314. It was Mahomet who introduced the succession of women among the Arabs. About 150 years ago, despite the "Koran," the delegates of the Kabyle Confederations pronounced in a final manner the exclusion of women from successions: *Jobbé-Duval*, "Thèse," p. 160 (1874); *Lehr*, "Dr. Civil Russe," I, 393.

³ "L. Thuring.," 6; *Heusler*, II, 604.

⁴ There are certain possessions which women receive in preference to men because these possessions can only be used by them, and the converse is true. From this there arise special kinds of succession, about which, however, there is hardly any question excepting in Saxony: *Chaisemartin*, 392. — (A) "**Heerge-wate**" ("vestis bellica"). The armor is kept for the nearest male agnate: "L. Thur.," 31; "Sachsensp.," 1, 27, 2; 22, 4. This was extended to other

male descendants, then how should the daughters be treated? Two solutions were possible: make them serve to re-establish the male line, as in the Athenian custom of leaving girls as heirs in default of male issue,¹ or the "Erbtochter" of the German law;² or else leave them out of the succession entirely. Perhaps it was this last course which was resorted to originally, especially in the case of land, so as to leave the field free for the right of the "vicini," or that of the people of the same lineage. But, little by little, the right of the daughters was strengthened against the others as a consequence of the Roman and Christian influence, and, again, as a consequence of the disintegration of the agnatic family; and, as a consequence of this, the maternal relatives took part in the succession alongside of the paternal relatives. It is at this stage of evolution that the Salic Law seems to have arrived in its Title 59, which is so much discussed, and where the question of succession "de alodis"³ is involved. This Title, which is an addition to the tariff of compositions given in the early Custom, had as its exclu-

objects, — for example, tools, books: "Preuss. Landr.," 2, 1, 523; *Grimm*, 582. — (B) "**Gerade**" (clothing and ornaments used by women). The daughter, and, if she be dead, the nearest female relative, are the only ones who have a right to them: "L. Thur.," 32, 38 ("rhedo"); "Burg.," 51 (14, 6): "mala hereda," meaning "nuptialia ornamenta." According to Gaupp, the "materna hereditas" of the "L. Franc. Cham.," 42, was nothing more than the "Gerade": *Heusler*, II, 577; *Froideveaux*, "La Loi dite des Fr. Cham.," p. 135; "Sachsensp.," I, 27. Extension: *ibid.*, I, 5, 3; III, 38, 5. — If there are no relatives who are qualified to take them, both of these kinds of possessions come to the judge: "Sachsensp.," I, 28; *Heusler*, II, 617; *Stobbe*, V, 130; *Picker*, 1018. — In ancient India the daughters inherit nothing but the ornaments and clothing of their mother.

¹ *Beauchet*, "Dr. privé Athén.," I, 398. *Dareste*, p. 26: among the Hebrews, girls who are heiresses are married by their nearest male relatives, in order to prevent their family from becoming extinguished: "Ruth" iv, "Numbers" xxxvi.

² *Schroeder*, 777.

³ *Tacitus*, "Germ.," 20: "sororum filiis idem apud avunculum qui apud patrem honor. Quidam sanctiorem arctioremque hunc nexum sanguinis arbitrantur et in accipiendis obsidibus magis exigunt . . . Heredes tamen successoresque sui cinque liberi, fratres, patrueli, avunculi." "Sui" does not mean his own heirs. "Liberi" and "fratres" include neither the daughters nor the sisters. As to the paternal and maternal uncles, they seem to be placed in the same line: *Brunner*, I, 80; *Amira*, "Erbenfolge," 219; *Schroeder*, 71. Order in the "L. Sal.," 59: mother, brothers and sisters, mother's sister, the nearest maternal relative ("L. Emend.": father and mother, brothers and sisters, father's sister, mother's sister, the nearest relatives of the paternal line). Cf. "Sal.," 44 (right to the "reipus"): eldest son of the sister, eldest son of the niece, son of the maternal cousin, uncle who is the mother's brother. "Sal.," 58 ("de chrenecruda"): father and brothers, the nearest three in the maternal line and the nearest three in the paternal line: *Geffcken*, p. 223 (bibl.); *Heusler*, II, 524; *Dargun*, "Mutterrecht," pp. 60, 153; *Opet*, *op. cit.*; *Amira*, p. 25; *Brunner*, "Z. S. S., G. A.," III, 41; see also, *A. del Vecchio*, "Lo zio Materno," 1891; *Pollock and Mailland*, II, 238; *Glasson*, III, 153.

sive object the fixing of the rights of inheritance of the maternal relatives. They are classed in the following order: 1st, the mother; 2d, the brother or sister born of the same mother; 3d, the sister of the mother; 4th, the nearest maternal relatives after the former.¹ It is quite natural to assume that this classification was borrowed from that of the paternal relatives, so that the two groups of heirs called upon to divide the succession would be symmetrical. Nothing is said about the paternal relatives because their rights were not contested; but the scribes to whom we owe manuscripts which give a more recent text of the Salic Law thought it would be a good thing to show the paternal and the maternal relatives together (cf. "lex emendata"). They limited themselves to reserving land for the paternal line ("virilis sexus") and in the latter to the brothers of the dead (brother of the whole blood or brother of the same blood): "de terra viro in muliere hereditas non pertinebit." Title 59 says nothing on the subject of the daughters of the deceased; it assumes that the latter has left no posterity ("si filios non dimiserit"); everything would lead one to believe that they were excluded by their brothers, not only from the land, but even from the entire succession, with the exception of the "ornamenta muliebria" (cf. "L. Fr. Cham."); if there were no sons the daughters undoubtedly took the other possessions, but not the land (cf. "L. Rib. Thur."). The exclusion of women, which was at first absolute, was soon restricted to that which was later on called the

¹ The inferior status of women, which was commonly admitted until quite recent times, has just been brought up for discussion again, — especially by the partisans of the matriarchate. They base their arguments on Title 59 of the Salic Law (Dargun, Heusler, Opet, Ficker). But it is difficult for them to explain why the maternal uncle has gradually ceased to be mentioned, and why the brother of the deceased succeeds with his sister; it is also singular that we do not find the matriarchate in the order of succession which is told of by Tacitus. Among the Lombards and the Visigoths it is well established that the right of women progressed by becoming better developed. In the Visigothic law especially the equality of the sexes is of recent date (which weakens M. Glasson's recent remark that the oldest barbarian laws treat women better than the more modern ones): Code of Euric, 320; "Wis.," 4, 2, 1, 9; Zeumer, "N. Arch.," 26. Preference of males in the Anglo-Saxon law and in the "gavelkind" of Kent: *Pollock and Maitland*, II, 258. The interpretation of Title 59 of the Salic Law which we borrow from *Brunner*, "Z. S. S.," 1900, "G. A.," 1, is ingenious, but rather on the order of guesswork, and is open to a serious objection: why grant a privilege to the father's sister and to the mother's sister? "Rib.," 56. Perhaps because they have not left the house, whereas the brothers have gone away from it. Cf. the Lombard law. But this should have been specified. Let us observe that the Customary law sometimes grants the daughters privileges in the succession or in the marriage portion of their mother: *Pertile*, IV, § 126 (succession of women). Cf. "L. Fr. Cham.," 42; *Froideveaux*, p. 135 (various interpretations); Law of Burchard of Worms, c. 10 (in 1024).

personal belongings of the succession as contrasted with the acquets of immovables.¹ Also, while the older text of the Salic Law only contained the word "terra" by itself, we read in the later texts "**terra salica**," an expression the original meaning of which is very doubtful,² but which certainly in the seventh and eight centuries is synonymous with "**terra aviatica**" (land of the ancestors, "avi"), as is said in the law of the Ripuarians, 56, 4, in a provision which corresponds to that of the Salic Law, and which may be considered as the official interpretation of the latter, — at least as applying to the period of its redaction. Finally, the Edict of Chilperic, in 596, decided that daughters should inherit the land if there were no sons, sisters if there were no brothers, in such a way as to exclude the "vicini," and also undoubtedly the more distant collaterals.³

¹ According to *Heusler*, II, 578, the privilege of the male line was extended in Saxony and was applied even to acquets and cattle, and to agricultural implements as being accessories to the land. In the South of Germany, on the other hand, the principle of the equality of the sexes was admitted, excepting in the case of the "Ansedel," "Hantgemal." Thus among the Alamans ("Schwabensp.," 128, 148a); in time the privilege of males over the dwelling house became a right of primogeniture or a household right ("Berne," 1614, 2, 12, 6). On the "Handgemalgut," cf. *Heusler*, I, 232. "Handgemal" means "Hand Zeichen" (manual sign, "chirographum"), and "Stammgut," *Schroeder*, 432.

² Outline and bibl. in *Geffcken*, p. 226: *Du Cange*, see "Fusus." Various opinions: 1st. "Terra salica," just as one says "lex salica," has the same meaning as "terra" in general. The Edict of Chilperic says "terra," and nothing more: *Dareste*, p. 411; "Roisin," p. 6. — 2d. Salic land means "terra aviatica." — 3d. House and enclosure, something like the manor and the homestead of feudal times, — that island of individual ownership pointed out by Tacitus in his description of a system of collective ownership. "Sala" means house: "Alam.," 81, 1; "Sal.," 16, 2 ("salina"); "Dipl.," II, 284, 333. *Eccard* in his "Comm. s. L. Sal.," cites a Florentine commentary according to which the Salic Law or "selilant" was that "quæ ad salam sive domum curtis pertinet": *Guérard*, "Polypt. d'Irminon," p. 483. In the ninth century, in the region of the Rhine, the seigniorial manse as contrasted with the tributary manses is called Salic land. Cf. *Viollet*, p. 824 (bibl.); *Glasson*, III, 149; *Stobbe*, V, 88; *Heusler*, II, 576 (cf. "Hantgemal"). — The problem has become a complicated one for recent authors because they have connected it with the obscure question of the formation of the ownership of land following the invasions. Cf. on this subject: *Meitzen*, "Siedelung u. Agrarwesen d. West. und Ostgermanen," 1895. *Sohm* compares the "terra salica" to the Anglo-Saxon folkland; on the other hand, for *Schroeder*, p. 212, this is the land which is acquired by virtue of a "præceptum regis," whether the king made a gift of part of the crown's domain or whether he gave permission for the occupation of unoccupied lands; this would also be the nobleman's property, "ethel," "odal," which was granted to the Germanic princes in the same way as the conferring of an office, and which soon became hereditary; these Salic lands are contrasted with the "Hufe" ("Hof") or "sors" ("los," "hlôt"), with the portions of land coming from the community of the village and reverting back to this community. Cf. *Heusler*, II, 525, 575. On the Norwegian "odal" (personal belonging) cf. "Z. S. S.," 1901, "G. A.," 109.

³ If there were no sisters, did the right of the "vicini" still continue to

But the principle of the inequality of the sexes was not abolished in the Frankish law.¹ The father was only authorized to do away with this principle by **calling back to the succession** the daughters; it depended upon him whether they should compete with the sons. A celebrated formula of Marculfe, II, 12, shows that the inspiration in this was taken from the Christian and Roman ideas; the father gives the same rights to his sons and his daughters as regards his inheritance, contrary to that which he calls the "impious old custom":² "Sicut mihi a Deo æqualiter donati estis, ita et a me sitis æqualiter diligendi et de res meas æqualiter gratuletis tam de alode paterno quam de comparatum vel mancipia."³

In the next stage, the **feudal system**⁴ was opposed to the succession of women because they were incapable of rendering the military and court services connected with the possession of a fief.⁵ But the principle of the inheritability of fiefs led to the transmission of these possessions in the same way as others. Women could aspire to them on condition of rendering the feudal services by means of a representative, and, as their most natural representatives were their husbands, from this there developed a right for the lord to impose a marriage upon his female vassal until she attained sixty years. However, on this point the feudal deeds and the Customs were divided: sometimes they admitted the succession of women (or of cognates) (**feminine fiefs**), sometime it was rejected (**masculine fiefs**) in order to allow only the males (or the agnates) to inherit. As a general thing, women only took

exist? The Edict is silent. The end of its § 3 seems to contemplate acquiescence to which the "vicini" could lay no claim: cf. title 45, "L. Sal.," "de migr.," *Geffcken*, p. 270 (bibl.); *Gierke, op. cit.*; *Meitzen*, I, 588; *Chaisemartin*, 412.

¹ The sons who took the succession were charged with the nourishing and support of their sisters, if they did not marry; if they did marry, the sons had to furnish them with the customary marriage portion.

² The "Sachsenspiegel" was condemned by the papacy because of its exclusion of daughters. Cf. as to the Roman law: "Petrus," I, 6; "Ass. de Jér.," I, 275, ed. V.

³ *Pasquier*, "Inst.," p. 512.

⁴ "L. Feud.," 1, 1, 3, 8: "filia non succedit in feudo nisi investitura fuerit ut filii et filiae succedant." Thus there resulted a particular system for each fief until a common law came to be established. Cf. French entails, especially fee tails in England: "Summa Norm.," 25; *Littleton*, 13. In the latter country in 1100 there was absolutely no doubt that women could succeed to fiefs held by military tenure: *Pollock and Maitland*, II, 260. In France, cf. *Beaumanoir*, 14; "Jostice," 12, 7, 3; *Durand*, "Spec.," p. 311; "Const. Chât.," 68, 75; "Cout. Not.," 71; "Gr. Cout.," p. 290; "T. A. C., Bret.," 232; *Loysel*, 634; *Pothier*, VIII, 100. — Cf. Venice, Statute, 4, 25; "Const. Sic.," II, 26.

⁵ Cf., however, ladies who held fiefs sitting in feudal courts, daughters or widows taking part in the political assemblies: *Loysel*, 608; *Beaumanoir*, 41, 27.

if there were no males of the same degree.¹ "If there were a son only a day old and there were forty daughters," says Philip of Navarre, 69, "they would have no right, for a daughter cannot be the lawful heir before a son." On the other hand, in the case of possessions of people who were not nobles the principle which prevailed in the Customary law was that of equality between men and women.²

In many places, however, the privilege of the males subsisted in the form of **excluding from the inheritance daughters endowed in marriage**.³ The mere departure from the family was originally sufficient to make them lose every right of inheritance, whether they were endowed or not; when it no longer had this effect, they were looked upon as being sufficiently provided for when they received the marriage portion. Sometimes the exclusion took place as matter of law, sometimes it resulted from a clause of **renunciation of succession** inserted in the marriage contract.⁴ Sometimes the Custom compelled them to be contented with a chaplet of roses⁵ as their entire marriage portion; sometimes the marriage portion had to be a proper one ("marriage in conformity" in Normandy). Finally, the marriage portion is designated under the name of the *legal share*, in localities where the loss of the rights of inheritance is made subordinate to the receiving of the entire legal share.⁶

¹ *Loysel*, 634 *et seq.* Foreclosure of descendants (whether males or not) by the women: *Beaumanoir*, 14, 28; "Cout. Not.," 71; *Loysel*, 325; *Blackstone*, II, 14.

² "Summa Norm.," 24; *Beaumanoir*, 14, 11. *Contra*, Alsatian "colonges." In certain places there was a right of preference for males among nobles, affecting common tenures as well as fiefs: *Glasson*, VII, 467.

³ It was a Roman custom to bequeath the marriage portion to the daughter while disinheriting her: *Dig.*, 34, 1, 10, 2; 33, 5, 21; *Esmein*, "N. R. H.," 8, 4. Exclusion of daughters who had had a marriage portion in the Lombard laws: "Roth.," 181; "Liut.," III, 102 (*cf.* daughters "in capillo," with their hair hanging down, — a distinctive sign of the unmarried woman, and daughters "in casa," who had not left the house); *Pertile*, IV, 51; in the Italian statutes, with the effect of keeping the property in the family. See *La Mantia*, "Storia d. Legislaz. Ital.," I, 242 *et seq.*; *Pertile*, IV, 56, 62; *Brünneck*, p. 83; *Viollet*, p. 826; and in the Customs of the South of France: "Montpellier," 90; "Marseille," II, 54 (*ed. Fresquet*); "Giraud," II, 248; "Bergerac," 55; *Gide*, p. 441; *Tardif*, p. 60. *Cf. De Ribbe, op. cit.*, p. 1003. — As to the Customs of the North, *cf.* "Touraine," 284. *Post*, "Inconsistency of the Quality of Heir and Donee." — "N. R. H.," 1877, 22; *Chaisemartin*, 390; *De Maulde*, "Procès politiques sous Louis XII," 1885 (unpublished documents): rights of Anne of France.

⁴ *Loysel*, 341; *Pasquier*, "Inst.," p. 509. These renunciations should have been cancelled according to the Roman law, because they affected future successions; but *cf.* as to this, *Sexte*, 1, 18, 2; *Gui Pape*, "Quest.," 227; *Meynial*, "N. R. H.," 1901.

⁵ *Ragueau*, see "Chapel," "Serpoul" (trousseau); *Laboulaye*, 407.

⁶ *Loysel*, 639: "The king must provide marriages for his sisters and daughters." "Honeste dotare" say the Italian statutes. *Cf.* a fitting marriage in

The idea of the physical weakness of women had long ceased to be sufficient to account for their incapacity of inheriting (legal or by agreement); public order, which was better assured owing to the more active part played by the State, protected women from violence. Other motives accounted for the inferiority of their condition. The expressed or implied clauses in the contract of infeudation were often the foundation of this inferiority; and, finally, the desire to prevent the parceling of the family inheritance acted very strongly in this direction.¹ Daughters and younger sons were sacrificed to the elder, not in the personal interest of the latter, but in the interest of the family. It is true that the right of primogeniture could have been granted to daughters; if it was refused them in order to be reserved for the men, it was because when they married they ceased to represent the family and took a new name; it was also because under various circumstances it is difficult, or even impossible, for a woman to carry on the rôle of the head of the family.²

§ 454. (B) **The Right of Primogeniture**, frequently found in the old legislations, where it is connected with religious ideas and the worship of ancestors, with which the "child of duty" is especially charged, and which is mentioned in the Bible where Esau gives it up to Jacob, "Genesis," xxv, is barely noticed in Tacitus, "Germ.," with relation to only one of the tribes of Germania, the Tencteres, and does not figure at all in the **barbarian laws** (any more than it figured in the Roman laws).³ One would have expected to see it there; with equal partition the house is not stable and is divided up in each generation. But perhaps this is only in appearance because the sons of the deceased often live in joint possession. Family communities make up for the absence of primogeniture;⁴ they are

Normandy: "T. A. C., Norm.," 80; "Summa," 24, 14; *Le Poittevin*, "N. R. H.," 1889; *Pertile*, IV, 60. In Corsica, in 1571, I, 43: arbitration with three near relatives. Elsewhere it is the legal share that must be paid them. As to widows *cf.* herein "Second Marriages"; *Pertile*, IV, 62; *post*, "Marriage Contract"; in countries of customs, "No one has a marriage portion who does not wish it," whereas in countries of written law there exists an obligation to furnish a marriage portion.

¹ This motive, which is found at an early period in the documents, has long maintained the inferiority of women in the matter of succession, even in countries where the effects of the Roman law have been felt the most, — for example, in Italy. In Sweden, where Birger Jarl called women to the succession in 1262, to the extent of one-third of the inheritance, the equality of the sexes was only proclaimed in 1845.

² *Loysel*, Table, see "Femmes"; *Beaumanoir*, "Jost.," *id.*

³ *Cf.* "Sal.," 43; "Cap. extr.," 7; "Div. imperii," 817. Succession to the throne of Lothaire in 954: *Loysel*, 328. — *Cf.* "Alam.," 91; "Bai.," 1, 1; 15, 9.

⁴ "Roth.," 167; "Liut.," 70; Capitulary of 818, 6, 11; of 825, 6 (I, 282,

preparing for it; in fact, the brothers have the eldest among them as their natural head; they live "sub seniore fratre."¹

With the **feudal system** the right of primogeniture finally appears.² 1st. Originally, it is established in the **interest of the lord**. The fief is indivisible because the rendering of feudal services, and especially the military services, would have been affected had there been a partition.³ The fief is granted to the eldest because he has that natural superiority over his brothers which is given him by age and experience, because he has been associated

330). As to the "Gemeinderschaften," "Ganerbschaften," "Genossenschaften," cf. *post*, "Legal Persons"; *Heusler*, I, 51; *Brunner*, I, 70; *Schroeder*, 326; *Frommhold*, 11; *Huber*, "Gemeindersch. d. Schweiz," 1897 ("Unters." by *Gierke*); *Pollock and Maitland*, II, 260; *Maitland*, "Domesday Book," 145. Example of Thanes holding the land in common with one of them as "senior" (although there is no right of primogeniture). These tenures recall the partition of the Norman and Angevin law. *Contra*, see *Guilhiermoz*, pp. 204, 205, who wishes to connect "parage" with "patrem"; which would be very difficult, as we see it, because "patrem" has given us the word "père" (father), while "parâtre" is a scientific word. In the same way the Provençal "paratge" cannot be derived from "paire," but comes from "par," meaning equal. "N holds from a lord 'en parage,'" seems to us to mean that N holds his land from such and such a lord upon condition that there shall be equality of lineage among his sons. Communities are even found in the South (Roussillon, Guyenne, Provence). Cf. *A. de Brandt*, p. 40; "Z. S. S.," 1901, "G. A.," 373; *Verdelot*, p. 28.

¹ Feudal primogeniture, just as elsewhere, the commoner's right of younger sons, would thus seem to have very important precedents in the family community ("Hausgenossenschaft," "Were," or group of relatives living together). Cf. *post*, "Anerbenrecht," indivisibility of commoners' tenures (see note 4, "Anerbenrecht," page 637); *Dultzig*, 68, 108, 117; *Brentano*, "Zukunft," 1895, 444; *Fick*, "Bauerl. Erbfolge," 1895; *Brandt*, p. 64; *post*, "Countries of Written Law"; *Sumner Maine*, "Inst. primit.," p. 123 (gavelkind), 154; *Dareste*, "N. Et.," 286, 297, 304.

² The right of primogeniture, so to speak, preceded the heritability of fiefs, for the grantor at the death of the vassal frequently renewed the grant for the benefit of the elder son of the latter. Once fiefs became hereditary, a period of uncertainty and hesitation was reached, which was escaped from more or less quickly according to locality. The Breton Assize of 1185 is one of the first legislative acts upon this matter, and it must have been preceded by an Anglo-Norman law of Henry II, which has not come down to us, but which must have prohibited the partition of baronies and fiefs of the hauberk, at least among males: "L. Henrici," I, 70, 21; *Glanville*, 7; *Bracton*, fo. 64; "T. A. C., Norm.," 8, 83; "Summa," 23 *et seq.*, 99; "Cout. de 1583," 335; *Planio*, "N. R. H.," 1887, 145; *Pollock and Maitland*, II, 258; *Guilhiermoz*, p. 214. If there were several fiefs the eldest son only took one of them. The indivisibility of fiefs was still more necessary for the Normans, established in a hostile country, or for the Crusaders in Palestine: *Ph. de Nav.*, 69, 71; *J. d'Idelin*, 68, 148, 156, 182. To tenure by descent and the system of homage to the eldest (applied in the Duchy of Normandy, cf. *Guilhiermoz*, p. 202) should be likened the joint lords' domain of the South: *Dognon*, "Inst. du Languedoc," p. 16, the Catalanian system: "Usat. Barchin.," 31, the German system derived from the Law of Conrad the Salic, 1037: "Sachsensp.," *Lehr*, 29, 2, and the "L. Feud.," I, 2; 4, 1. Cf. *Glasson*, VII, 430; "N. R. H.," 1885; *Heusler*, II, 614 ("Gesamtbelehnung"); *Loysel*, 611, 638; *Schroeder*, 401, 409.

³ As to the dismembering of the fief, cf. *Guilhiermoz*, p. 195.

with his father — at least, in fact — in the carrying out of feudal duties longer than his brothers, because it is to the interest of the lord to maintain this situation, and because at the same time transmission by inheritance takes place to his advantage more readily. On the other hand, in the succession to rural tenures, reasons of a different kind often caused the youngest son to be preferred (minority, youth, belonging to the household).¹ 2d. The indivisibility of large fiefs and of important manors had a **political** reason; they were small States whose parceling would have caused many difficulties; the administration of justice and sovereignty cannot be divided. 3d. In the last stages of the law, neither the interest of the lord nor political interest are brought into play, because the feudal military service has come to an end and centralization has taken away all independence from the manors;² the right of primogeniture still persists in the **interest of the family**. And, since at the period when it was established the old constitution of the family was weakened in many places, it scarcely had that absolute and severe character which one is only too liable to attribute to it. Each of the foundations which it had had was found to be undermined with such rapidity as not to have been capable of producing its full effects for any length of time.

¹ **Ultimogeniture.** — 1st. In a system of collective ownership the elder sons have a share and a separate hearth; only the youngest son lives and works with his father; he is near him at the time of his death and becomes the guardian of the hearth, — a very important rôle in the Animist Religion (gallows puppets made out of mandrake roots gathered under a gibbet and given as a sort of domestic god to the younger son, reservation of the hearth itself to the youngest son of all in the gavelkind of Kent, legend of "Hop o' my Thumb"). — 2d. The youngest of the sons keeps the paternal house because he has not been able to create a separate establishment for himself; he has a greater need for it, and it is a just compensation for his work, — 3d. The eldest son is often a rival of his father, who has become old; it is not the same with the Benjamin, upon whom the father lavishes his affection. — Brittany ("quevaize," meaning right of the youngest child): *B. de Richebourg*, 4412; *Furic*, "Usm. de Cornouaille," 1644, p. 61. England: Hoel the Good, "C. Ven.," I, 16; borough English, Year Book, I, Edw. III, f. 12 (in 1327). Artois, Picardy, Hainaut, Brabant, Friesland, Westphalia, Alsace, Switzerland, etc. In ancient India and in the Caucasus it co-exists with the right of primogeniture, and, a still stranger thing, it does not exclude a privilege for the benefit of the brothers coming between them; it is true that Gautama does not take this last very seriously: "Let the middle brother," says he, "receive besides a share equal to that of the others some old beast of burden with only one eye and with a horn or a tail missing": *Ernouf*, "France judic.," 1882-83, I, p. 313 (according to *Elton*); *Pollock and Maitland*, II, 277; *Kovalevsky*, p. 224; *Grimm*, p. 475; *Heusler*, II, 579; *Huber*, IV, 559; *Stobbe*, § 283, 321; *Schroeder*, p. 736; *Viollot*, p. 724, n. 1; 842; *Bonvalot*, "Dr. de juv.," 1901; *Post*, I, 223; II, 188; *Dareste*, 273; "N. Et.," 271; *Michelet*, 59; *Britz*, 669; *Glasson*, VII, 498; *Dultzig*, 111; *Chaisemartin*, p. 446; see *Ragueau*.

² In the eighteenth century it is still said that the baronies are indivisible.

The eldest, instead of taking the entire fief, is charged with the endowment of the younger children and the giving of a marriage portion to the daughters,¹ and no longer has anything but a reference legacy and a share for his profit: the principal manor and the homestead as a reference legacy, and two-thirds or one-half of the fief by way of share to his profit.² The dividing up of the fief could only be avoided with the assistance of entails in trust. From the thirteenth century the right of primogeniture is found to be very much restricted: there is no right of primogeniture among the daughters³ or the next in the collateral line, nor is there any with respect to plebeian possessions.⁴ Already it has become only an exception; equal partition is the rule, following the custom of the Roman law.⁵

¹ *Springfeldius*, "de apanagio," 1663; see "Dig. Ital.," *Maffert*, "Thèse," 1900. — *D'Argentré*, "Advis s. le Part. des Nobles," 1570.

² "Paris," 13; "Orléans," 89; "Touraine," 260; *Glasson, Guilhaumez, op. cit.*; "Confér. des Cout. de Guénois," pp. 183 and 700; *Ferrière*, on "Paris," 13 *et seq.* Besides the texts that are cited therein, cf. "A. C., Bord.," 57; "Vermandois," ed. *B.-B.*, 161, 168; "A. C., Anjou et Maine," *id.*, Table; "A. C., Bourgogne," in *Giraud*, II, pp. 296, 272.

³ "T. A. C., Norm.," 9. *Contra: Ponthieu, Lavedan, etc. Cf. Iwein*, 7715.

⁴ *Beaumanoir*, 14; "T. A. C., Norm.," 8; "Bourg.," etc.: even for fiefs: cf. gavelkind of Kent, — an old custom whose keeping up and development are to be accounted for by the commercial prosperity of this county: *Pollock and Maitland*, I, 165; II, 269 (bibl.). — However, according to some of the Customs, plebeian tenures belonging to a noble are partitioned in the same way as noblemen's tenures. The indivisibility of plebeian tenures has also been established in the interest of the family or has continued to exist as a relic of the family community: *Viollet*, 840, 841 (primogeniture in Normandy); *Glasson*, VII, 419, 470; "Barèges," 1; *Soule*, 27; *Labourt*, 12; *Merlin*, "Rapports," 21; Nov., 1790; *Sagnac*, p. 218. — Germany, system of the "Anerbenrecht": *Stobbe*, § 322 (V, 382); *Heusler*, II, 616; *Blondel*, "Et. sur les popul. rurales de l'Allem.," p. 191; *Verdelot*, "Thèse," 1899; *E. v. Dölzig*, "Deutsch. Grunderbr.," 1899 (bibl.); ("Z. S. S.," 1900, "G. A.," 279); *Frommhold, op. cit.*, and "Anerb.," 1886. *L. Brentano*, and after him *Fick, op. cit.*, see in the "Anerbenrecht" a seigniorial institution and connect it with the "Hofrecht." But this theory is contested by the majority of legal historians, who make the "Anerbenrecht" a consequence of the family community; from this would have sprung the estates in tail and estates to youngest sons, appanages, recompenses or "Abfindungen" owed by the "Anerbe" — who takes the whole of the inheritance — to his brothers, and marriages or marriage portions to the daughters, unless they be excluded from the paternal house because of the dower which they acquire when they marry: *Stobbe*, § 324 (bibl. on the "Abfind"), 290; *Boissonnade*, "Anc. Cout. du Japon," 1894, p. 13. — As to daughters in Lombard law see: *Kjer*, "Dansk og Langob. Arveret," 1901 (C. R. in "Z. S. S.," 1901, "G. A.," 367). — *Chaisemartin*, p. 442. — Repurchase of the eldest, Decree of Nov. 30, 1793.

⁵ Equality, which did not exist between elder children and younger children, existed still less between Children of Different Marriages. Very often, in fact, in the old Customary law, the mother's dower was limited to the children who were issue of the marriage so as to exclude the children of the other marriages. The application of the old laws to second marriages produced an analogous result. The father's possessions were thus partitioned, to make use of the old expression, "par ventrées." As to these institutions,

Under the form which it had assumed, primogeniture had become too much reduced to give the French nobility any real power. And the Revolutionary laws and the Civil Code in abolishing primogeniture only generalized the common law of the Customs.¹ In vain was it attempted to re-establish this right in 1826 by means of legislation; this resurrection met with a very lively opposition in the shape of public opinion. But there are still families where the eldest son is appointed, that is to say, the eldest son is provided for at the expense of his brothers to the extent that the law will allow, and often beyond this, as had already been formerly done in countries of written law.² The School of Le Play proposed regulating the freedom to make a will in such a way as to allow the father of a family to choose among his children the one who is most worthy to carry on his work and so to avoid the parceling up of a patrimony which has been built up with difficulty. It is also with this latter end in view that many French families have adopted the course of having an only son; but this system, which Malthus was naïve enough to vaunt under the name of "moral restraint," is inspired rather by base selfishness than by real pride; they shrank from having the care of children. Individuals have gained nothing by substituting this for the right of primogeniture and the State has lost a great deal.³

cf. post, "Marriage Contract." In the Netherlands they are described as a right of devolution; and it was by virtue of this very right that Louis XIV claimed the Netherlands themselves in the name of his wife, Maria Theresa (War of the Devolution, 1667): *Britz*, 670; *Stobbe*, V, 101; *Ficker*, IV; II, 457. Decree of 18 Vend., year II.

¹ Decree of March 15, 1790; April 8, 1791 (abolition of the rights of primogeniture and preference of males). Mirabeau's speech (read an hour after his death in the Constituent Assembly, on April 2, 1791); *Laferrrière*, p. 220; *Sagnac*, p. 518; *Sevin*, "Orig. Revolut. du Code Napoléon," 1870, 350 *et seq.*; *Brandt*, *op. cit.*, p. 69.—Estates in tail, Decl. 1806, 1808; Peerage, "Ord." 1815, Law of May, 1826 (entails); *R. Foelix*, XVI, 11.

² It is to be observed, in fact, that the Roman principle of equal partition (*Argou*, II, 21) had departed from this: (a) by means of testamentary provisions conferring some advantage on the eldest, even in the families of plebeians; (b) by certain Customs ("Béarn," "Bigorre," "Pays Basque") conferring the family possessions upon the eldest son or eldest daughter impartially, and describing the younger sons as *slaves*: *A. de Brandt*, "Droit et Cout. des Popul. rurales de la France en mat. successorale," 1901, p. 29. *Cf. Lagrèze, Cordier, etc.; Lespinasse*, "R. prat.," 1879 (*Cayolers*).—*Flammer*, "Dr. Civil de Genève," p. 18: customs, being stronger than the laws, kept up the right of primogeniture, which had been prohibited; the youngest sons remained bachelors and became the men servants of the eldest, or else emigrated: *Th. de Montaugé*, "L'Agr. Toulouse," 118.

³ It is a good thing in our opinion for each one of the children to receive a portion of the father's possessions: but, if this partition results in the ruin of some enterprise, and means the liquidation or the selling at a very low price of an industrial or commercial establishment, it fails to attain its object, and

§ 455. **Lack of Representation.** — In the very old law representation was not admitted, either in the direct line or in the collateral line: (a) grandsons did not share with sons who were brothers of their predeceased father in the succession of their grandfather; (b) all the more reason why if a brother died, his brother succeeded to him and excluded his nephews who were the sons of another predeceased brother. In our day, on the contrary, and before this in Rome, grandsons or nephews represented their father and had the same rights of succession as he had, because the affection of the grandfather or the uncle was carried back to them. In the old Germanic law it seems that two reasons were opposed to representation: 1st. When brothers lived in a community, the death of one of them did not at the moment confer any right on his sons; the circle of interested parties contracted, and that was all.¹ 2d. Leaving out all question of a community, the uncle was preferred to the nephew because, owing to his age and his position, he was more fit to fill the part of head of the family. This is so true that in certain legislations sons are excluded from the succession of their own father by their uncles, who are brothers of the latter (**tanistry** in Ireland).² — The cause of the uncles should not have prevailed, because it was in opposition to the general aspect of the law of inheritance.³ From the year 596,

it would be better to confer the entire patrimony upon the eldest or one of the other sons charged with setting up his brothers and giving a marriage portion to his sisters. We do not condemn the system of equal partition, but we do criticise its unintelligent application. The care of avoiding the disadvantages that it carried with it should be left to the tribunals and to the father of the family subject to their control. It would be a mistake, moreover, for one to imagine that this reform and other more radical ones, such as the introduction of the freedom to bequeath by will or the establishment of the right of primogeniture, would change the existing customs: *De Bonald*, "La Famille et le Dr. d'Aïnesse," 1826; *Noiret*, "Morcell. et Reconcentr.," 1901; *Brandt*, *op. cit.*, p. 69 *et seq.* (details as to the actual application of the old Customs); *Verdelot*, p. 614; *Regnier*, "Thèse," 1900.

¹ *Gierke*, II, 949; *Dultzig*, 69. The grandsons who were the issue of a son who was married and had an establishment outside of the house could not compete with their uncles who remained connected with the family community to which they themselves no longer belonged.

² There are no traces of this system in the barbarian laws; but it was sometimes applied to the succession to the throne under the Merovingians (the children of Clodomir); *Viollet*, "Inst. pol.," I, 246; "Mém. s. la Tanistry" ("Ac. Inscr.," 32, 2, 275). Application to the fief in Poitou: *D'Espinay*, "N. R. H.," 1896, 477; *De la Ménardière*, "Succession de Frère à Frère dans la T. A. C. de Poitou"; *Chaisemartin*, 398: The inheritance remains in the heart of the family; *Grimm*, 5: a child "in sinu avi." Cf. *Heusler*, *loc. cit.* "Z. S. S., G. A.," 1901, 372.

³ Roman law: "Cod. Théod.," 5, 1, 4. Cf. "Nov. Just.," 118; *Papien*, 10; "Burg.," 14, 75, 78; "Wis.," 4, 5, 4; 4, 2, 18 ("Ant.," 327); *Grimoald*, 5; "Liut.," 3; "Sax.," 46. — When the grandsons compete only among them-

the "Dec. Childeberti" allowed grandsons "ex filio" or "ex filia" to represent their father or their mother in the succession of the grandfather. It is not certain that this law was applied; and, in fact, we are in possession of later formulæ of the **recalling to succession** of grandsons wherein it is apparent that legally they would not have inherited.¹ In Germany it is reported that the question was settled in 942 before Otto I by the duel at law; the champion among the nephews took the succession.²

During the feudal period representation combined with the right of primogeniture. The grandson of the predeceased eldest son enjoyed the same privileges as his father and kept the succession to the fief from his uncles. This was a solution which was not without its disadvantages, because it sometimes resulted in giving the lord a child for his vassal, and because it might make of a minor the head of the State. The law was not sufficiently well settled to avoid conflicts taking place between uncles and nephews, like the one which arose between John Lackland and his nephew, Arthur of Brittany; the tragic death of the latter was only a temporary development of that which was called the "casus regis." The misfortunes which overthrew John Lackland seemed to be a just judgment from God upon the usurping uncle; and, in fact, in the fourteenth century representation prevailed in England.³ In France, during the thirteenth and fourteenth centuries, there is a divergence between the Customs, and in the sixteenth century representation is with difficulty admitted in the collateral line.⁴ The Decree of April 8-15, 1791, generalized repre-

selves because the sons have predeceased them, the partition by heads, "per capita," is a logical consequence of the family community. It was practised first of all, it would seem. Cf. "Sal. Hérolde" (59), 62, 6, and "M. G. H., L. L.," IV, 590; "Sax.," 46; *Stobbe*, V, 96; *Heusler*, II, 583. After the Frankish period partitioning by stocks, "per stirpes," which is in accord with the system of assumed affection, is substituted for partition by heads: "Rib.," 48; *Kozière*, 141; *Chaisemartin*, 410. — If the deceased only leaves nephews, sons of several brothers, they inherit from their common ancestor and partition by heads according to *Azon* (*id.* Diet of Spire, 1529): they come in by representation and partition by stocks according to *Accursius* (*id.* Civil Code, 742); *Pasquier*, "Inst.," 487; *Stobbe*, V, 114. Cf. Civil Code, 787.

¹ *Kozière*, "Form.," 131 *et seq.*; *Sirm.*, 22; *Marculfe*, II, 10, etc.; *Thévenin*, Table.

² "M. G. H., S. S.," III, 440. It does not seem that very much account was taken of this decision: "Sachsensp.," 1, 5, 1; "Schwabensp.," 8.

³ "T. A. C. Norm.," 12; *Marnier*, p. 25; "Summa," 23, 5; *Glanville*, VII, 3; *Bracton*, fo. 267 h; *Brunner*, 43; *Pollock and Maitland*, II, 281. — "N. R. H.," 1893, 5.

⁴ *Beaumanoir*, 14, 23; *Desmares*, 238, 282. Representation in the collateral line was not admitted until 1580 in the "Cout. de Paris," 319. Certain of the Customs still rejected it even in the direct line: "Ponthieu," 8; "Boullenois,"

sensation in the direct line of descendants, and the Decree of the 17th Nivôse, year II, Art. 77, established it indefinitely in the collateral line in conformity with a small number of the Customs. The Civil Code only admits it in the direct line and in favor of the descendants of brothers and sisters, following the example of the "Novella," 118, and of the Custom of Paris.

§ 456. (II) **Lineage (Ascendants and Collaterals).**¹ — If there were no descendants, the succession seems to have devolved in the old times upon the lineage of the deceased, in order of **kindred** or groups of relatives having each a common ancestor (thus my kindred includes my entire posterity, son, grandson, etc.).² If there

75, etc.; *Loysel*, 321. Unlimited representation in the collateral line: "Anjou," 224; "Auvergne," 12, 9. Cf. public law: *Guyme*, "Tr. de la Représ.," 1727, 1779; "Champagne," *id.* 1720; "Mignot," *id.* 1777; *Gerhardi*, "Orig. de la Règle: Représentation a lieu à l'Infini," 1767; *Ricard*, "Tr. de la Représ. et du Rappel," "Œuvres," 1685, 1783. — On the recalling to succession cf. *Argou*, I, 439; this can be done by means of some deed; distinction between the recalling in terms of law (that is to say, according to the Roman law), and not in terms of law, — the latter merely having the same effects as a legacy: *Pasquier*, 512.

¹ On computation of relationship cf. *Heusler*, II, 586; *Stobbe*, V, 62, and authors cited. Especially will one find very full details in *Ficker*, I, 277-475 (he distinguishes in Germanic law four kinds of calculation: 1st, by groups of brothers; 2d, by groups of cousins; 3d, by degrees; 4th, by taking into account the line which contains the greatest number of degrees); cf. II, 22; XLII, 68. — "Stemmata" or "arbores cognationum" drawn up after the manner of the Roman law, — especially *Paul*, IV, 10, in the "L. Rom. Wis."; *Girard*, "Textes," p. 427 *et seq.* The "Lectura" of *Joh. Andreae* "super arboribus consanguinitatis" was very well known. — In Germanic law relationship is figured differently; it is represented in the form of the human body; each member or each joint constitutes a degree: "Genu, Geniculum": "Sal.," 59; "Rib.," 56. — "Jostice," p. 228.

² The system of degrees of consanguinity considered by Mayer and Eichhorn at the beginning of the nineteenth century as the basis of the German law of succession, and discarded afterwards by Siegel and Wasserschleben, reckoned many partisans, beginning with the works of Brunner, Gierke and Heusler; however, Amira and Ficker, even to this day, still refuse to admit it. If it is rejected, the Germanic system of succession is nothing but confusion: no guiding principle can be found in it. The existence of this system of consanguinity seems to have been established especially among the Lombards, the Anglo-Normans and the Frisians: "Roth.," 153. Cf. "Liut.," 17; *Thévenin*, "Textes," no. 55; *Glanville*, VII, 3; *Bracton*, f. 68 b; "Fleta," VI, 2; *Britton*, VI, 3, 4; "Summa Norm.," 23; "T. A. C., Bret.," 220; "A. C.," 566; "N. C.," 594; *Brunner*, "Erbf.," 15; "Sippe u. Verg., pass." Moreover, the term "parentela" has in the barbarian laws more the indefinite meaning of our word "parenté" (relationship): *Heusler*, II, 594; *Huber*, IV, 548; *Ficker*, II, 55, 304, 387, 616; *Homeyer*, "Parentelenordn.," 1860; *Stobbe*, V, 62; *Kohler*, "Z. V. R.," VII, 201 (India). The very fact of the computation of relationship not by degrees, but by lines, bears witness to the favoring of the system of degrees of consanguinity; for it would have been strange not to have applied it under circumstances of so great importance as the devolution of an inheritance. Cf. Law of the 17th Niv., year II (orders of heirs, calling to mind the degrees of consanguinity): *Daresté*, p. 290; *Kohler*, "Abh.," 341; *Schroeder*, 327 (bibl.). Criticism of *Ficker* in *Daltzig*, 56. This system has persisted in the successions of noblemen in Germany: "Sachsensp.," 1, 3, 3. It is not formulated "ex professo" in a

were no descendants of the deceased, the kindred of his father — that is to say, the relatives who were issue of the latter — were called to the succession. When this kindred was exhausted they passed to the kindred of the grandfather, etc. This system, with the strict application of the agnatic principle, has left traces in the Customs of the Middle Ages; but it has been replaced in a general way by systems which are less logical and which tend to become like the Roman rules. According to the latter, the ascendants succeeded and shared with the brothers and sisters (or nephews of the full blood) of the deceased ("Novella," 118, of Justinian); if there were none of these the succession devolved upon the nearest collaterals, without any distinction being made according to the nature and the origin of the property: personal belongings and acquests, movables and immovables, were treated in the same manner and formed one single mass. This classification of relatives, based upon the presumed affection of the deceased, was accepted in countries of written law. The Custom of Toulouse was the only one which deviated from it, because, as concerned this matter, just as in the matter of the "privilege of the double tie" (of relationship), the law enacted previous to the reforms of Justinian, that is to say, the Theodosian law, had remained in full force: the paternal relatives excluded the maternal relatives. As to the countries of Customs, they followed the rules of the written law, — at least, in the case of **succession to movables and acquests**.¹

§ 457. **Succession to Personal Belongings**,² in countries of

single text; they limit themselves to applications of it. As to its abandonment, *cf. Heusler*, II, 608. — *Dareste*, "N. Et.," p. 92 (Greece); *Post*, II, 190; *Lardy*, "Législ. civiles des Cantons Suisses," 1877, gives tables of the computation of relationship according to the Germanic systems (degrees of consanguinity, etc.); *Stintzing*, "Gesch. d. Popul. Lit.," I, 151 (on the "arbores").

¹ *Glasson*, VI, 427. — *Cf.* especially: *Beaumanoir*, 12, 14, 18; "Jostice," pp. 235, 252; "Const. Chât.," 19; "Cout. Not.," 91; *Desmares*, 93; "Summa Norm.," 23 *et seq.*; "T. A. C., Bret.," 220. — As to acquests, *cf. Ficker*, II, no. 570. — *Jarriand*, *op. cit.*; *Escarra*, "Succ. aux Biens réels dans les Cout. Anglo-Norm.," 1903 ("Thèse").

² See especially the treatises on personal belongings by *Renusson* in 1700 and by *Pothier* in 1777. — *Dufourmantelle*, "Thèse," 1882; *Viollet*, 845; *Glasson*, VII, 471; *Schroeder*, 733; "Z. S. S.," 1901, 109 (Norway); *Ficker*, II, 404; III, 469. — Formation of the theory of personal belongings, *cf. variations*, *ibid.*, V, 164, 244, 292. Old tendency towards uniformity in the system of personal belongings in the matter of succession, repurchase, and the community. In the seventeenth century this tendency had long since ceased, as is proved by *Lebrun*, and as was inevitable in the progressive disintegration of the rights of the family. — As to the "Stammgüter" or family possessions of the German nobility, which are transmitted in the male line, *cf. Verdelot*, "Thèse," p. 90. — "Z. S. S.," 1881, "G. A.," 1898.

Customs, may be summed up according to the final law in the "splitting" or division of personal belongings into two parts, the one coming from the father or the paternal family, the other coming from the mother or the maternal family. Each mass returns whence it came, — "paterna paternis, materna maternis."¹ The older law sprang from the idea that only paternal personal belongings were included in the succession; the mother of the deceased, being excluded from the paternal inheritance, had brought nothing into it, which resulted in the maternal line, the relatives by the distaff or the spindle ("Spillmagen," "Kunkelmagen") having nothing to claim in the hereditary possessions; the relatives by the sword or by the spear ("Schwertmagen," "Speer-magen")² being alone called to collect them. In conceding to women important rights of succession, the maternal line was eventually allowed to take the possessions in the succession which came from the mother; to make the paternal relatives benefit thereby would have been to sacrifice one family to the other. Thus there was established in the new law the repartition between the two lines, but not without falterings and compromises.³ **The Edict of Mothers**, 1567, repealed in 1729, attempted for a little time, but without any success, excepting in Provence, to intro-

¹ "Cart. de Redon," in 871; Statute of *Burchard of Worms*, 1; "L. Feud.," 2, 11; "Ass. de Jér.," "C. des B.," 58; "Cout. Not.," 12; "A. C., Picardie," 156; *Boutaric*, I, 76; "Ord.," V, 156; *D'Espinay*, "Cartul. Angevins," p. 245. — The South: "Béarn," 1551, wills; *Lavedan*, 6; *Jarriand*, "N. R. H.," 1890, 240; "R. Q. hist.," 1890, 214 (succession of persons not having attained puberty, *Quercy, Confluent*). — *Pollock and Mailland*, II, 297. — *Schroeder*, 735 (bibl.); *Stobbe*, V, 105; *Heusler*, II, 527; *Ficker*, II, 404; III, nos. 705, 745 (equality of both lines originally; extension of this rule from acquets to personal belongings: nos. 570, 586). Splitting, resplitting and resplitting again, in such a way as to divide the mass into eight parts, in certain Customs. — The "Schwabensp.," 148, cites the Bible, "Numbers," xxvii, 8. — "Montpellier," 58.

² *Heusler*, II, 606. Peculiarities of the German law on the subject of the "Vatermagen" and "Muttermagen" and of the distinction formerly established between these classes of relatives and the "Schwertmagen" and "Spillmagen," etc.: "Sachsensp.," I, 71, 1; "Schwabensp.," 148 (128), 275 (225). Sometimes the male agnates exclude the women and sometimes the paternal line excludes the maternal line, etc.: *Ficker*, III, 518, 590, 4, 1; 5, "Z. S. S.," 1883, "G. A.," 1; *Stobbe*, V, 106; *Pertile*, IV, 71, 76. As to the succession of the "Muttermagen," cf. *Brunner*, "Berlin, Akad.," 1894, II, p. 1293; *Adam*, "Thronfolgerecht der Kognaten," 1897. See also "Toulouse," 124. Sometimes the maternal relatives only have one-third. Sometimes the father takes to the exclusion of the mother: *Chaisemartin*, p. 390; *Giraud*, "Essai," I, 112.

³ Exclusion of daughters in the collateral line (of equal degree): *J. d'Ibelin*, 175; "Jostice," 12, 6, 28; "Cout. Not.," 71; "Const. Chât.," 68; "Gr. Cout.," II, 25 (p. 279); *Loysel*, 634 et seq.; "Paris, A. C.," 16; "N. C.," 25; *Pothier*, VIII, 100 (ed. *Bug.*). — Barring of descendants (whether males or not) of the women: *Loysel*, *ibid.*; "Touraine," 284; "Auvergne," 12, 25; *Beaumanoir*, 14, 28. Cf. "Primogeniture," "Representation."

duce into the countries of written law this rule, which was so contrary to Roman legislation.¹

§ 458. **Ascendants.**² Rule: "**Personal Belongings do not Ascend.**"³ — This rule has been extended in two directions. (A) Formerly it signified that ascendants did not succeed to their descendants; they were excluded by the collaterals, and even by the Treasury.⁴ Is this peculiarity of the Customary law to be accounted for by the influence of the rule, "**fiefs do not ascend**"? ⁵ This could be readily understood, because at a given time the majority of lands were fiefs and copyholds.⁶ Must one rather see

¹ *Mellier*, "Sommaire explicatif de l'Edit du Roi par lequel il ordonne que dorénavant les Mères ne succéderont à leurs Enfants ès Biens provenus de Côte paternel, mais seulement ès Meubles et Conquêts provenus d'ailleurs," 1575; *Bouhier*, "Tr. de la Succ. des Mères," 1726; *Argou*, II, 22; *Viollot*, 847.

² As to the rights of ascendants, cf. especially *Ficker*, II, 399; III, nos. 702, 740, 9175; *Britz*, V, 678. — Texts of the Customs in Guénois, II, 15. — *Pertile*, IV, 69.

³ *Tacitus*, "Germ.," 20; "Burg.," 14, 53, 78; "Thur.," 6. On the other hand, the "L. Sal.," 59, calls fathers and mothers to the succession: "Rib.," 58; "Wis.," 4; "Alam.," 92; "Roth.," 170; "Fris.," 9; *Greg. Tours*, IX, 93. Charters, for example, that of Saint-Omer, "Ord.," IV, 251; "Lib. pract. Rem.," 39; "L. Henr. I.," 70; *Glanville*, VII, 1, 10; *Chaisemartin*, 401; *Ficker*, II, 457 (details and special system); III, 364, 607; *Stobbe*, V, 107; *Pertile*, IV, 71 (mother). Exclusion in China, Greece, and among the Slavs: *Dareste*, "Nouv. Et.," 298, 90.

⁴ "Cout. Not.," 185, 90, 194; "Gr. Cout.," p. 369; "Paris," 312; *Loyse*, 322; "Ass. de Jér.," "C. des B.," *Abridgment*, 58; *Commentary* on "Roth.," 153. The personal belonging is defined as being the property which the deceased holds from his ascendants by means of succession or gift. If it is a piece of property that has been given, the reversion restores it to the ascendant. If it is a piece of property that has come to him by succession, the ascendant is dead and can no longer reclaim it. The rule, "Personal belongings do not ascend," seems at first blush to be inapplicable. But this merely appears to be so. There are exceptional hypothetical cases, it is true, where it is liable to apply. N dies leaving a personal belonging which came to him from his father (who predeceased him), and which was an acquet of the latter's; can the paternal grandfather of N succeed to this personal belonging in preference to the collaterals? Or, again, can my father take in my succession the personal belongings coming from my paternal uncle, whose succession he had renounced, etc.? *Masuer*, 32, 8; *Pasquier*, "Inst.," 499.

⁵ "L. Feud.," 1, 14; 2, 11; 2, 50; *J. d'Ibelin*, 185; *Blackstone*, II, 14; *Glasson*, VII, 462. The fief could only go to the descendants of the grantee from the point of view of the grantor; the ascendants of the first vassal were thus excluded from it. If it were a matter of a fief that had been granted in former times, an ascending inheritance of the present vassal belonged to the posterity of the original vassal; but the fief had escaped him to go to his descendants, and he himself could not take it back. This same reasoning applied in the case of copyholds. — Italy: right of ascendants to freeholds, but exclusion of the mother (and of brothers born of the same mother): *Commentary*, on "Roth.," 153; *Texts* in *Pertile*, IV, 70; "Z. S. S.," 1901; "G. A.," 374 (*Kier*, etc.)

⁶ *Brunner*, "Erbf.," 22, suggested an explanation of this rule drawn from a passage in *Glanville*, 7, 1, 10: "Nemo ejusdem tenementi simul potest esse hæres et dominus." The vassal who wishes to dispose of his fief for the benefit of his son is only free to do so during his lifetime by means of subinfeudation; thus he grants it to his son as a fief held under a mesne lord that has passed to

therein a formula previous to the feudal system, demonstrating the fact that the succession of ascendants was a physical impossibility? Because one of two things must have taken place,—either the descendants had not left the paternal house, and in this case they possessed nothing of their own, or else they had left the paternal house, and then the ties which united them to their descendants were broken. But, according to this last hypothesis, it is not very easy to see why these ties between them and the collaterals still remained. Whatever its origin may be, this rule was too contrary to the spirit of the new law to last very long; it was abandoned, and with the exception of brothers and sisters the ascendants were preferred to any of the collaterals.¹ In the past, legal reversion had helped in supporting this rule. — (B) At this point the rule, “Personal belongings do not ascend,” should have disappeared. It was preserved by giving it a new meaning; it meant that the paternal personal belongings did not come to the maternal relatives, and vice versa, — at least, if there remained no person of the line for which the personal belonging had been appropriated. In this case the property devolved from one line upon the other. Thus understood, it was a useless repetition of the maxim, “*Paterna paternis, materna maternis.*”² — (C) **Legal reversion** for the benefit of the ascendant donor is not connected, as has been thought, with the provisions of the Roman laws relat-

the heirs of the body or to the collaterals; it is only upon failure of heirs that it reverts back to the original grantor: “*Etabl. de Norm.*,” ed. *Marnier*, 25. “*Assise*” of Count Geffroi, 1187. — In Normandy, at the beginning of the thirteenth century, this theory did not exclude the right of ascendants to succeed. In England, following the Statute “*Quia Emptores*” (18, Edward I), it was possible for a vassal to grant a portion of his fief without subinfeudating it; and thenceforth the obstacle which stood in the way of the right of ascendants to succeed, — which was that “No one could be heir and lord of the same tenement at the same time,” — disappeared. *Britton*, II, 310, 163 (according to him, the inheritance, which is the important thing, descends and never ascends). Cf. *Pollock and Maitland*, II, 284 (a means of weakening the consequences of the right of primogeniture). Assuming that the rule, “Nobody can be,” etc., had its influence upon the Anglo-Norman law, it could not account for the principle in the other legal systems that “Fiefs do not ascend,” and still less for the analogous principle, “Personal belongings do not ascend.”

¹ The rule, “So long as the stem has a stock it does not fork,” *Loysel*, 334, expresses the preference for ascendants before collaterals: “*Paris*,” 325. — Cf. *Chaisemartin*, 399 (“*Schoossfall*”); “*Sachsensp.*,” VII, 17.

² *Beaumanoir*, 14, 22, 23, 24: The personal belonging which has come from the father passes to the paternal grandfather, although the latter is excluded by the brothers and sisters of the deceased with regard to movables and acquests (they are one degree nearer). *Contra*: “*Gr. Cout.*,” p. 369; *Desmares*, 293. Cf. “*Parl. aux Bourg.*,” p. 119. On these contradictory texts, cf. *Picker*, III, 580; *Laurière*, on *Loysel*, 334; on “*Paris*,” 312. Succession of ascendants to the usufruct in certain of the Customs: *Argou*, II, 22. Cf. *Civil Code*, 754; *Pothier*, II, 1.

ing to the restitution to the "paterfamilias" of the "dos" by succession in the direct line,¹ in case of a dissolution of the marriage owing to the predecease of the wife. Nor can it be derived from the pre-Justinian any more than from the Justinian law; in fact, the restoration of the "dos" by succession in the direct line had ceased to be made use of at the time of the invasions;² thus it is not from the Theodosian legislation that it could have been borrowed. Justinian gave this institution a sort of artificial life, but, as the influence of the Justinian law only made itself felt rather late in France, and as reversion was there practised before this period, it was not borrowed from the Justinian legislation to any greater extent than this.³ In reality it is only a survival of the old Germanic law, according to which a gift was

¹ Dig., 23, 3, 6 (Pomponius); "Cod. Just.," 6, 61, 1 and 2; *Mitteis*, "Reichsrecht," 251; "Cod. Théod.," 3, 5, 9 ("wedding gifts" restored to all who gave them); "Novella," 25 of Leo the Philosopher (ninth century).

² Without having been abrogated, the old law was no longer applied. This is the result of the texts inserted in the "Papien" and the "Brév. d'Alarie"; "Novella, Théod.," II, 14, 1, 3; "Novella, Valentinian," III, 34, 8, 9, 10; "Novella Major," 6, 6, 7; *Papien*, 26, 10; "Ed. Théod.," 54; *Mitteis*, *op. cit.*, 248. — "Cod. Euric," 321; "L. Wis.," 4, 2, 13. — Cf. "Cod. Just.," 3, 38, 12 (which does not contemplate a right of reversion to the mother); 5, 13, 1, 13; "Novella," 22, 23; "Petrus," I, 3: no legal reversion; acquiring of the marriage portion by the surviving husband, unless there be an agreement to the contrary; "Toulouse," 88, 113 *et seq.*

³ Reversion in the barbarian laws ("Sax.," 42; "Alam.," 54, 2; *Heusler*, II, 318, 326; "Wis.," 3, 1, 5; 4, 5, 3; 5, 2, 4. Cf. "Bai.," 15, 8; "Burg.," 62, 2), later on in the "Schwabensp.," 15; in the Scandinavian law *Amira*, "N. O.," I, 529; II, 655; in Flanders and in Friesland. In the Anglo-Norman law the reversion was admitted formerly (*Glanville*, 7, 18, 3; *Delisle*, "Jug. de l'Echiq.," no. 537), unless the property had been granted as a fief by the donor to the donee, because no one can be heir and lord of the same tenement; this perhaps explains why it has disappeared from the English law (*Glanville*, 7, 1, 9); the "Summa Norm.," 119, also rejects it. Sicilian law: "Catane," 14; "Messine," 12, reversion of Norman origin: *Brünneck*, 35. In the French sources the reversion is frequently found in the twelfth and thirteenth centuries, and rarely in the fourteenth and fifteenth centuries, as a consequence of the influence of the rule, "Personal belongings do not ascend," or else because the old conception of the gift has been abandoned; the reversion is generally found in the second half of the sixteenth century because of the influence of the Roman laws, and because the rule, "Personal belongings do not ascend," had changed in meaning. In the "Cout. de Paris," it disappears between the "Const. Chât.," 18, and the "N. C.," of 1580, 313; "Cout. Not.," 185; *Desmares*, 293; "Gr. Cout.," p. 369; "N. R. H.," 1891, 188. Municipal charters, Laon, etc.; "Ord.," XI, 186, 233, 236, etc.; *P. de Fontaines*, 15, 14; "Justice," 253; "Reims," 1520, 6; "A. C., Champ.," 10; "Vitry," 26; "Amiens, T. A. C.," 63, 70, 82; *Marnier*, "Picard.," 15; *Guynes*, ed. *Taillar*, p. 213; "L. de Droiz," 857. On "Olim," I, 715, cf. *Glasson*, VII, 506; *Brunner*, p. 699 (the text contemplates the right of reversion in the most formal manner under the form of a succession by some special right, and it is sought to do away with it by departing from the rule, "Personal belongings do not ascend"). Thus we believe that M. Glasson is mistaken in denying the existence of the right of reversion during the feudal period, whether it be in countries of written law or in countries of Customs: "Schwabensp.," I, 16.

first of all looked upon by the donor as a conditional act, an act of generosity which was only meant for the donee himself, and, at the very most, for his children or his descendants; if he had no posterity, the property which had been given reverted back to the donor. This conception, which was abandoned for ordinary gifts, subsisted in the case of gifts made by ascendants to their descendants, no doubt because there was found therein an opportunity to keep the property in the family.¹—In **countries of written law** the reversion took place more fully; there was seen therein the same effect as an implied condition subsequent would have,² and, consequently, the property reverted to the donor free from every charge.³ The **countries of Customs** gave the ascendant lesser rights, perhaps because whatever advantage he lost by way of reversion he recovered by way of repurchase and the reservation. Reversion was looked upon as the exercise of a true right of intestate succession;⁴ the donor only

¹ Celebrated controversy among the Glossators to decide whether the marriage portion ought to be restored, even in case there were children. Bulgarus, who agreed with the texts, maintained this; Martinus, who was of a more practical turn of mind, denied it. The wife of Bulgarus having died without leaving any children, the father-in-law of this juriconsult consulted Martinus. "If I were in Bulgarus's place," said the latter, "I would not give you back the marriage portion; but in his case, unless he contradicts himself, he should give it back to you." Martinus thought that he had found a very good opportunity of confounding his rival. But this was not so at all. Bulgarus restored the marriage portion without hesitation, to the great disappointment of Martinus. Thenceforth the opinion of the latter prevailed in practice, for the disinterestedness of Bulgarus found few imitators; and we must indeed admit that the object of the marriage portion is to provide for the maintenance of children. Cf. the Edict of 1456 as regards Provence.

² The reversion of the old law took place "ipso jure" in the South as well as the North; at Rome the "pater" only had an action for the restoration of the marriage portion by succession in the direct line. The reversion belonged not only to the paternal ascendants, but to the maternal ascendants, and sometimes to every relative; it was applied to every gift, and not merely to the marriage portion. If the donee had children, the reversion did not take place; this was not so in the case of marriage portion by succession in the direct line. We can see how the reversion differed from the Roman institution that must have served as its prototype. Judicial law saw in these differences happy innovations and invoked the not very serious reason given by *Pomponius*, Dig., 23, 3, 6, in order to justify the Roman rule, "Ne et filiae amissæ et pecuniæ damnum sentiret." *Beaumanoir* reproduced it: "One is more easily reconciled to one loss than to two," says he, "and one must encourage gifts for the benefit of children"; he states that there were controversies as to the existence of the reversion (14, 23). Cf. *Ficker*, III, 588; *Argou*, II, 22.

³ Excepting for the mortgage over the marriage portion, which the wife of the donee had, Civil Code, 951.

⁴ Perhaps the reversion to the stock, of personal belongings in the collateral succession, was the decisive analogy which directed the juriconsults of the countries of Customs. Perhaps they should have made of the reversion a method of succession in order to avoid the difficulties which would have resulted from the restoring of ownership carried out by the donee in accord-

took back the property which had been given if he found it still in the hands of the donee and in the same condition as when it was given; conveyances, grants of mortgages and servitudes, could be set up against him, as against every heir; and, as every heir does, he contributed to the payment of debts; his right only affected the immovables which were personal belongings, and in order to exercise this right he had to accept the inheritance; all the more did he have to be called upon to collect it (which excluded relatives of an illegitimate child).¹ — Abolished by the Law of the 17th Nivôse of the year III, reversion was admitted again by the Civil Code, Art. 747, under its customary form, that is to say, by way of an anomalous succession.²

§ 459. **Collaterals.**³ — The system of succession as affecting collaterals can be summed up for countries of written law in the following principle: The nearest relative of the deceased is preferred to the furthest removed, excepting for the application of the privilege of the double tie and representation. The same rules apply in countries of Customs for movables and acquests, but they are not applied exactly to personal belongings, as we shall see.

§ 460. **The Same.** — (A) **Nearest in Degree.**⁴ This rule met with so many obstacles that it passed almost into the condi-

ance with the complicated proceedings of disseisin-seisin; it is obvious that these proceedings were inconsistent with the revocation of the right of the donee, "ipso jure." In countries of written law the question of the transfer of ownership was more simple.

¹ *Loysel*, 333 (bibl.); see *Ferrière*, *Guyot*, etc.; *Pothier*, "Don.," 3, 4; "Succ.," 2, 3.

² Cf. Civil Code, Art. 747, 766, 351, 352. — Reversion by agreement, *ibid.*, 951, 952.

³ Although the collaterals have always been excluded by the descendants from the ordinary succession, this was not so with regard to the right to the "Wergeld": a part of it was reserved for them, because they assisted in taking vengeance for the death of their relative: *Brunner*, "Z. S. S.," 1882, "G. A.," 1, and "D. R. G.," II, 136. *Britz*, p. 670: at Tournay, the "honorable reparation" for homicide all goes to the eldest son, whereas the "profitable reparation" (pecuniary) is equally divided among the children. — Conversely, the succession of collaterals was not organized among the Franks, — at least, in the case of land, — before the Edict of Chilperic; the land was redistributed among the "vicini" in conformity with the system of collective ownership which had continued to exist where the Franks were found to be grouped together in "vici" (*Heusler*, II, 575; *Schroeder*, 320), a system destined to disappear rapidly when it came in contact with the Romans: *Dareste*, "Nouv. Et.," pp. 304, 324, 90, 343; *post*, II, 179, 196; *Marçais*, "Par. Succ. en Dr. Mus.," 1899; "R. de Lég.," III, 54. — Cf. "Succession to the Throne": "Ass. de Jér.," II, 395, ed. B.

⁴ The reckoning of degrees of relationship was made in certain Customs according to the Roman laws, and in others according to the Canon law; but in the end the Roman method prevailed almost everywhere. — "Ass. de Jér.," "C. des B.," 53 *et seq.*

tion of an exception.¹—(a) “*Paterna paternis, materna maternis*,”² and by applying this maxim the paternal personal belongings go to the collateral who is furthest removed in the paternal line rather than to the nearest collateral or ascendant in the maternal line, and vice versa. One collateral thus could not prevail over another by reason of his being of a nearer degree, excepting if they were both in the same line.³—(b) As a general thing, *resort to the origin of possessions* is compulsory and prevents taking into account the proximity of the degree. In this respect the Customs vary a great deal: ordinarily, three principal systems are to be distinguished: 1st. According to **Customs relating to the stock** (“Tours,” “Mantes,” “Reims,” etc.),⁴ the personal belonging passes to the descendants of the first person who acquired it; it returns to the *stock* from which it has been detached.⁵ As many successions as there were personal belongings having a distinct origin, together with very complicated inquiries as to the genealogy of each one,—such were the vices of this system, which system was the most faithful to the conception of the conservation of possessions in the family. 2d. According to **Customs of the side and line** (“Paris,” “Meaux,” and the majority

¹ See “Privilege of the Male Line”; *Ficker*, II, 257 (one-third to the women).

² In Friesland, in Switzerland and at Hamburg partition by halves of all the property among both lines, as is done according to the Civil Code, 733; *Britz*, 681, 686.

³ **Competition between ascendants and brothers and sisters.** (A) *Countries of written law.* Brothers and sisters of the whole blood compete with ascendants. — (B) *Countries of Customs.* The Customs are divided. Generally brothers and sisters are excluded by ascendants from the succession to movables and acquêts and exclude the ascendants from the succession to personal belongings: *Argou*, II, 22; *Stobbe*, V, 108. Customs according to which the mother is excluded by the father, and even by the brothers and sisters; brothers and sisters of emancipated children exclude the father and mother; brothers and sisters living in a community: at the death of one of them the succession goes to the community, etc.; *Heusler*, II, 185 (cf. 608): if the ties of blood prevail the father and mother are preferred; on the contrary, the interest of the house may give the brothers and sisters the ascendancy: “*Sal.*,” 59; “*Rib.*,” 56; “*Alam.*,” 95; “*Fris.*,” 19; “*Sachsensp.*,” I, 17 (preference of the father and mother); “*Burg.*,” 51, 2; 78, 1 (preference of brothers in the succession of the brother who has partitioned the family possessions with his father); *Pertile*, IV, 70; *Lehr*, “*Dr. Scandin.*,” 382; “*Dr. Russe.*,” I, 414; *Britz*, 678; Law of Niv., year II; Civil Code, 748. — “*Ass. de Jérus.*,” II, 284, ed. B.; “*Siete Part.*,” 7, 13, 4.

⁴ *Chaisemartin*, 404: “The property should go whence it came.” “*Jus recadentiae, revolutionis*,” “*Rückfallsrecht*.” Thus the family community is reconstituted: *Blackstone*, II, 14; *Ficker*, III, 463; *Lecoq*, “*Qu.*,” 87; *Laurière*, on “*Paris*,” 329; *Britz*, 682.

⁵ *Stock*, trunk, root, branches, bough, — so many expressions drawn from the use of genealogical trees. The lineage is a series of relatives, and side and line are understood to apply to the paternal or maternal side, and, in one of these sides, to the line to which the first acquirer belongs: *Ficker*, II, 188; III.

of the others), the personal belonging goes to any relatives of the first person acquiring it, descendants first of all, and if there are none, then to collaterals; if the first person acquiring it has left no descendants the personal belonging goes to the family of his brother or of his uncle, — to an inheritance to which it had never belonged, however. This system, which was a little more simple than the preceding one, was still very complicated. 3d. The **Customs of the side only** ("Chartres," etc.) gave the nearest paternal relative of the deceased all the paternal personal belongings, and to the nearest maternal relative all the maternal personal belongings. Thus the difficulties of application were done away with, but at the risk of despoiling one family for the benefit of the other; thus in the paternal line are found the relatives of the grandfather and the grandmother; the personal belongings coming from the grandfather may pass to the relatives of the grandmother, if they are nearer related to the deceased.¹

§ 461. **The Same.** — (B) **Privilege of the Double Tie.**² This Roman prerogative, which was based upon the conception of presumed affection, gave the brothers and sisters of the whole blood the entire succession in preference to half-brothers, that is to say, descendants of the same blood or descendants of the same mother. Certain of the Customs applied this rule to successions to movables and acquests, and it was sometimes even extended to collaterals other than brothers and sisters.³ With relation to personal belongings the privilege of the double tie could not be conceived of; but the brothers or relatives of the whole blood took in both lines, because they belonged to both lines; descendants of the same blood or descendants of the same mother only took a share in one line, the one to which they belonged.

§ 462. **The Same.** — (C) **Representation** in the collateral line

¹ *Argou, loc. cit.; Britz*, 681 (Antwerp, Ostend, etc.).

² *Guyne*, "De la Représ. et du Double Lien," 1779; *Mignot, id.*, 1777; *Serres*, "Inst.," p. 297. — Law of the 17 Niv., year II, Art. 89 (suppression); *Civil Code*, 733; *Britz*, 684.

³ The Customs are very much divided; some do not admit it: "Paris" (*id.*, *Civil Code*, 733), "Melun," "Sens"; others only allow brothers and sisters to enjoy it: "Saint-Quentin," "Dreux," and nephews as well, "Orléans"; there are some that apply it without limit: "Blois," "Montargis"; *Loysel*, 335; *Pasquier*, "Inst.," 495; *Argou*, II, 23; *Britz*, 684. — Same hesitation in foreign countries: *Brunner*, "Erbfolg.," 28; *Pollock and Maitland*, II, 300 (bibl.). The English common law absolutely excludes relatives of the half blood, even from the succession to personal belongings; but in the time of *Bracton*, fo. 65, 6, they disputed: *Blackstone*, II, 14; *Chaisemartin*, 403; "Sachsensp.," I, 3; II, 20; "Schwabensp.," 3; *Stobbe*, V, 116; *Heusler*, II, 612; *Ficker*, III, 444, 213; *Lattes*, "Dir. Cons. Lomb.," p. 262. — Also, *Loysel*, 335; "T. A. C., Bret.," p. 479.

was rejected by certain Customs and admitted in others, and then it was sometimes admitted to infinity and sometimes within limits fixed by law, — that is to say, to nephews and nieces, following the Roman law. "The more the Customs advanced towards the North," says Lebrun, 3, 5, 2, 3, "the more were they hostile to the right of representation."

§ 463. **The Same.** — (D) **Devolution.** Collaterals to infinity inherited, no matter of what degree they were, in the last stages of the Customary law, and even, according to the Law of the 17th Nivôse, year II.¹ But in old times relationship was limited in its effects over inheritance;² the barbarian laws and certain of the Customs, being connected with the Roman or Germanic methods of computation, refused the right to inherit to those beyond the 5th, 6th and 7th degrees, and sometimes even the 10th degree. Sometimes, even, the clauses in feudal grants or enfranchisements of serfs, restricted the right of inheritance still more. The Civil Code, in Article 755, declares that beyond the 12th degree relatives do not inherit. This is a solution by way of compromise between the system of presumed affection and that of the rights of relationship. — If there are no relatives in one line the personal belongings which would have reverted to the lord belonged first of all to him;³ it is only in the sixteenth century that devolution from one line to another, or, rather, the passing of personal belongings to the heir of movables and acquets, was admitted.⁴ "Where one branch fails the lineage inherits," Loysel, 342. "Fiscus post omnes etiam in centesimo gradu."

¹ "Berry," 19, 1; Law of 17 Niv., year II, Art. 75.

² The limitation of relationship does not very well agree with family solidarity; but originally it may be that there was no succession outside of the circle of the "sui," which would give three degrees (sons, brothers, nephews). The other restrictions are drawn from the Roman law: "Thur.," 34; "Rib.," 56, 3, etc. (5th degree); "Sal.," 44, 9 (6th degree); "Wis.," 4, 1, 7; 4, 2, 11; "Bai.," 15, 10; "Roth.," 153; "Schwabensp.," 14; *Gratian*, c. 2, c., 35, q. 5 (7th degree); "Sachsensp.," I, 33; *Beaumanoir*, 14, 3 (4th degree). — The 10th degree is only the 5th canonic degree reckoned in the Roman way: "Inst. Just.," 3, 5, *in fine*; *Glanville*, VII, 1; *Bracton*, fo. 67, 372 b. The limitation of relationship is in accord with the custom of representing it by means of the human body, and not by using genealogical trees: *Chaisemartin*, 387; *Brunner*, 44, 37; *Heusler*, II, 591; *Schroeder*, 319; *Stobbe*, § 287; *Pollock and Mailland*, II, 305; *Ficker*, I, 475; *Valroger*, "Celtes," p. 468 (second cousins); *Dareste*, "Etudes," 329.

³ *Desmares*, 184; "Cout. Not.," 92; *Lecoq*, "Q.," 87; *Boutaric*, I, 78; *Masuer*, 33. Sometimes the same rule is applied to the succession to the movables: "Olim," II, 787, 418; *Cl. Liger*, 431; *Zeeland*, "Z. S. S.," III, "G. A.," 31; *Masuer*, 32, 8. Exclusion of the ascendants by the Treasurer.

⁴ *Dumoulin*, on *J. Lecoq*, 87; "Paris, N C.," 330; *Loysel*, 342; *Laurière*, on "Paris," 330; *Glasson*, VII, 477; *Ficker*, III, 464.

§ 464. **The Surviving Spouse.**¹ — (A) *Countries of Written Law.*² If there are no lawful relatives the surviving spouse succeeds to the predeceased spouse; if there are relatives, he only has a right to the **poor man's fourth** in conformity with the "Authentic," "Præterea": the surviving spouse who is poor takes one-quarter of the inheritance of the predeceased spouse who is rich, when there are at least three children; the share of a male, if there are more children. This quarter is usufruct if there are children and ownership if there are none. In the eighteenth century courts restricted the right of the surviving spouse to a mere allowance for life, even when there were collaterals.

§ 465. **The Same.** — (B) *Countries of Customs.*³ Originally, if no family survived, the Treasury was preferred before the surviving spouse, who had to be contented with the portion of the survivor which was established for his benefit. But, when attention was paid to the notion of the presumed affection of the deceased in order to regulate his succession, under the influence of the Roman ideas, it led to a recognition of a reciprocal right of succession between the spouses, giving a preference over that of the lord or the Treasury,⁴ and which was of the same nature as that of relatives.⁵ The Law of November 22 to December 1, 1790, generalized the succession of the surviving spouse if there were no relatives living.⁶

¹ *Post*: "Rights of the Widow" (bibl.); *Guyot*, see "Quarte"; *Serres*, "Inst.," III, 10, 3; *Louet*, "F.," 22; "V.," 13, etc. — *Viollet*, 853; *Stobbe*, § 294; *Pertile*, § 127. — *Daresté*, "Nouv. Et.," pp. 304-327; "Z. S. S.," 1898, "G. A.," 107; *Ficker*, IV.

² Roman law: "Bon. possessio unde vir et uxor"; "Cod. Théod.," 5, 1, 9; "Cod. Just.," 6, 18, 1 (Authentic "præterea"); "Novella," 53, 6; 22, 14; 117, 5; "Novella," 106 of *Leo*. — "Siete Part.," VII, 13, 7.

³ *Loysel*, 340: "The wife does not succeed to the husband, nor the husband to the wife"; *Bacquet*, "Aubaine," 34; "Norm.," 146; "Maine," 286. — Ordinarily, the Customs remain silent, which proves that they know nothing of succession between spouses: "Ass. de Jérus.," "C. des B.," 186: "No man is his own heir at his death, as is his wife." She excludes, says this text, invoking "Genesis," ii, 24 ("Vir et uxor unum corpus"), even the sons and daughters and fathers and mothers and brothers and sisters. But it seems that she only acquires a limited ownership. Cf. c. 187. In the same way at Liège, by virtue of the marriage agreement, the surviving spouse takes all the possessions left by the other; but the right of devolution prevents his abusing this favor to the prejudice of the children: "Z. S. S.," *loc. cit.* (one-half to the widow, one-third to the dead).

⁴ "Berry," 19, 8; "Poitou," 299; *Louet*, "F.," 22 (Order of 1582). Forfeiture in case of the wife's adultery and of a separate maintenance decreed against the husband.

⁵ *Pothier*, "Cout. d'Orléans," Introduction to Vol. XVII, no. 35: the spouse has the seisin. *Contra*: Civil Code, 767; *Britz*, 693, 690: he is the necessary heir (Flanders).

⁶ I, 4. Cf. Law of March 9, 1891.

§ 466. **Irregular Successions.** — In a strict system of individual ownership¹ the possessions of a person who has died without relatives capable of succeeding him should be "res nullius," which could be seized upon by the first comer.² But this rather impractical solution was discarded from the time of the Frankish period;³ the royal Treasurer appropriates the possessions in case of the failure of heirs, no doubt following the example of what took place at Rome⁴ and because of the royal patronage over individuals who had no family. The right resulting from **failure of heirs**⁵ which belonged to the lords-justices (lay or ecclesiastical, individuals or towns), passed away as a consequence of the feudal movement, and the king only kept it in those localities where he himself administered justice. Alongside of this right,⁶ and acting almost as different interpretations of it, are the rights of **succession to the estate of deceased aliens** and of **succession to the estate of an intestate bastard**,⁷ and even the right of **confiscation**.⁸

¹ Cf. Rights of the "vicini": *Heusler*, II, 616.

² At Rome, usufruct "pro herede."

³ "Sal." 44, 10; 60, 2; 62; "Fris." 19, 2; "Bai." 15, 10, 4; "Roth." 223; *Brunner*, "D. R. G.," II, 48, 71; *Zeumer*, "Forsch. D. Gesch."

⁴ *Girard*, "Man.," p. 878.

⁵ The heirs could at first only claim successions that were vacant within a year and a day ("Ass. de Jér.," "C. des B.," 196), then during 10 and 30 years: "T. A. C., Norm.," 21, 2; "Sachsensp.," I, 28; "Montpellier," 114. As to the prescription running against the petition of the heir, see *Ferrière*, *Guyot*, — "Abr. de C. des B.," 34 *et seq.*

⁶ Administration of vacant successions by the public officers, but only since the twelfth century, for up to that time they are simply conferred upon the lord: "Fribourg en Bearn," 4; "Saint-Antoine en Rouergue," 1144; "Albi," 20. The custodians pay the debts: "L. d. Droiz," 897 (appointment of a "curator" by law if the creditors ask for it). Details in *R. Caillemier*, p. 58. Cf. in the existing law the distinction between a vacant succession which nobody claims, not even the State, and for which a "curator" is named, and the succession to which the heirs have failed, which escheats to the State: *Guyot*, *Ferrière*, see "Curateur à Succ. vacante." In fact, there is a vacancy as soon as the heirs of the first degree have renounced: *Pothier*, Introduction to Vol. XVII, "Cout. d'Orléans," no. 67.

⁷ One does not find in failure of heirs the penal character which distinguishes confiscation, and from this difference, which was scarcely perceptible originally, there resulted in time the two opposite systems: *Blackstone*, II, 16, 18.

⁸ With the confiscation of the possessions of a man condemned to death or to banishment will naturally be connected, although there is no penal condemnation, that confiscation which affects the succession of usurers ("T. A. C., Norm.," 49, Dauphiné, Savoy, for example "Evian," 4; "Fribourg en Uecht," 57), of suicides, persons dying intestate or unconfessed ("desperati"), both guilty towards the State or the Church. The unconfessed: "Summa Norm.," 20; "Et. de St. Louis," I, 93; *Boutaric*, I, 39; *Du Cange*, see "Intest." The intestate is only a sort of unconfessed man; he has not made any provisions for the salvation of his soul; his succession was first of all confiscated, and when legislation became milder they limited themselves to distributing his property for pious uses: *Glanville*, VII, 16. The "intestia" of Roussillon are probably only a relic of persons in mortmain. As to suicides, cf. *Loysel*, 837: "The man who puts himself to death in despair has his property confis-

The prerogative of the lord-justice found itself limited in two directions: 1st. As a general thing, it only affected allodial holdings and movables, because fiefs and copyholds reverted to the lord who had granted them; these kinds of possessions were never unoccupied and without an owner.¹ 2d. Successions resulting from failure of heirs were often divided between the lord and the charitable organizations;² they were appropriated for public charges, especially for the succor of the poor, as an accidental and unforeseen resource which humanity prescribed should be used to benefit those who had been disinherited by fortune. If the lord-justice divided the inheritance with the poor, all the more should he indemnify the creditors of the inheritance, at least within the limits of the assets which he collected ("intra vires").³ Such was the general custom based upon equity; but it was rather difficult to justify from the strict legal point of view, because the lord seems rather like a grantee by some special right or a privileged occupier than an heir⁴ (cf. Law of Nov. 22, — Dec. 1, 1790, 1, 3).

§ 467. **The Revolutionary Law** began by abolishing the inequalities which resulted from the right to the preference of males and the right of primogeniture (nobles' possessions, D. March 15,

cated by his lord." His movables, at least, were confiscated, and sometimes his immovables themselves; and *Cl. Liger*, Art. 1435, establishes the application of the archaic right of ravaging to the lands of the suicide. In time distinctions were drawn according as to whether the suicide was conscious or unconscious of his act, and whether the suicide did or did not take place in order to escape a capital punishment. Cf. Dig., 48, 21; "Summa Norm.," 20; "Et. de St. Louis," I, 92; "T. A. C., Bret.," 296; "A C., Bord.," 41; *Beaumanoir*, 69, 12 (Table, see "Suicide"); "Gr. Cout.," p. 664; "Olim," I, 442, 6, etc.; *Boularic*, I, 39; II, 15 (rejects confiscation); *Bracton*, II, 504 ("felonia de se ipso"); "Fleta," I, 34; *Britton*, I, 7. Diversities in German law: "Sachsensp.," II, 31, 1; *Brunnenmeister*, "Quell. d. Bambergensis," p. 93. Rights of the executioner over the condemned whom he executes: "Gr. Cout.," 657. As to "Hagestolzen," or unmarried men, cf. "Z. S. S.," 1901, "G. A.," 1. Succession of emigrants, cf. "Lois civiles interm."

¹ *Glanville* calls the lord "ultimus heres": *Glosson*, VII, 463; "T. A. C., Norm.," 88 *et seq.*; "Schwabensp.," I, 32 *et seq.*; 159.

² Details and texts in *R. Caillemer*, p. 75; *Britz*, 691. In England the succession of the intestate was in the end distributed under the supervision of the Church: *Pollock and Mailland*, II, 356.

³ Cf. in *R. Caillemer*, p. 119, the discussion of this question: "Roth.," 223: the king does not pay debts; *Pertile*, IV, 134, 127; "Olim," II, 328. Cf. to the contrary: "Lunas," 7; "Riom," 5; "Arles," 83, etc.

⁴ We may observe a tendency of the old law to confer the succession of a person upon the body or the establishment to which that person belongs; for example, the succession of a monk to his monastery, and that of a patient to the hospital where he was cared for. *Viollet*, 487: the Charité of Lyons adopted its orphans. Law of the 15th Pluv., year XIII, Art. 8. The Vestry Board receives the possessions of the priest. The possessions of (secular) ecclesiastics belonged first of all to the Church; later on, in the fourteenth century, their relatives succeeded to them: *Loysel*, 343 *et seq.*

1790; plebeians' possessions, D. April 15, 1791, which were passed in spite of the protestations of the deputies from Normandy and Béarn). In the countries of written law the Novella, 118, does not recognize the Customary privileges, but freedom to make a will allowed their re-establishment; this freedom was attacked, and if the opposition of the Romanists and the deputies from the South for a time prevented the reform from coming to a head, on the 25th of October, 1792, the Convention did away with trust-entails and renunciations to future successions; and on March 17, 1793, it abolished the power to leave by will to the direct line; the Decree of the 5-12 Brum., year II, and the 17th Niv., year II, restricted within the narrowest limits the portion which could be disposed of.

This last law, which can be called the "Succession Code of the Convention," contains two other series of provisions:

(a) Devises aiming to maintain the old rules were annulled, dating from July 14, 1789, and partitions of successions which had vested since that date were to be remade according to the new principles. We see that the Law of Nivôse, like that of Brumaire, also, had a retroactive effect. At the same time that they proclaimed in the Declaration of the Rights of Man that the retroactiveness of laws was a crime, the members of the Convention applied it to matters of succession, either out of hatred of the Old Régime or else under the influence of deputies who were interested in this iniquitous measure; they did not want for sophisms whereby to justify themselves in their own eyes; they pretended that, dating from 1789, equality had been established, and that all they did was to apply a pre-existing principle. This was the distinction of a casuist, which did not prevent the results of this law from being deplorable; they had to repeal it in the year III.¹

(b) In the devolution of succession they considered neither the nature nor the origin of possessions; they formed but one single mass, in the same way as the Roman legislation, which simplified their transmission a great deal. The right of inheritance is conferred first upon the descendants, who succeed in equal portions, either "per capita" or by means of representation; it is forbidden to favor any of them, and the special gifts must be shared alike,

¹ Laws of the 5th Flor., 3d Fruct., year III; 3d Vend., year IV; 18th Pluv., year V; *Glasson*, "Réf. Soc.," 1889, II, 217; *Sagnac*, pp. 234, 325; *Aron*, "N. R. H.," 1901, 618.

even by those who decline. Contrary to the axiom of the Customary law, "Bastards do not succeed," the Laws of June 4, 1793, and of 5-12 Brumaire, year II, had given to mere natural children the same rights of succession as to legitimate children, and to children born of an adulteress one-third of these rights (with the retroactive effect abolished by the Laws of the 15th Thermidor and the 3d Vend., year IV).¹ If there are no descendants, the inheritance is divided into two equal parts, one for the paternal line, the other for the maternal line; and if there is any occasion for it, this division is followed by a redivision. In each line they do not seek, as would be done under a system of succession based upon presumed affection, to ascertain who is the nearest relative of the deceased, but rather who are the relatives who are descendants of the nearest ascendants of the deceased; in this way they finally establish a series of lines or groups of kindred, that of the father and that of the grandfather, etc., which are called successively to the inheritance. This unexpected resurrection of the Germanic system of groups of kindred, which was at that time so much forgotten in Customary France, seems to be accounted for by two causes, — one which is rather archaic, and the other which is rather revolutionary: 1st, it was proposed, just as in the Customs, to restore the possessions as nearly as could be to the line or the stock which had provided them; 2d, this proceeding had the advantage of dividing the property among a great number of persons, for it must often have happened that each group of kindred contained many members. In each group the descendants excluded ascendants, — for example, the brother is preferred to the father; this privilege for the younger generations accords with the old principle that "Personal belongings do not ascend," but perhaps in establishing it, it was only desired to attach the classes which were most naturally fitted to support it to the new political system. Representation is admitted to infinity for the same reason, and thenceforth partition takes place by stocks. The privilege of the double tie is abolished, but those of the whole blood have a share in each line. If there are no relatives (and they succeed without the limitation of degree) the surviving spouse is called; as well say that he, or she, will hardly ever succeed; not very much favored in this direction, they are still less favored in that which concerns the portions of the survivor, such as dower, which the old law had instituted in their favor;

¹ *Sagnac*, pp. 317, 356.

the Revolution abolished them. The State is the ultimate heir.

Two motives dominate the Revolutionary legislation, — a regard for Equality, and the desire to simplify the law of succession by parceling the fortunes. It is based on the idea which was so widespread in the eighteenth century that the individual has no right to make a disposal of his possessions to take place after his death; this right belongs to the law alone. And this legislation is inspired, not by the probable wishes of the deceased, but by the political reason. Succession is not a sort of presumed will, the will of those that death has taken unawares before they had made known their last wishes; in theory it is looked upon as a regulation in the interest of the public, regarding the final disposal of possessions which have been abandoned by their owner, — a theory perhaps of a very momentous nature, because the State might take advantage of it in its own interest to deprive the relatives who were capable of inheriting. But, as a matter of fact, they are far from contemplating giving it this meaning; the State gains nothing; it limits itself to protecting the family against the caprices of individuals. In short, the system established by the Law of Nivôse is an incoherent amalgamation of new ideas and obsolete principles.¹

¹ Cf. various opinions: "N. R. H.," 1901, 616.

TOPIC 3. ACQUISITION OF HEIRSHIP AND ITS CONSEQUENCES

§ 468. The Vesting of the Succession.	§ 477. The Same. — (B) Renunciation.
§ 469. Incapacity to Succeed.	§ 478. The Same. — (C) Time to make an Inventory and deliberate.
§ 470. Disinheritance.	§ 479. The Same. — (D) The privilege of the Inventory.
§ 471. Disqualification.	§ 480. Partition between Co-heirs.
§ 472. The Rôle of the Heir.	§ 481. Forms of Partition.
§ 473. Acquisition of a Title by Inheritance.	§ 482. Effects of Partition.
§ 474. Hereditary Seisin.	§ 483. Refunding.
§ 475. Acceptance and Rejection.	§ 484. Payment of Debts.
§ 476. The Same. — (A) Acceptance pure and simple.	§ 485. Separation of Assets.

§ 468. **The Vesting of the Succession**¹ only takes place to-day as a result of natural death ("nulla viventis hereditas").² But formerly it also resulted from events which were likened to death, and which one might be tempted to term in a general way *civil death*, although this term was hardly applied excepting to cases of criminal condemnation and entering into religious orders.³ Such were, in the very old law, leprosy,⁴ the loss of sight, madness,⁵ and perhaps the serious infirmities which accompany old age.⁶ **Absence**⁷ had not so radical an effect, although it authorized the handing over of the possessions of the one who was absent⁸ to his nearest relatives. In fact, the law counted so much on the

¹ *Pothier*, III, 1; *Pertile*, IV, 119; *Stobbe*, § 279.

² "Commorientes," Civil Code, 720; *Pothier*, III, 1, 1; Dig., "de reb. dub.," 9, 22; Law of 20 Prair., year IV; *Zeys*, "Le Nil," § 7; "Acad. lég. Toul.," 187 (Fons).

³ *Post*, "Persons," *Loysel*, 345; *Pothier*, "Pers.," 70; *Pertile*, IV, 120. The excommunicated, "T. A. C., Norm.," II, 3.

⁴ *Post*, "Persons"; "Roth.," 176: he is "tanquam mortuus."

⁵ "Frison"; *Amira*, "Erbenf.," 151. — Cf. "Wis.," 3, 4, 12.

⁶ Cf. giving up of possessions, *post*.

⁷ As to absence, cf. *Ferrière*, *Guyot*; *Villequez*, "R. h. Dr.," II, 209; "Dig. Ital.," and "Encicl. Giur. Ital.," see "Assenza"; *Stobbe*, V, 10 (bibl.); Civil Code, 112 *et seq.*

⁸ An absent man is one who leaves his domicile and is not heard from any more. It is **Domicile** which determines the personal status of a person; at first it is not very clearly distinguished from citizenship or connection with a lord's domain. During the monarchic period one could have a domicile: (a) of *origin*, that is the domicile of the father and mother at one's birth; (b) of *fact*, resulting from establishing oneself in some place with intent to remain there; (c) of *law*, in the place where one has a benefice or an office, and only in so far as matters relating thereto are concerned; (d) of *choice*, or one agreed upon for the carrying out of a contract, etc.; (e) with respect to marriage, a residence of six months or one year in the parish; (f) with respect to tallage: *Argou*, I, 12; see *Guyot*, *Ferrière* (bibl.); Civil Code, 102; *Homeyer*, "Heimath" ("Berl. Abh.," 1852).

possibility of the return of the absent man that it presumed him to be living as long as the contrary was not proved, or as long as a hundred years had not elapsed since the date of his birth.¹ His possessions were administered by a curator appointed at the request of the interested parties.² After a delay of 3, 7, or 10 years, according to locality, the heirs presumptive³ were put into a provisional possession; twenty or thirty years after the last news or the disappearance, the legatees were finally put in possession by the court. In such cases the spouse who was present could not remarry unless proof of the death of the one who was absent was produced.⁴

§ 469. **Incapacity to Succeed**, in the very old law, exists when it is *physically* (demented, idiots, lepers,⁵ children of tender age,⁶ women) or *morally* (ecclesiastics,⁷ monks,⁸ people condemned to capital punishment) impossible for the heir to be head of the family;⁹ 2d, when the person whom the ties of relationship would call to succeed does not belong to the house (alien, bastard,¹⁰ son

¹ *Contra*: Pothier, "Introd. à la Cout. d'Orl.," XVII, no. 7: there is no presumption as to whether he is living or dead; it is for those who have an interest in doing so to prove that he is alive. — Contrary to this idea, it was allowed: (a) that he take part in successions opening for his benefit; (b) and that rights dependent upon the death of the absentee could not be exercised by the interested parties (for example, usufruct). Laws of Oct. 5, 1791, 21st Vent. and 16th Fruct., year II.

² "Coutume de Châtillon," Art. 72 (see Giraud, Ferrière).

³ Does this mean the nearest relatives at the time when the taking of possession was allowed or at the time of the disappearance? Diversity in the Customs: Stobbe, *loc. cit.* — If the absentee has left an agent there are difficulties. — The spouse who is present can demand the dissolution of the community, and this dissolution becomes final or is bound to take place when a final partition is made.

⁴ "Novella," 117, 11; "Authentica, hodie," on l. 7; "Cod. Just.," "de repud.," Dig. X, "de spons.," 19; Bretonnier, see "Absents." Cf., however, Pothier, "C. de Mar.," 106.

⁵ "Summa Norm.," 25, 22, 10; "Cout. de Barèges," 2 ("pee," from "pecus," idiot; "taros," imbecile). Deaf mutes: Bonnefoy, "Thèse," 1899; "Roth.," 176, and "Sachsensp.," I, 4 (lepers). Dwarfs, hermaphrodites, etc.: Schroeder, 737. As to hermaphrodites, cf. Zeys, "Le Nil," § 6; Post, II, 176, 178 (bastards).

⁶ Probability of their living? Cf. "Alam.," 92; "Wis.," 4, 2, 17; Stobbe, § 37, 280. According to several of the Scandinavian laws a child can only inherit if he has eaten or been baptized. — As to the rule, "Infans conceptus pro nato habetur," cf. Lambert, "Stipul. pour Autrui," p. 166.

⁷ "Cout. de Barèges," 1; Loysel, 343; Stobbe, V, 17.

⁸ According to the Roman and the canon law, the monk succeeds to his relatives and transmits this succession to the monastery. But the Customary law places him under a disability; he can neither succeed for his own advantage nor for that of the monastery: Loysel, 345; post, "Persons"; Londry, "Mort civile des Relig.," 1900 (bibl.); Stobbe, V, 18; Laws of Feb. 20, March 26, and Oct. 14, 1790; of the 18th Vend., year II.

⁹ "Summa Norm.," 25, 9.

¹⁰ "Wis.," 4, 5; "Bai.," 14, 8. Children born of an incestuous union:

who is emancipated or who has founded a separate home,¹ daughters married outside of the house²) or is set aside owing to the application of the seigniorial right (for example, he is a serf). Capacity to succeed even depends sometimes upon equality of status with the deceased; thus, the plebeian cannot succeed to the noble in certain localities.³ Many of these incapacities disappeared in the later law, which was especially concerned with carrying out the probable wishes of the deceased. However, the incapacity of aliens, bastards and monks remained, and we have seen what happened with regard to the exclusion of daughters. Legal persons or people in mortmain were not always deprived of the right of succeeding; thus the monastery took the possessions of the monks when they died.

§ 470. **Disinheritance.** — This principle was contrary to the spirit of the very old law, according to which one can no more take away from a person the status of being an heir than one can confer it upon him;⁴ at the same time, the "foris familiatio" or expulsion from the family produced the same effects.⁵ In its final form disinheritance was borrowed in the countries of the Customs from the Roman law, and the judicial practice of the countries of written law. In the thirteenth century a testator could deprive his heirs of only the "disposable" portion of his estate; they kept the legal share and the reserve share;⁶ under these conditions the simplest means of disinheriting one's heirs was to grant one's "disposable" possessions on somebody other than they. When it became lawful to oust them of the entire succession,⁷ and this is

"Sal. em.," 14, 16; "Liut.," 32; "Roth.," 185; "Alam.," 39; "Wis.," 3, 5; "Cod. Théod.," III, 12. — *R. Caillemer*, "Admin. et Conf.," 129.

¹ Anticipated partition between father and children, *post.*, "Reservation"; "Sal.," 60; "Montpellier," 58. — *Freund*, "Was in der Were verstirbt," 1880.

² "Roth.," 181; "Liut.," 2 (girls "in capillo in casa"). Anticipated renunciations of succession, *cf.* "Z. S. S., G. A.," 1889, 202.

³ "Sachsensp.," I, 17, 33.

⁴ "Wis.," 4, 5, 1; "Roth.," 71, 61, 166; "Bai.," 1; "Sax.," 16, 62; "Burg.," 24; "L. Alam.," 1; "Faux Capit.," III, 326; *Schroeder*, 333.

⁵ In the barbarian laws and the Capitularies to disinherit means to alienate one's possessions; but we have seen that restrictions were placed upon the freedom of alienation: *Grimoald*, 5; "Liut.," 105; "Sax.," 64; Capitulary of 814-827, c. 6, etc. (I, 312, 114); Dig. X, "qui filii s.," 4, 17, 1; *Grimm*, "R. A.," 482. — On the forswearing, *cf.* *P. de Fontaines*, p. 76; *Beaumanoir*, 60, 7; "A. C., Artois," 7, 7; *Daresté*, "Nouv. Et.," pp. 342, 69 (Greek law).

⁶ *P. de Fontaines*, 33, 33; 44, 10; *Beaumanoir*, 12, 17; "Ass. de Jér.," "C. des B.," 239; *Boutaric*, I, 103; "Anjou," 251; "Maine," 369; "Tours," 286; *Peleus*, "Act. forens.," V, 31; "Schwabensp.," I, 17; II, 122. *Cf.* "Petrus," I, 15 et seq.

⁷ Ordinance of 1556; *Chassaneus*, "Cons. Burg. de Succ.," 13, 2. *Cf.* exclusion of daughters, "foris familiatio." — *Pothier*, "Succ.," I, 2, 4; *Ferrière*, on "Paris," 318. — As to the position of the children of the man disinherited,

what was accepted at least by the sixteenth century, a formal declaration became necessary (will, notarial deed, or declaration before the judge), which moreover had no effect unless it were based upon a just ground which was expressly recited.¹ Though this requirement did not apply to the "disposable" portion, the courts found a means of protecting the interests of the family, which were liable to be too readily sacrificed; at the end of the sixteenth century it annulled disposals which were inspired, not by a desire to gratify the legatee, but by hatred or anger against an heir (action "ab irato").² This nice search for motive left the tribunals a great latitude. Just as disinheritance was hampered by formalities, so was its revocation made easy; it could be implied, — for example, it might result from the fact that the man disinherited had been received by the man disinheriting and had lived with him; it was even presumed, when he had rendered him great services.³ The Decree of 9th Fructidor, year II, abolished disinheritance, and the Civil Code has not re-established it.⁴ — **Officious disinheritance**, which was also abolished by the Revolutionary law, permitted the father of the family to "set up" his grandchildren and disinherit his prodigal sons. By this means results analogous to those of a spendthrift guardianship were arrived at, while avoiding the scandal which comes with the latter; the son who was disinherited received an allowance for his support, or else the usufruct of the succession.

§ 471. **Disqualification**⁵ is only an implied disinheritance *pro* cf. *Ricard*, "Don.," III, 951; *Renusson*, "Propres," II, 7, 6; "T. A. C., Norm.," 10: refusal of a marriage portion to the daughter who lives "luxuriose."

¹ In the sixteenth century it was agreed that the enumeration of just causes of disinheritance which it contained should be borrowed from the "Novella," 115, c. 3, and to them was added marriage without the consent of father and mother: *Beaumanoir*, 12, 17; "Et. de St. Louis," I, 144; "A. C., Bret.," 495; "Ord." of 1556; 1579, 41; Declaration of 1639. Disinheriting and revocation of gifts because of ingratitude had for a long time been applied in this case: *Stobbe*, § 253; *Schroeder*, "Z. R. G.," IX, 140 (texts); "Sachsensp.," I, 5; the misconduct of the daughter does not make her lose her rights of succession. *Contra*, various Customs: "T. A. C., Bret.," p. 507, ed. P. — Outside of legal just causes, was disinheriting possible for some serious reason? Controversy: *Pothier*, 1, 2, 4; *Furgole*, "Test.," 8, 2, 92.

² The Civil Code no longer recognizes the action "ab irato." The Law of Niv., year II, did not allow collaterals to be excluded and had thus rendered the action "ab irato" on their behalf useless. As to disinheritance "cum elogio," cf. *Ricard*, "Don.," I, 630.

³ Law "si furioso" (Dig., 27, 10, 16; "Arr. Parl. Paris," 1611, 1625); *Ricard*, "Don.," III, 1139; *Lebrun*, "Succ.," III, 5, 2; see *Denisart*.

⁴ Laws of Oct. 14, Nov. 14, 1792, 9th Fruct., year II, Art. 20; *Sagnac*, pp. 308, 375.

⁵ Dig., 34, 9; *Argou*, II, 20; see *Ferrière*, *Guyot* (bibl.); *Gendreau*, "Thèse," 1889.

nounced by the law after the death of the deceased when circumstances have prevented the latter from making use of the power of disinheriting,¹ — for example, because his heir had attempted to kill him.² The causes for disqualification were the same as those of disinheriting,³ and they produced analogous effects.

§ 472. **The Rôle of the Heir.**⁴ — The heir in Roman law perpetuated the person of the deceased. In French law the patrimony was divided into several masses. They had not been able to accept the fiction that the deceased and his successor were one person. The heir rather resembled one functionary who takes the place of another, and who is not held bound by the obligations of the latter as far as every detail is concerned; he became the head of the family in his turn and exercised the powers of his predecessor, but he did not inherit the personality of his predecessor. This is not the same as saying that he may be compared to the mere grantee by specific titles.⁵ For each of the masses of the inheritance, the succession vests *by "universal" or joint title*, in this sense, that one takes a mass of possessions and not isolated pieces of property, one by one; and also in this sense, that one assumes the legal status of one's ancestor, and not that one creates for oneself an entirely new status having no connection with the preceding one.⁶ The Romans pushed the notion of

¹ Thus it is possible to grant a pardon, but this is no longer done, for disqualification is a public penalty.

² "Roth.," 163; "Fris.," 19, 1; "Sachsensp.," III, 84, 3; *Stobbe*, V, 15.

³ Generally speaking, the succession is not confiscated, but it passes to the next degree of kin. It seems, however, that originally the children of the person disqualified were punished because of their father's offense: "Summa Norm.," 22, 10; *J. Lecoq*, "Q.," 266; *Lebrun*, 3, 9, 10. But *Pothier*, I, 2, 4, 6, protests against this doctrine: *Boutaric*, I, 39. Children of heretics and of those condemned for high treason, etc.: *Stobbe*, V, 16.

⁴ Cf. *Blackstone*, II, 29 (one abbot succeeds to another, etc.); *Isambert*, I, 279 (in 1526): the king is not held bound to pay the debts of his predecessor; *Le Bret*, "Souver.," IV, 10.

⁵ It may be that originally the inheritance of movables did not differ very much from a mere occupation affecting things which had been abandoned. Cf. "jus spoli."

⁶ It is difficult to see anything but an acquisition by some special right in the succession to the "Gerade," to the "Heergeräth" (cf. the English "heriot," *Pollock and Maitland*, I, 293; II, 257). And if one wishes to get some idea of the possibilities of the parcelling of an inheritance, one has only to suppose with *Pollock and Maitland*, II, 253, the existence of a succession in which a split and a resplit take place, which result in four portions, and in each portion property some of which is subject to the common law, some to the Custom of Gavelkind, and some to the Custom of Borough English; should there be heirs for each one of these sub-successions, the result would be infinitesimally small portions. The general right then becomes very much like a special right. But at the same time one can understand the adoption of the Roman ideas as to the "successio in universum jus defuncti," if one will observe with *Heusler*, II, 525, that the Germanic heir ordinarily succeeds to the general

succession by "universal" title to its utmost consequences and merged the personality of the heir with that of the deceased ("successio in universum jus defuncti"). The old French law stopped halfway, either because of the personal character of debts or the fact that they could not be transmitted, or else because of the distinctions made between the possessions of the family and the personal possessions, between the house and the lineage. But the early conception of the part played by the heir was little by little effaced, in proportion as its peculiarities disappeared or became less; for example, when the obligation lost its personal character, the debts of the deceased passed quite naturally to the heir, together with his possessions.¹ Thus they returned to the Roman conceptions. These they found in perfect harmony with the very powerful idea of moral and economic mutual responsibility of relationship under the Old Régime; the son would have thought himself dishonored in not paying, even out of his own possessions, the debts of his father; and the third party in negotiating with the father relied upon the son, and, in fact, upon the whole household. Thus the liabilities were closely united to the assets, all the elements of the patrimony tended to form but a single mass.²

By an early combination of the Roman law and the Customary ideas, two categories of "universal" heirs were to be distinguished, — 1st, heirs or persons who perpetuated the person; 2d, mere successors to the possessions. The former were the lawful relatives who inherited upon intestacy; the latter were irregular. He is not a "universal" heir, but he is an heir by "universal" right (*cf.* "L. Sal.," 50, 58: "facultas," "fortuna"; "Liut.," 20: "substantia"; "Alam.," 35, 57, "hereditas"; "Sachsensp.," 1, 6, 2: "erbe," meaning all the property left). Taking possession of the house of the deceased, at least, in certain places; for example, in Neerlande; this symbolizes inheritance. In the petition for inheritance one proves one's title to it against anybody who possesses "pro herede" or "pro possessore." *Cf.* Pollock and Mailland, II, 253. For Heusler the conception of the patrimony ("Vermögen") is economic and not juridical; all the rights and obligations designated by this are, in fact, only one. *Cf.* Zeys, "Le Nil" (a great number of heirs). *Cf.* Blackstone, II, 29.

¹ Canon law: The son is held "juxta facultates" for the debts of his father in order to save the soul of the latter (restitutions); Dig. X, 3, 28, 14; 5, 12, 5; 5, 19, 9; 5, 39, 28; *Stobbe*, V, 60.

² What does the inheritance include? There are rights that die with their holder; for example, the family rights. The inheritance is understood to apply to the rights and obligations which go to make up the patrimony; and, again, certain of these rights cannot be transmitted (for example, the usufruct). As to the character of claims and debts, *cf. ante*. At an early time claims could be transferred in the same way as corporeal objects. As to debts, *post*, and Heusler, II, 540. From the succession the Greek law excludes the right to pursue the murderer and the right to marry the daughter left as an heir where there is no male issue, etc.: *Daresté*, "Nouv. Et.," 90.

lar successors upon intestacy, such as the Treasury. In the former the law saw a survival of the person of the deceased; if they were heirs of the body, this was natural enough; if they were other relatives, it was not hard to apply the same theory. But the second class above mentioned was scarcely in harmony with the Customary principles; there was not much inclination to strengthen their rights by regarding them as perpetuators of the person; the disfavor which fell upon them resulted in their being left in their original position, which corresponded pretty nearly to that of legatees in the Roman legislation.¹

§ 473. **Acquirement of a Title by Inheritance** took place by operation of law, without formalities and without an act of acceptance. This was as logically demanded by the family joint ownership. The heir did not have to accept; if he made no renunciation, the succession belonged to him from the moment of the death of the deceased.² One can even say that a renunciation would have had scarcely any object, as long as the heir was not held for the debts, or was only held for them to a limited extent; he had a chance of winning and ran no risk of losing. The annoying formalities imposed on a renunciation (after the law came to allow it), and the disfavor shown to the Roman privilege of demanding inventory (before acceptance) show the legislator's repugnance to the idea of an heir's refusal to act. For the descendants of the deceased, especially, the preservation of the house was a sacred duty. Suitable enough as this principle was for the members of the family who formed a part of the house (*cf.* in Roman law the circle of the "sui") it was equally inappropriate for distant relatives and "a fortiori" for irregular successors and legatees. It would have been natural to exact an acceptance from them, and even to require them to make proof of their rights;³ and it would

¹ *Loysel*, 304, 313; *La Thaumassière*, on "Berry," 19, 9; *Argou*, II, 19; *Pasquier*, 490.

² No inheritance in abeyance henceforth: "L. Feud.," 1, 14; 2, 1, 11, 33. And, consequently, also, transmission of the succession, simply because of the fact that it is open, to the heirs of the heir: *Pertile*, IV, 123. The succession, in fact, was originally nothing more than the liquidation of a pre-existing community: *Gierke*, "Z. R. G.," XII, 481, and "Genossenschaftsrecht," I. *Cf.* Flanders: heir by necessity; *Britz*, 693.

³ The legislation of other countries has shown us attempts in this direction. Sometimes the heir himself attempted to place his right under the protection of the law, and sometimes the public authority itself intervened because of the rights that it had over vacant successions. The heir was asked to swear that he was the true heir; he was put in possession only after he had paid for it. Sometimes public authority went so far as to liquidate the succession and only paid over the net assets to the heir after having paid the debts. Thence-

have been natural to hold that prolonged silence would carry with it the loss of their rights of inheritance.¹ But the old law did not go so far; it merely treated the heirs or successors on intestacy in a different manner from testamentary successors; the latter were not allowed to have the immediate exercise of their rights; it was necessary for them to demand the delivery of their inheritance from the lawful heirs, and in case of a refusal, to have themselves put in possession by the law.

§ 474. **Hereditary Seisin.** — Before any physical entry on the property, the lawful heir is considered as being in possession, by operation of law at the death of the deceased. The latter is considered as having himself put the heir in possession at the moment of his death: **the dead enfeoffs the living.**² The result of this formula is that the heir, from the moment of the death, has all the advantages of possession and cannot be deprived of them, — the right to the profits, the rôle of defendant in suits for the property-title, the bringing of actions for possession,³ the continuation of the prescriptive possession of his ancestor, and “a fortiori” the power of taking possession by his own authority, without the intervention of the lord or the law,⁴ of the property belonging to

forth the practice of the inventory became general. Thus through the Customs the privilege of inventory was arrived at. What actually took place was an entry upon the land registers. Cf. *Stobbe*, V, 31.

¹ Were the rule, “*Fructus augent hereditatem*,” and the Juventian Senate Decree, which were rejected by the Civil Code, 138, applied in the old law? No, according to *Pothier*, “*Propr.*,” no. 429. — Are sales made by the heir apparent valid because of the rule, “*Error communis facit jus*”? It is doubtful.

² “*Mortuus saisit vivum*”: “*Olim*,” I, 452, 16 (in 1259); II, 517, 9; II, 556, 3, etc.; *J. d'Idelin*, 151; “*Et. de St. Louis*,” II, 4; *Beaumanoir*, 27, 2; 41, 9; “*Const. du Chât.*,” p. 63; *Desmarest*, LII, 234, 286; “*Gr. Cout.*,” pp. 233, 287, 304, 367; *Boutaric*, p. 128; “*Stil. Parl.*,” 28, 6; “*Paris*,” 318; *Loysel*, 317; “*Arr. de Lamoignon*,” “*Succ.*,” 1, 2; see *Ragueau*, “*Der Todte erbt den Lebendigen*” (middle of the fifteenth century, Western Germany). The “*Sachsensp.*,” 6, 1; 3, 83, already said that with regard to fiefs and other property the deceased transmits the “*Gewere*” of the property to the heir together with the property itself (“*possessionem beneficii sicut et beneficium*”). — *Glanville*, 9, 1, 4, 6, 2; 11, 1, 3; 13, 9; “*Summa Norm.*,” 35; see *Ragueau*. Cf. “*Ass. de Jér.*,” “*Abr. C. des B.*,” 47, 57.

³ *J. Faber*, “*Inst. de Interd.*” (“*Stylus Curiae Franciae*”), § “*retin.*,” 7; “*Gr. Cout.*,” II, 31. — Cf. the Norman law: writ of “*saisina antecessoris*”: “*T. A. C., Norm.*,” 74; “*Gr. Cout.*,” II, 21: “*saisina defuncti descendit in vivum*”; *Blackstone*, II, 14: “*saisina facit stipitem*” (French translation, III, 20).

⁴ “*Gr. Cout.*,” II, 21; “*Stil. Parl.*,” III, 28; “*T. A. C., Bret.*,” 66, 540: the dead puts the living in possession in the direct line, the law in the collateral line. — In the German law the putting in legal possession, is frequent and the symbolical taking possession by the heir also (for example, he places himself upon the seat reserved for the head of the family, etc.). In the Netherlands the heir has his title recognized at law and, following the judgment, publicly takes possession of the house of the deceased by taking hold of the door with his hand and placing his foot upon the threshold (“*Anevang an Thure*”).

the succession, movables or immovables, personal belongings or acquets, freeholds or copyholds.¹ This privilege belonged only to the heirs at law,² — to descendants and ascendants first of all, and only towards the sixteenth century to the collaterals themselves. A few Customs extended it to successors appointed by will.³ On the other hand, the seisin of the movables was very generally vested in the testamentary executors, so as to enable them to fulfill their duties.⁴

Upon this question of the acquiring of possession of the inheritance, the Customary law was distinct from the Roman legislation; for, according to the latter, the heir should only have possession by virtue of taking possession in fact.⁵ The history of the theory of possession at Rome will alone enable one to understand why the Roman heir, succeeding "in universum jus defuncti," was not und Schwelle"). In Southern Germany the intervention of the law is still more clearly marked: *Stobbe*, V, 34, 26; *Heusler*, *op. cit.* According to some these were nothing more than useful formalities, having nothing essential about them. Others think that originally the possession of the inheritance can only be acquired by means of the carrying out of the "Anevang" by the heir upon his own initiative or following the intervention of the law; in time the "Anevang" must thus have degenerated into a mere formality, and through the fact of the death alone the heir found that he acquired the ownership and the possession ("civilissima") of the inheritance at one and the same time. — In English law the heir before having taken possession (entry) has the seisin only in law and not in deed; he could not begin an action of trespass against a third party who might encroach upon his rights. As to rights of entry and the assizes of "mort d'ancestor," *cf. ante*, Chap. II, Topic iv, § 270, and *Lehr*, p. 701. The heir of the personal property must ask for administration of it at the hands of the law. — *Cf.* the Civil Code, 724, 769: putting in possession of irregular successors. — Italy, *Pertile*, IV, 125. — *Cf.* "T. A. C., Bret.," 66.

¹ Even as late as the fourteenth century the lord is given the seisin before the heir (in the case of fiefs): "Gr. Cout.," II, 19; II, 27 (pp. 234, 305, 367); *Desmares*, 234 (local customs still require the lord to be given the seisin); *Varin*, "Arch. lég. de Reims," I, 662, 711. — But as to fiefs themselves, in the end the seisin of the lord came to be dispensed with. The right of the family did away with it. — *Cf.*, however, *Glasson*, VII, 487 (evolution in the opposite direction); "Artois," 6.

² The seisin is individual and not collective; it is conferred upon the "nearest heir and the one best able to succeed," and not upon the entire lineage: "Et. de St. Louis," II, 4; "Paris," 318; "Jostice," 16, 2. Each heir is seised of his share, and not of the whole. Controversy upon these points, which bear rather upon the acquirement of the ownership: *Blondeau*, "Sép. des Patr.," p. 652. — *Pothier*, "Succ.," 3, 2, 4; *Ferrière*, on "Paris," 318; *Denisart*, see "Héritier," 5, 2.

³ "Stil. Parl.," 28, 10; "Gr. Cout.," p. 282; *Masuer*, II, 33; XI, 34. — Seisin to the appointed heir: "Olim.," II, 556, 3; "Bourg.," 3, 43; "Berry," 19, 28; "Niv.," "Don.," 12; *Pothier*, "Succ.," p. 111 (ed. B.): countries of written law. But this only contemplates the acquirement of the ownership. Italy (Modena, Rome, etc.): *Pertile*, IV, 122. — *Cf.* *Beaumanoir*, 30, 38; *Loysel*, 312 *et seq.*

⁴ "Olim.," II, 255, 9; *Beaumanoir*, 12, 6.

⁵ There are three hypotheses to account for seisin: 1st, Roman origin (Planio); 2d, Germanic origin (Heusler); 3d, Customary origin (reaction against feudal exaction) (Laurière). *Cf.* synopsis of these systems in "R. crit.," 1891, 584 (Dufourmantelle).

invested with the possession and the ownership at one and the same time. That is what we have to explain. One is accustomed to taking the question backwards, and, consequently, to ask, by what peculiarities was possession found to be acquired by the heir in the Germanic law immediately after the death of his ancestors? In truth, it is a perfectly natural consequence of his situation "de facto," and the usual course is for possession and ownership not to be separated. The heir, who is most often the son or the grandson of the deceased, lived under the same roof with him; he was at the same time joint owner and joint possessor of the family property. In saying that he had the seisin from the moment of the death, they were not expressing a fiction, but a reality and a positive fact. The same could not be said, it is true, with regard to collaterals; but, again, it would have been more difficult to concede them the seisin. When the formation of the family became modified, this principle seemed to lose its reason for existing; it was the object of the attacks of the Romanists, who held it to be a veritable heresy;¹ but the practical advantages which it offered were its salvation, and it is again met with in the Civil Code, Art. 724. By declaring that the heir was seised "a die mortis," usurpations were made more difficult; his interests could no longer be jeopardized by mere accident, an unforeseen absence, or a lack of knowledge of the death. The advantage was also gained of his escaping from the payments of the seigniorial profits which were demanded in cases of change in fiefs and copyholds brought about by death, under the pretext that the lord had to give the seisin or invest the new vassal and the new copyholder. These pretensions could be replied to by saying that it was not the lord, but the deceased who gave the seisin or invested the heir; the formula, "The dead gives the seisin to the living," was perhaps invented as a protection against feudal exaction.² But the fundamental rule of which it is a picturesque expression is earlier than the feudal period;³ it dates back to barbarian times⁴ and is found again in

¹ *Innocent IV*, "Com. s. Decret.," Dig. X, 2, 19, 8; *Balde*, "Const.," 337, no. 12; *Cujas*, on Law 30, Dig., 4, 6 ("possessio defuncti quasi juncta descendit in heredem") (cf. D., 41, 2, 23), says that the maxim, "The dead encoffs the living," is derived from an inaccurate interpretation of this rule ("vox de via collecta"). Cf. *Viолlet*, 831; "Gr. Cout.," II, 21; "Bourg.," 310. But seisin existed previously to the revival of the Roman law. See as to the Roman law and its influence, *Stobbe*, V, 28.

² *Laurière on Loysel*, 317.

³ The collaterals have the seisin, but this does not prevent them from being subjected to the payment of the seigniorial fees: "Paris," 318, 33.

⁴ See texts in *Heusler, op. cit.*: "pater me vestitum dimisit."

all the countries where the Germanic influence has made itself felt, — not only in Germany¹ and in France, but in Italy,² in Spain,³ and in England.⁴

However, in the last stage of our old law hereditary seisin is not very clearly distinguished from the "successio in universum jus defuncti" of the Roman law. The acquiring of the possessory actions seems like a necessary consequence of the acquiring of the succession; and, if one is to believe Lebrun and Pothier, the old maxim, "The dead gives the seisin to the living," would be understood to apply to ownership as well as to possession.⁵ Owing to this alteration, it was not difficult to connect with it, as was sometimes done, the obligation which was imposed upon heirs to pay debts "ultra vires" and the declarative effect of partition, — two institutions, one Roman and the other Customary, but both entirely foreign to possession.⁶

§ 475. **Acceptance and Rejection.** — The logical outcome of the very old law was that the heir did not have to accept formally the succession; if he did not renounce it, that was sufficient to make him acquire it. But the doctrine which prevailed drew its inspiration from the Roman law and likened the heir at law to the testamentary successor, and gave both of them the choice between three courses, — acceptance pure and simple, renunciation, acceptance with the privilege of inventory.

§ 476. **The Same.** — (A) *Acceptance pure and simple* took place "verbis aut facto," by taking the title of heir or by playing the part of heir, — "He who takes the possessions of the succession to the sum of five sous performs the act of an heir."⁷ By this means the one who was capable of inheriting barred himself from making use of the power of renunciation and came within the contemplation of the Customs.

§ 477. **The Same.** — (B) *The renunciation*⁸ was, on the con-

¹ "Dipl." of 1322 in *Kraut*, "Privatr.," § 159.

² Italian statutes: *Pertile*, *op. cit.*; *Lattes*, "Studi Sen.," II, 319.

³ *L. de Toro*, 45; *Covarruvias*, "Op.," II, 3, 5; *De Paz*, "De Tenuta," 1671.

⁴ *Pollock and Maitland*, II, 60; *Bracton*, fo. 31 b., 262, 434 b.

⁵ *Ferrière*, on "Paris," 318, 1, 2; *Valin*, on "La Rochelle," 56, 21.

⁶ *Civil Code*, 724; *Pothier*, V, 3, 1. This is the counterpart of the acquiring of the assets.

⁷ *Loysel*, 319; "L. Rib.," 67.

⁸ "Burg.," 65; "Wis.," 5, 1, 6; 7, 2, 19 and 5, 8. Cf. Commentary on "Liut.," 57. Germany: no example of renunciation before the fourteenth century: *Heusler*, II, 570. At Neufchâtel, in Switzerland, the children of the insolvent could not renounce until the nineteenth century. Greek law: *Daresté*, "Nouv. Et.," 88. English law: the heir of the real property cannot renounce, but is only held liable for the debts up to the amount of the value of the prop-

trary, in opposition to the spirit of the old law. It was tolerated, witness the maxim, "He is not heir who does not wish to be"; and people capable of inheriting had recourse to it from the time when they found themselves held for debts "ultra vires" of the inheritance. But the disfavor which attached to it was shown by the fact that it was impossible to make an implied rejection.¹ Originally, this rejection assumed a formal declaration and symbolical formalities, such as the casting of one's belt into the grave of the deceased.² From the thirteenth century, at least, it is carried out by means of a declaration in court;³ a declaration made to the clerk and a notarial deed, which were both equally in use after this, are only variations of it.⁴ It is also met with, it is true, under the form — to-day prohibited — of **renunciation to future succession**. From the twelfth century, at the latest, it is imposed upon daughters who have been given a marriage portion, and it is specified in their contract of marriage.⁵ If the heir neither accepted nor rejected, he could decide at any time, because the power of renunciation could not be lost by prescription.⁶ But, once having taken place, renunciation as well as acceptance could not be revoked.⁷

§ 478. **The Same.** — (C) *Time to make an inventory and deliberate*. Drawing their inspiration from the Roman law and modifying it at the same time, they gave the heir a period of three months to post himself as to the amount of the succession, and, forty days to choose from the various courses which were open to him. During this respite the actions of creditors of the inheritance were not barred, but suspended.⁸

erty. The heir of the personal property can renounce at law, but is not deprived of his share of the succession if anything remains after the debts have been paid.

¹ "Gr. Cout.," 2, 40, p. 365; *J. Lecoq*, "Q.," 489; "Paris," 317.

² *Bouthors*, "Sources du Dr. rur.," p. 538; *De Ribbe*, "Soc. prov.," p. 142; "Frioul," *Pertile*, IV, 126. Alsace, *Stobbe*, V, 51. Cf. renunciation of the community by the wife.

³ Renunciations entered in the register of the "Parloir aux Bourgeois" (thirteenth century). Cf. Italy, *Pertile*, IV, 126: permission of the bishop, dues to be paid, disabilities: "L. Feud.," 2, 45 and 51. At Rome the sons of traders are held liable for their debts, even if they have renounced the inheritance.

⁴ *Loysel*, 318.

⁵ Civil Code, 791; cf. "Arles," 1142, etc.; "Et. de St. Louis," I, 9; *Lebrun*, 3, 8, 1; Law of 5 Frim., 22 Vent., year II; 18 Pluv., year V; *Lattes*, "Dir. cons. Lomb.," 261.

⁶ Variations in the Customs: *Pasquier*, "Inst.," 491; *Pothier*, III, 4, 2; *Merlin*, see "Abstent"; Civil Code, 789; *Villequez*, "N. R. H.," 1889, 733.

⁷ Civil Code, 783, 790; *Pothier*, 3, 1, 1, 3 and 4; *contra*, *Lebrun*, 3, 8, 2, 61 (one may withdraw one's renunciation).

⁸ *G. Durand*, "Specul.," II, 2, 16; *J. Faber*, "Inst.," p. 60, ed. 1582 (3

§ 479. **The Same.** — (D) *The privilege of the inventory*¹ offers the same benefits as acceptance and rejection; the heir is not liable for the debts "ad infinitum," and the balance of the hereditary assets, once the debts had been paid, belonged to him.² But, as this Roman institution was almost equal to a renunciation, royal letters were demanded in countries of Customs in order to allow recourse to be had to it,³ and the heir using it found himself excluded, at least in the collateral line, by the man capable of inheriting who was of a degree further removed and who accepted purely and simply.⁴ Moreover, the administration and the liquidation of the hereditary possessions and the payment of the debts were incumbent upon the accepting heir thus placed at the head of a patrimony which was insolvent, and for whose acts he was made responsible.⁵ By means of a sort of assignment of possessions he had the power to escape from this rôle of assignee in bankruptcy, which was sometimes rather dangerous; he was at liberty to give up the succession to the creditors and the legatees.⁶

§ 480. **Partition between Co-heirs.**⁷ — No one can be compelled to live in a state of joint possession, says Article 815 of the Civil Code. This is an expression of the modern law, a law very hostile to the community system and the silent partnership of other times.⁸

months); "Cout. Not.," 84, 85; "Gr. Cout.," p. 364; *Boutaric*, I, 77; *Masuer*, 32, 28; *Pasquier*, "Inst.," p. 425; "Arr. de Lam.," "Succ.," 9; *Pothier*, VIII, 125; *Serres*, II, 19; "Ord." of 1667, 7, 1; "T. A. C., Bret.," 316.

¹ "Cod. Just.," 6, 30, 22 (Justinian's "lex Scimus"). In countries of Customs a confusion of the "jus deliberandi" [and the privilege of inventory. The "Ord." of 1667 generalizes this.

² The hereditary share of the person renouncing was sometimes looked upon as having no owner. But this rather impractical idea, that the inheritance could only be put off once, gave way to the Roman system of the successive transmission to the different kinds of heirs, the furthest removed being invested if there were none nearer than they.

³ "Cout. Not.," 84 (in 1366); *Pasquier*, p. 426 (case of Loysel). Required in countries of written law. Edicts of 1697 and 1704; *Argou*, IV, 5; *Bretonnier*, see "Bén. d'Inv." "R. de Lég.," IX, 311; cf., however, *Serres*, II, 19. Done away with by the Law of Sept. 7-11, 1791. — German law: various forms; *Stobbe*, V, 53.

⁴ *Loysel*, 320; *Laurière*, on "Paris," 342; *Lebrun*, 3, 4, 5; *Pothier*, 3, 3, 3. — Prohibition for the heirs of the responsible agents of the public funds to accept under the privilege of inventory: "Ord." of January, 1563, 16. — *Pertile*, IV, 137; "Aosta," 5, 12 (prohibition).

⁵ "Paris," 345; see *Ferrière*; *Bretonnier*, on *Henrys*, 6, 4, 2 (frauds); *post*, "Partition of Inheritances"; *Stobbe*, V, 56; *Pertile*, IV, 137. Cf. Austria: publishing at law, following which the creditor who does not come forward loses all right; *Siegel*, p. 439.

⁶ *Pothier*, Introduction to Title 17, "Cout. d'Orléans," no. 53; *Stobbe*, V, 5; Civil Code, 802.

⁷ *Fleury*, II, 328; *Glasson*, VII, 518; *Stobbe*, V, 38; *post*, II, 205.

⁸ In German law partition between heirs can only take place at the expiration of **thirty days** after the death. This period for mourning is closed

Joint possession is now as rare as it formerly was frequent; under the old system customs and economic conditions often compelled the heirs, and especially brothers, to live in a state of community.¹ Partitions *in fact* affecting the enjoyment of property were made a part of these associations and sometimes put an end to them. But the disfavor which in the end affected joint possession was extended to these partitions themselves, no doubt because the rights of the parties were not very well settled in them; the partition of *right* (that is to say, which existed in a formal agreement proved by deed) became necessary, and the only thing which could take its place was divided possession carried on for thirty years.²

§ 481. **Forms of Partition.** — We will first look at partition in itself, setting aside the incidents of refunding and the payment of debts. As a general thing, it is carried out in a friendly way by means of an agreement; but in case of the disagreement of the parties, or if one of the persons interested is under a disability, it takes place in court. The possessions which cannot be partitioned are sold at auction, and the price is distributed among the coparceners. "It is customary for the eldest to apportion and the youngest to choose."³ The desire to avoid parceling the possessions scarcely comes to light until the last period of the old law, and then no more than in the Civil Code. The only object pur-

with a religious ceremony. During this time the peace of the house where the death took place must not be disturbed; the widow and the household must not leave it; they live upon whatever provisions happen to be there; and the heirs cannot be pursued by the creditors having claims against the inheritance: "Sachsensp.," I, 22; *Stobbe*, V, 23 (bibl.); *Grimm*, "R. A.," 481; *Homeher*, "Der Dreissigste" ("Abh. Berl. Akad.," 1864); *Siegel*, "K. V. J.," VII, 275; *Heusler*, II, 567. Cf. house of the widow or "Beisitz," *post*, "Marriage Contract." Delay in which to make an inventory. — The month of mourning is of Jewish origin.

¹ *Beaumanoir*, c. 22 ("compagnies d'éritage"); "A. C., Bord.," 56, 67, 74, 97, 139, 143; "Toulouse," 91; "A. C., Bourges," 22. Cf. *Anségise*, IV, 23; *Thévenin*, "Textes," nos. 70, 126; "Roth.," 167. — The continuation of the community, *post*; "Orl. A. C.," 180; "N. C.," 213, 216; *Lattes*, "Dir. consuet. Lomb.," p. 267; *Wippermann*, "Ganerbschaften," 1873. — *Sumner Maine*, "Inst. Prim.," pp. 133, 140; "Et. s. l'ancien Dr.," p. 314; *Daresté*, "Nouv. Et.," pp. 344, 347; *Pollock and Maitland*, II, 243, 268, 272; *Blackstone*, I, 2, 12; *Glasson*, "Inst. Anglet.," VI, 261. Also joint possession of fiefs, partition of the user, tenure in partition.

² *Pothier*, "Succ.," IV, 1. Cf. *Loysel*, 93, 94; *Beaumanoir*, 22, 7.

³ *Loysel*, 390. Allusion to the barbarian Custom: *Greg. Tours*, 4, 22; *Du Cange*, see "Sors," "Consortes"; *Grimm*, 480 ("Kürrecht"); "Sachsensp.," III, 29, 2; Dig. X, 3, 29, 1; *J. Faber*, "Inst. de Act.," § "Quædam," no. 10; "Cod. Théod.," 7, 8, 5, 2; *J. d'Ibelin*, 148; "Abr. C. des B.," 49 (inverse order); "Et. de St. Louis," I, 106 (the demandant divides the property into shares and the defendant chooses one); *Beaumanoir*, 16, 19; Lord, *Compromise*, *Disposal*, *Agreement*; "Bord., A. C.," 139; "Gr. Cout. Norm.," 26; "Tours," 266, 271; "Anjou," 279; *Gui Pape*, 289; *Pertile*, IV, 131; *Blackstone*, I, 2, 12.

sued is equality at any price, even to the details.¹ When the division is not equal, the co-heirs who are injured are given an action to rescind the partition, even although the shortage is not more than half, — as the rule would be if there were a sale;² and, when there is equality, and it ceases after partition is carried out, they are given an action of warranty because of the eviction.³ If one of the heirs grants his rights in the inheritance to a stranger (that is to say, to one who is not an heir) the other heirs can exclude the grantee by means of the **repurchase of the inheritance** and indemnifying him. In this way the possessions remain in the family; imprudent speculators are kept away, and a difficult transaction is facilitated, a transaction which is one of such a nature as to estrange even those who are united by the bonds of a close relationship.

§ 482. **Effects of Partition.** — In Rome partition was looked upon as an act which *attributed* rights, as an exchange between co-heirs, each one giving up to the others his undivided rights over the part which they received.⁴ The Customary law started with the opposite point of view; it saw in partition an act which *declared* rights, and not one which transferred them; the fact of joint possession was wiped out by a fiction (*retroactive effect*); each co-heir was looked upon as having received his portion direct from the deceased; consequently, he was looked upon as holding nothing from his co-heirs and as having transferred nothing to them; everything was carried out just as though the partition had taken place at the very moment of the death. Perhaps this way of looking at it is due to the fact that the Roman analysis of partition was too nice for our old juriconsults; they did not grasp it very well and substituted for it a fiction which was much more simple in their eyes. It seemed to them quite natural to give fictitious force to the period of joint possession, though often

¹ As to the question of parceling in general, see: *H. Passy*, "Division des Héritages," 1839; "Syst. de Culture," 1846; *L. Faucher*, "R. D. M.," 1839; *Baudrillard*, "Popul. agricoles de la France," 1885-93; "Enquête sur l'Etat des Familles et l'Applic. des Lois de Succ." (by the Society of Social Economy), 1892; *Souchon*, "La Propr. paysanne," 1899; *A. de Brandt*, *op. cit.*; *Verdelot*, "Thèse," 1899; "Econ. Fr.," Jan. 18, 1896; "Réforme soc.," June 1, 1898; Aug. 1, 1899, etc.; "Acad. Sc. mor.," 1902, 479 (cadastral survey notices, 1657, in Champagne); *Albert*, "Lib. de tester.," 1900.

² *Pothier*, "Succ.," IV, 6. Cf. Law of the 2d Prair., year VII.

³ *Pothier*, "Succ.," IV, 5, 4; *Lebrun*, IV, 1, 36. Contract for rents.

⁴ Dig. "Com. div.," 6, 8 (contrary opinion by *Trebatius*, Dig., "de us.," 31); "Petrus," 22, 23; "F. Sirm.," 25; "Bign.," 18; "Andec.," 54; *Marculte*, II, 14; "App. Marc.," 39; *Thévenin*, 16, 53, 108, etc.

very short.¹ Perhaps one should connect the Customary system with the old forms of joint possession (community or joint ownership "zu gesamter Hand"); the co-heirs shared only the enjoyment of the property, and this only during the joint possession; they had a right to dispose of the whole or part of the inheritance on condition only of all acting together; when the law changed on these points, the old solutions were kept for new reasons.²

As is usually the case, the theory was not formulated first of all in the form of a general rule; it was limited to practical questions. It is the fiscal aspect of the question which is the first to appear in the texts in the thirteenth century,³ and the documents of this period do not show any trace of the innovation. It is laid down there that in case of partition the heirs do not have to pay the lord the customary **profits** upon alienation.⁴ The transfer which took place owing to death already carried with it the payment of the seigniorial rights (relief, etc.); it would have been very hard to have demanded others (fifths, lord's due, and fees) when partition took place, especially when in the majority of cases this proceeding followed very closely after the death. To this practical reason there was added a theoretical basis. As a result of partition each party interested became the full owner of his portion, instead of having joint rights over the entire succession (though in reality he gained nothing and lost nothing). When Roman law, which was progressing, caused the character of an exchange to be attributed to partition, at least in the School and in the books, the question of the seigniorial rights became more complicated. The followers of Bartolus were divided. For some of them, the lord's due and fees not being payable in case of an

¹ To the contrary, *Planiol, op. cit.* But the fiscal question is settled by the "L. de Jostice," *loc. cit.*, and by the Bartolists before it is thought of applying this principle in civil matters.

² To this effect *cf.* the German law, especially with regard to fiefs. The partition of the issues ("Mutschierung," "Ooerterung") could not give rise to the payment of these seigniorial dues.

³ Various systems of accounting for the customary rule. — 1st. A borrowing from the L., 30, D., 4, 6. — 2d. *Lebrun*, "Succ.," IV, 1, 21, connects it with the seisin. But the rule is applied to testamentary successors, and even to some kinds of members of communities. — 3d. It is a weapon forged by the jurists against feudal exaction. But it would have been useless for the descendants, for they were not compelled to pay the transfer tax: "Gr. Cout.," p. 304; *Beaumanoir*, 27, 4. — 4th. It is preferable to see in it a common opinion which made it prevail over the Roman doctrines because of its practical advantages: *Beaumanoir*, 14, 20, 21; "Jostice," p. 241; "Toulouse," 125, 126; *D'Argentré*, "Prat. des Nobles," q. 40; *Loysel*, 542.

⁴ *Beaumanoir*, 52, 24.

exchange, partition benefits by this favor; yet difficulties are presented with respect to partition with settlement and with respect to sale at auction, — two proceedings which are more like sale. For the others, partition was a compulsory alienation, and they concluded therefrom that it should be free from the payment of the seigniorial rights. This was rather a doubtful theory, for in the old Customs the compulsion of partition was scarcely perceptible, and, by admitting that a transfer was indispensable, there was no excuse to deprive the lord of his rights.¹ It was easier to say with certain jurists that partition was an act "sui generis," which was carried out without intention of a transfer; but, if this were done, one had to fall back on the first explanation; this came to the same thing as saying that partition was not an exchange, which is contrary to the Roman doctrine. This is the explanation which prevailed, and it triumphed in so absolute a manner that to ordinary partition were likened, after some dispute, the equivalent acts whose object was to put an end to joint possession, such as partition with settlement,² sale at auction,³ etc.

The Roman theory and the Customary theory were divided on another point, in that which concerns the outcome of **mortgages given during the joint possession** by one of the co-heirs. If the property mortgaged falls into the portion of another heir the mortgage still continues, according to the Roman doctrine, because the actual owner is the assignee of the mortgagor; it disappears, on the contrary, according to the Customary doctrine, because the mortgagor is looked upon as never having been the owner. It seems as though this question had only been brought up in the sixteenth century.⁴ At this time the system of mortgages in the

¹ *Balde*, "L. si domus, D., de leg.," 1; *J. Andreae*, "Ad Specul. de Contr. emt.," § "nunc dicend"; *Alb. de Rosate*, I, 110; *Boutaric*, I, 83; *Gui Pape*, 48, 92; *Louet*, "L.," 9; *Guy Coquille*, on "Niv., Fiefs," 24; *D'Argentré*, on "Bret.," 73, 4; "Advis. s. le Part. des Nobles," q. 40.

² Dues which must be paid in case of an exchange with a settlement: "Toulouse," 125, 126, 143; *Beaumanoir*, 27, 5; "Jostice," p. 241 (or partition), but not in the case of a partition between co-heirs, "Orléans, A. C.," 54; "N. C.," 15, 113; *Dumoulin*, on "Paris," "Fiefs," 33, 1, 69 ("principalis intentio fuit dividere") (bibl.); "Censive," 78, 1, 170; *D'Argentré*, on "Bret.," 73; "de laudim," no. 2453; *Louet*, "L.," 9.

³ "Orléans," 114: the fees for a sale must be paid in case there is an adjudication to a stranger, but not if it accrues to the benefit of a coparcener: "Paris, N. C.," 80; *Brodeau*, on this article (bibl.); "Arr." by *Lamoignon*, 11, 5; *Glasson*, VII, 512.

⁴ *Louet*, "H.," 11; Orders of 1569, 1571, 1581, and 1595; *G. Coquille*, "Q.," 27; *Pothier*, "Succ.," 4, 5, 1. — The question had already come up in 1538 with regard to the case of a feudal distraint carried out upon the share of a co-heir: *Dumoulin*, on "Paris," "Fiefs," 1, 9, 43.

old law was finally established; from every notarial deed there sprang a general mortgage over the present and future possessions of the parties, and, as there is no one who at some time or other does not draw up a deed before a notary, the majority of inheritances were found to be encumbered. Under this system the Roman theory of partition would have had the most grievous results; in fact, if it had been applied each time that the inheritance of one of the co-heirs had been mortgaged — and we have seen that this happened nine times out of ten — this pre-existing mortgage, which was often unknown, would have extended over all the possessions of the inheritance and would have survived the partition. The co-heirs who owed nothing would have been exposed to the prosecution of the mortgage creditors and all their co-heirs; they would have been dispossessed and the partition would have had to be made over again. These disadvantages caused the courts of the sixteenth century (especially 1595) to prefer the Customary theory. But one would be mistaken if one thought that the law logically followed out in all details the principle of the *declaratory effect* of partition. Upon many questions it has only bequeathed us uncertainties.¹

§ 483. **Refunding.** — In order to make up the mass to be partitioned, one is not limited to combining the assets and the liabilities of the deceased; it is necessary to join thereto **gifts** which the heirs have received from the deceased; after which the partition can take place without one of them being found to have profited at the expense of the others.² This regard for equality contrasts with the system of privileges which dominates the system of successions on intestacy. But those privileges are peculiar to feudal matters, or have for their object the keeping up of the family; outside of these two conceptions one only meets with equalizing provisions.

The **children remaining in the family community**³ were the only heirs originally; as everything which they acquired went to increase the family inheritance, they could neither keep their

¹ Capacity of partitioning, warranty in case of eviction: *Pothier*, 4, 5, 4; *Lebrun*, 4, 1, 56. Repurchase of joint possession, *Pothier*, "Communauté," 146. Succession including at the same time movables and immovables and accruing to one of the spouses, *ibid.*, 140. — Partition is not subject to the repurchase by a person of the same lineage: *Chassaneus*, on "Bourg," 10, 9, 19.

² *Leroux de Lincy*, *op. cit.*, p. 121 ("Sent. du Parl. aux B.," 1293).

³ *Du Cange*, see "Cella"; *Beaumanoir*, 14, 26; *Ragueau*, see "Cellé"; *B. de Richebourg*, III, 258.

savings, enrich themselves by their own industry, nor receive gifts. Thus equality between them was assured.¹ But when those who had been put out of the community were admitted to the succession, whether they were children who had been emancipated or daughters who had received a marriage portion, this was no longer the case.² Sons who had been emancipated had worked for their own gain; those who lived in the house had only worked for the family; the family belongings, that is to say, the inheritable estate, took any earnings received by these latter. It would have been iniquitous to call those who were emancipated to share in the partition without compelling them to contribute their personal gains to those of their brothers. The former were given choice between two courses; either they could adhere to the old principle which excluded them from the succession, so as to preserve their personal gains; or else they could claim their hereditary rights, but then they had to *contribute* these gains and *partition* them with their brothers.³

Advancements of inheritance which sons or daughters had received on the occasion of their being set up in business or of their marriage should also be *refunded* to the mass to be partitioned. Only the heir who had received gifts from the deceased was allowed to keep them if he preferred it, provided that he did not raise any claim to the inheritance, and upon condition that they should not be excessive.⁴ The old decisions pushed the passion for equality to such an extent as to compel children to refund, not only the sums which had been given them, but even those which had been lent them. Pothier thus justifies this **refunding of debts**: "It would be an indirect advantage if a father caused his money in cash to go to one of his sons while the others would only have in its stead a mere claim against their brother."⁵

¹ "Roth.," 167, 199; "Liut.," 2, 4; "Wis.," 4, 5, 5. On the contrary, there was no refunding among the Franks unless there was a clause providing for it: "L. Sal. extrav.," 14; *Thévenin*, nos. 13, 131. Cf. "Rib.," 59, 9; "Milan," 19; "R. h. Dr.," 1860, 534.

² Cf. Roman law: "collatio bonorum, dotis"; *Girard*, 889.

³ "Jostice," 12, 21 and 24; "Gr. Cout.," p. 315; *Beaumanoir*, 14, 12; *Desmares*, 236; *Leroux de L.*, p. 108, 109 ("Parl. aux Bourg."); "Toulouse," 91, 121; *Giraud*, II, 271; *Pertile*, IV, 129, 131. — This power resulted first of all from the stipulations inserted in the marriage contract (declaration that the gift was made as an advancement on the inheritance). In the fourteenth and fifteenth centuries this came to be a usual clause and the "Cout. de Paris," 1510, Art. 123, implied it after some discussion: *Lamoignon*, "Arr. des Rapports." — Cf. "Saehsensp.," I, 13; *Laurière*, on "Paris," 278; *Lebrun*, 2, 3, 6, 1.

⁴ *Loysel*, 351; "T. A. C., Norm.," 9, 13, 14.

⁵ Sixteenth century: *Louet*, "R.," 13; *Meynial*, "Thèse," 1886; *Deschamps*, *id.*, 1889.

It was especially as between children or descendants that equality seemed to be desirable.¹ As to ascendants or collaterals, many of the Customs did not compel them to refund;² and still less was there any obligation of this nature incumbent upon testamentary successors. As among children, more or less strictness is shown according to the Customs. In this respect there are three principal classes to be distinguished. — 1st. **Customs of absolute equality**, which are most like the old law, make the refunding compulsory, even in the case of descendants who renounce the succession.³ By this means every fraud affecting equality is found to be averted.⁴ — 2d. In the **Customs of simple equality** ("Paris") the heir can avoid carrying out the refunding by renouncing the succession; but, if he accepts it, he must always refund, even when the deceased has exempted him therefrom.⁵ — 3d. A few Customs called **Customs of reference-legacy** ("préciput") allowed the heir to escape the refunding by renouncing the succession, and allowed the deceased to exempt him therefrom, even although he had accepted the succession.⁶ In this latter case he took what was given to him *by way of reference-legacy* over and above his share. The Law of the 17th Nivôse, year II, could scarcely fail to adopt the system of the Customs of absolute equality, so well did it agree with its tendencies; but, even before the Civil Code, a Law of the 4th Germ., year VIII, gave up

¹ Cf. *post*, "Reservation," "Disposable Portion," *P. de Fontaines*, 34, 10; "Et. de St. Louis," I, 136; II, 26; "L. d. Droiz," no. 83; *Beaumanoir*, 14; "Gr. Cout.," I, 40; *Boutaric*, I, 103; "Jostice," 12, 21, 5; "Ass. de Jér.," "C. des B.," 170. — From this it follows that the refunding does not benefit the creditors: *Loysel*, 355.

² *Loysel*, 355. Privileges exempt from the refunding, *ibid.*, 352; *Pothier*, 4, 2, 3; *Ferrière*, on "Paris," 304; Civil Code, 852. — German law: weapons, horse, etc.: "Sachsensp.," I, 10.

³ All gifts are presumed to be an advancement of inheritance; they can only be kept through one's right as an heir.

⁴ "Summa Norm.," 35; "T. A. C., Bret.," 207; "Anc. Cout. d'Anjou," ed. B.-B., Table, see "Rapport"; "Anjou," 260, 337; "Maine," 278, 349; "Touraine," 309, etc.; Law of the 17th Niv., year II, Art. 42. Cf. "Lois civ. intern.," see "Rapport"; *Esmein*, p. 162.

⁵ "Paris," 303; "Orléans," 304, and the majority of the Customs. One cannot be heir and donee at one and the same time: *Beaumanoir*, 7, 19 *et seq.*; 14, 14; 70, 58, distinguishes between the refunding and the reduction. From this there arises the "refunding for another," — that is to say, the obligation imposed upon an heir to refund the gifts made to his spouse, to his father, and to his son; for they are looked upon as persons interposed: *Loysel*, 353 *et seq.*; "Gr. Cout.," pp. 365, 371; Civil Code, 847; *Pothier*, 4, 3, 5.

⁶ "Nivern.," 27, 8; "Berry," 19, 42; "Bourbon," 368; *Pertile*, IV, 131. Cf. Roman law, Civil Code, Art. 840. The refund is only due because the intention of the deceased was to maintain equality among the heirs. As to the "Abfindungen" in the German law, cf. *Stobbe*, §§ 324, 290.

this system in order to become more like the more modern system of the Customs of reference-legacy.

The refunding of immovables generally took place *in kind*, excepting in the Customs of simple equality, where it could be carried out *by taking less* if there were immovables of equal value and quality which formed a part of the succession. The encumbrances (servitudes, mortgages) which had been created by the donee became void when the property conferred passed into the share of his co-heirs; but the sales which he had made remained in force, which meant that the refunding took place by way of taking less whenever the donee had disposed of the possessions which he had received. It was also by taking less that the refunding of movables was carried out.¹

Equality may be disturbed not only by gifts "inter vivos," but also by legacies. The Customs saw in this a still more pressing danger, for the will is much more exposed than is the gift to undue influence; the condition in which the testator finds himself at the time when he makes a will, that is to say, as a general thing, on his death-bed, lays him open to every influence and points him out as a prey to every kind of greed. Therefore, the common law of the Customs adopted without any exception, even in the case of collaterals, the rule that **one cannot be heir and legatee at the same time.**² The only advantage which the heir drew from a legacy was the power of choosing between this legacy and his hereditary rights.

§ 484. **Payment of Debts.** — The old law only by degrees arrived at the revived Roman law doctrine according to which the heir is responsible to an unlimited extent and out of his own property for the debts of the deceased, — at least, if he accepts without reservation ("creditores propinquissimi sunt heredes").

¹ *Beaumanoir*, 14, 13 *et seq.*: cf. 20, 9 and 10 (penalty for concealment); *Pothier*, 4, 2, 7; *Lebrun*, 3, 6, 3 and 4. Withholding: "Paris," 305. Offices: *Argou*, II, 28.

² "Gr. Cout.," 369; "Olim," I, in 1261; "Parl. aux B.," Aug. 13, 1293; *Boutaric*, I, 103; *Ferrière*, on "Paris," 300; *Pothier*, VIII, p. 179, ed. B.: "A means of preserving peace and harmony in families. . . . It was all the more important to maintain this equality with respect to warlike and ferocious men such as our ancestors were, — men who were more susceptible to jealousy than others and always ready to come to blows and to kill for the slightest thing." In the case of gifts this danger was less, because here it was a matter of something that had been consummated. The inconsistency between the capacity of heir and that of legatee did not exist in the countries of written law, where only the refunding of gifts "inter vivos" was recognized, — a refunding which one can always dispense with by renouncing the gifts. Cf. Law of March 25, 1898.

In early times debts were personal, not capable of transfer or of succession;¹ they died with the debtor.² Having become inheritable,³ they only conferred rights over the movables of the debtor;⁴ they were charged to the heir of the movables and only up to the amount of the value of the latter,⁵ because the head of the family has not the right to destroy the family's patrimony. As ideas progressed, the hereditary immovables became liable just as the movables; and finally they came to impose upon the heir the obligation of paying debts "ultra vires" (in excess of assets) out of both the succession and out of his own possessions.⁶ This evolution has already been partly explained under the subject Obligations. It only remains to show how the hereditary liabilities

¹ Primitive system of transactions for cash and promises followed by the giving of the pledge or of surety, which is rather a method of payment than a promise. However, even in the barbarian period certain laws charged the debts to the heirs: "Rib.," 67; "Roth.," 362, 369, 323; "Wis.," 5, 1, 2; 2, 6; "Arech." (774), 10 (debtors who give away all their possessions "inter vivos" in order to defraud their creditors); *Pertile*, IV, 134, 137 (sons, whether separated or not from their fathers). — Survival of the old law: "The dead carry out execution upon the living, and not the living upon the dead." Declaration of March 4, 1549; Civil Code, 877. — Lewis maintains, contrary to the general opinion, that the heir was originally held liable for the debts "ultra vires," and that later on his responsibility became less.

² If the deceased has committed a murder the obligation to pay the "Wergeld" is incumbent, not only upon his heirs, but upon his relatives, for the relatives are just as much exposed to the private vengeance as are the heirs: "Sal.," 53, 62; "Sax.," 2, 6; "Roth.," 2 (two parts of the claim of the "Wergeld," one for the heirs, the other for the relatives); *contra*: "Rib.," 67; 12, 2; "Bai.," 8, 20; "Thur.," 31 (heirs alone); *Heusler*, II, 541; *Brunner*, *op. cit.*; *Darestie*, "Nouv. Et.," 90. The responsibility for debts "ex delicto" is limited even under the family community system. Were this not so, it would have been too easy to wipe out even this community itself by means of its debts: Capitulary of 816, 5 (I, 218); *Heusler*, II, 545. *Contra*, *Amira*, "Erb.," 213. Debts "ex delicto" generally: *Stobbe*, V, 59 (bibl.).

³ The transmissibility of claims to the heirs of the creditor seems to have been far more easily admitted than the transmissibility of debts; however, the numerous deeds in which it is stipulated that the debtor will pay the creditor or his heirs bear witness to the fact that this was not done without some hesitation.

⁴ Capitulary of 816, c. 5 (I, 268); *J. d'Ibelin*, 68; "Ass. de Rom.," c. 124; "Et. de St. Louis," I, 15; "A. C. Bourges," 62; "Malines," in 1535, 16, 35; "Sachsensp.," 1, 6, 2; 2, 41; "Richst. Landr.," 10, 3. — "Lorris," 15, 11; "Bourbon," 316; "Touraine," 310, etc.; "Arr.," by *Lamoignon*, *op. cit.*, 1. — *Cf. Stobbe*, V, 50; "Summa Norm.," 19, 6 (religious authorities charged with the liquidation of intestate successions, at least with regard to the movables). — *Post*, "Testamentary Executors": they are given possession of the movables and, consequently, are charged with paying the debts. *Cf.* especially as to English law, *Lehr*, p. 724, and *Pollock and Maitland*, II, 344.

⁵ "Rib.," 67, 79; "Burg.," 65, 47; "Liut.," 57; "Wis.," 7, 2, 19; 7, 6, 8; 5, 6, 6; "Roth.," 224; "Cap.," IV, 23; "Gr. Cout. Norm.," 59, 88; "Schwabensp.," 20, 10; *Esmein*, 180. — *Cf.* power of renouncing given to the heir who is the beneficiary: *Stobbe*, V, 52.

⁶ "L. Rib.," 67, 1. See the German proverb: "Wer einen Heller erbt, einen Thaler bezahlen muss."

followed the disposal of the assets and united with the latter, and how the personal responsibility of the heir has been coupled with that of the deceased.¹

From the moment when the movables were charged with the debts, they were charged in the hands of the heir as well as in those of the deceased. In either case the responsibility was thus limited to a portion of the inheritance. However, it became natural to connect the liabilities and the assets. When distraint upon immovables came to be permitted, it was also authorized, owing to the same reason, when they were in the hands of the heir. But why was not the heir always considered as being held "propter rem," *i. e.* only "intra vires"? Why was he made a personal debtor liable "ultra vires," *i. e.* beyond the estates, assests, and why was he made subject to arrest for debt, like his intestate, in case he became insolvent? Various reasons brought about this result:² 1st. The influence of the Roman idea that succession bore "in universum jus defuncti," with this correction, that the renunciation and the privilege of inventory prevented all harm; if the heir suffered because he had taken upon himself too heavy a responsibility, he had done it of his own free will. 2d. The practical motive, the actual confusion of the property of the deceased and that of the heir; it often happened that the responsibility became unlimited, as there was no means of knowing what property it should have been confined to. 3d. The mutual moral responsibility of the members of the house, the idea that the

¹ The transmissibility of debts to the heirs was prepared for by means of those clauses in deeds by virtue of which the debtor bound his heirs themselves: *Marculte*, II, 25; *Desmares*, 159; "Cod. Cav.," II, 213; "Cart. Lang.," 6. Outside of any agreement, the mere fact of having enriched themselves without giving any consideration therefor made them responsible: "Ass. de Jér.," "C. des B.," 165, 171. Thus, according to the "Sachsensp.," II, 17, 1, the heir is not responsible for any debts excepting those for which he has received an equivalent, "wederstadinge" and debts arising out of theft or plundering; this last kind of debt only obliges him to restore the thing stolen that is found to be in the succession; he does not have to pay any composition. Cf. *Heusler*, II, 546; *Stobbe*, V, 58, 60.

² "Wis.," 7, 5, 8; *Beaumanoir*, 15, 4; 7, 8; *P. de Fontaines*, 15, 84; "Cout. Not.," 18, 84. See "Privilege of Inventory." Cf. *Desmares*, *loc. cit.*, *Esméin*, "N. R. H.," 87, 52, 61. Customs which make the heirs jointly and severally responsible: "Amiens," 91, 159; "Norm., Rêgl.," 1666, 159; *Masuer*, 31; *Lebrun*, 4, 2, 7, 11. — *Stobbe*, V, 52: "ultra vires" obligation, even where the influence of the Roman law did not exist: *Daresté*, "Nov. Et.," 298, 328 (China). — But in the English law the heir is only held liable for debts up to the amount of the value of the property that he has received. And, again, we must add that even almost up to our own time the immovables escape the creditors: *Glasson*, "Inst. Angl.," 259; *Lehr*, p. 701; *Pollock and Maitland*, II, 117. — In Mahometan law the heir is only held "intra vires": *Zeys*, "Tr. de Dr. Mus.," II.

latter constituted a legal person whose acts were connected by a close bond, whoever might be the doer of them; the debts of the house passed from the father to the son; at first religion,¹ and then honor, made it a duty to liquidate them. Custom often imposed upon the heir before the law did so the obligation of paying the debts; the credit of the family profited thereby. The combination of these ideas led to remarkable consequences: 1st. Thus the distinction between the *representatives* of the *person*, that is to say, the heirs at law, who were the only ones held for debts "ultra vires" of the inheritance (and not for legacies),² and the successors to property, that is to say, irregular successors, legatees, and "universal" donees, who were held "intra vires" ("bona non intelliguntur nisi deducto ære alieno").³ 2d. The privileged situation of relatives or heirs at law, the seisin which they enjoyed, placed them under the necessity of advancing the whole amount of the debts⁴ (under a levy); should one of them alone be called to the succession, he could be compelled to indemnify the creditors; if several of them were called, each one had to pay his "man's share," which was an almost inevitable solution in the case of liquidations as complicated as those of the old succession, with the difficulty of knowing the part of the liabilities which was incumbent upon each one of those interested.⁵ Moreover, they were given a recourse against the successors to the property for the amount that they had liquidated in discharging the debts. According to the final regulation ("contribution for debts") every "universal" successor had to pay a share of the liabilities proportional to the share of the assets which he received⁶ (except the eldest, who did not contribute for his reference legacy).⁷

¹ Restitution carried out for the salvation of the soul of the deceased: Dig. X, 3, 28, 14; 5, 17, 5, etc.; *Stobbe*, V, 60; "Const. Sic.," I, 25; *Pertile*, IV, 135; "Schwabensp.," V, 178. *Contra*: "Sachsensp.," 1, 6, 2, and 1, 18, 1. Cf. *Desmares*, 117.

² *Beaumanoir*, 12, 6; *Desmares*, 13, 1: "debita sunt præferenda legatis"; *Loysel*, 330; "Et. de St. Louis," I, 15; *Pothier*, "Succ.," V, 4; cf. VIII, p. 138 (the heir is only held for legacies which are "intra vires").

³ *Pothier*, 5, 3; *Lebrun*, 4, 2, 1; *Ricard*, "Don.," IV, 1, 112. But upon condition of making an inventory or some other deed equivalent to it, in order to be able to distinguish the property in the succession from their own personal belongings, — a thing which greatly reduced the difference between representatives of the person and successors to the property: *Boutaric*, II, 25.

⁴ *Pothier*, V, 3 (legatees are not personal debtors). *Lebrun*, *loc. cit.* In certain of the Customs each heir is held liable for the whole. Distinction between the personal advance and the advance by way of mortgage: "Gr. Cout.," p. 369; *Desmares*, 159, 167; "Cout. Not.," 18, 86, 26.

⁵ *Pothier*, 5, 3, 1; *Lebrun*, 4, 2, 1, 5; Civil Code, 873.

⁶ "Roth.," 385; *Pertile*, IV, 136; *P. de Fontaines*, p. 138.

⁷ Cf. *Laurière*, on "Paris," 334; "T. A. C., Bret.," 210. Other reference

§ 485. **Separation of Assets.** — The liability of the individual assets of the heir with the inherited possessions was an advantage for the creditors of the succession when the heir had resources; if he were insolvent it turned against them, they found themselves under the necessity of competing with his personal creditors. In Rome, in order to guard against this disadvantage, a collective measure in the interest of all the deceased's creditors was devised, the "separatio bonorum," which was an incident of the "venditio bonorum"; by this means, instead of one bankruptcy proceeding, two occurred, — that of the deceased and that of the heir; each one had its group of creditors, its special assets, and its administration. In our old law the separation of assets, although borrowed from the Roman legal system, took on an entirely different character. It ceased to be an incident of procedure for liquidation. Each creditor of the estate and each legatee was authorized to demand this partition individually against each personal creditor of the heir, and to move for the separation of all the possessions or of some of them only. The heir was not dispossessed, as he was in Rome, but kept the administration of the hereditary possessions, somewhat as in the privilege of inventory, and, as in that case, letters of chancery were necessary at first; in the seventeenth century they were no longer demanded.¹ Contrary to the decisions of the countries of written law, where these letters were for a long time required, and where it was only possible to ask for the separation during five years, the Parliament of Paris allowed it to be availed of at any time without imposing upon the creditors the necessity of making a demand at law.² One sees that the separation tended more and more to become a simple right of preference, a *lien* on the hereditary possessions;³ there was nothing to prevent the creditors of the succession having their claims paid out of the possessions of the heir, once his personal creditors had been indemnified (doctrine of Papinian and Pothier). It would have been more strictly logical had they made these two classes of creditors share with legacies in the German law: "Morgengabe," "Gerade," "Musstheil," etc.

¹ In the Swiss law the local authority steps in to supervise the payment of these debts, to compel the heirs to give surety, in order to insure this payment, and to pay them itself, — a thing which rendered useless provisions in the nature of the partition of inheritances.

² *Argou*, IV, 4. The same in Belgium: *Regnerus*, "Censura Belg., ad. t. de Separ."; *Raviot*, on *Périer*, "Arr. Dijon," 291, 8: five years in the case of immovables. Civil Code, 880.

³ *Loysel*, 494; *Bourjon*, "Succ.," II, 12, 28 (privilege).

each other out of the estate of the heir. It seemed that they were progressing towards this solution, because Ferrière shows the existence of a practice according to which the personal creditors of the heir had the right to demand a separation of the possessions as against the creditors of the deceased. What was the good of this if the latter had not shared with them? ¹

¹ *Contra: Lebrun*, IV, 2, 1, 16, and *Pothier*, V, 4; Civil Code, 881.

TOPIC 4. TESTAMENTARY PROVISIONS

§ 486. Neither Will nor Gifts "causa mortis."	§ 494. The Same.—(II) Capacity to make a Will or to receive by Will.
§ 487. "Thinx" and Ceremony of Appointing an Heir.—(A) Adoption.	§ 495. The Same.—(III) The Appointment of an Heir.
§ 488. The Same.—(B) "Affatomie."	§ 496. The Same.—(IV) Different Forms of Wills. (A) The Canon Will.
§ 489. Covenants pertaining to Succession.	§ 497. The Same.—(B) Modern State of Law.
§ 490. Gifts "pro anima" and Share of the Dead.	§ 498. The Same.—(V) Revocation of Wills.
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§ 486. Neither Will nor Gifts "causa mortis" were recognized in the Germania of Tacitus,¹ or even in the majority of the barbarian laws.² The old system of family community only accommodated itself to intestate succession, that is to say, the exercise by the relatives of rights which already belonged to them.³ With the disintegration of the family the will became once more possible. The Roman precedents and the influence of the Church⁴ were in favor of the evolution which was to result in the twelfth century in the renaissance of this institution which had been abandoned. But this result was only reached slowly.⁵ Those who wished to dispose of their possessions did so for a long time by means of contractual deeds "inter vivos" before employing the unilateral act such as the will is. The appointment of an heir was only gradually recognized, as witness the adages: "Solus Deus heredem facere potest, non homo";⁶ "Giguntur heredes,

¹ Tacitus, "Germ.," 20; Kohler, "Z. V. R.," 1887, VII, 224; Law of Gortyne; Dareste; Hauss, "Inscr. jurid. Grecques," III, 462; Dareste, "Nouv. Et.," 349.

² Excepting the laws of the Burgundians and the Visigoths, 4, 2, 4; 2, 5, 10. Cf. "Liut.," 6 ("Lomb., de ult. vol.," II, 12, 2); Palumbo, p. 317; Tamassia, "Alienaz.," 242; Schulze, "Langob. Treuh.," 14.

³ Alienation "inter vivos" was in general use earlier than the will for two reasons: (a) because it was easier actually to carry it out; (b) because it was sometimes necessary, and for that reason accepted by the relatives.

⁴ The Church went so far as to make it a duty to make a will and to punish those who died intestate; Du Cange, see "Intestati" (examples of third parties making wills for others); R. Caillemer, p. 47; Auffroy, p. 555; Pollock and Maitland, II, 356.

⁵ Before the thirteenth century instead of "testamentum" they say "carta divisionalis," devise, present, "gadium": see Du Cange; Rastall, see "Devise"; Auffroy, p. 338. "Destinatio" (Du Cange, see "Destinare"), destiny.

⁶ Glanville, VII, 1; "Poitou," 272, etc.

non scribuntur." They still said in our old Customs, "The appointment of an heir is not made,"¹ which at that time had two meanings: (a) the heir appointed by will is not in all respects like the relatives called by Custom; (b) the appointment of an heir is not required thenceforth in order to make a will valid;² thus there was no distinction between the will and the codicil.³

The disfavor with which the will was looked upon was also accounted for by the notion that "the will is a creation of the civil law," whereas the gift is due to natural law. It was a current prejudice in the school of natural law, accepted by everybody in the eighteenth century, that the will is a creation of the legislator, something artificial. In fact, they said, what could be more unnatural than to carry out the orders of a dead man? The philosophers who defended this theory made themselves without realizing it the perpetuators of the old Customary tradition, which was hostile to testamentary provisions, and the orators of the Revolution were inspired by these same ideas.

§ 487. "**Thinx**" and **Ceremony of Appointing an Heir** ("affatomie"). — (A) *Adoption* was almost the only means, in use in many of the primitive legislations, of creating heirs for oneself when one was afraid of dying without posterity.⁴ The proceeding which is the most like it in the barbarian laws is the Lombard "thinx" or "gairethinx."⁵ The man who despaired of having children because of his advanced age or his state of ill health appointed an heir before the full public assembly.⁶ In order to do this, it is probable that he proceeded by means of the giving of weapons, in the same way as in political emancipation, thus treating the man appointed as though he were his own son. The Edict of Rotharis was satisfied with the presence of free men and the inter-

¹ *Beaumanoir*, 12, 58; *Loysel*, 304; "Paris," 299.

² *Contra*: countries of written law. But exceptions: "Toulouse," 123 b.

³ *Loysel*, 300. Uselessness of the codicil clause ("ut vici codicillorum scriptura debeat obtinere"): *Serres*, II, 23; *Argou*, II, 17.

⁴ "Rib.," 48 ("adoptare in hereditate vel adfatimi"); *Daresté*, "Et.," III, 110, 190, 263, 290, 350; *Kovalevsky*, "Cout. Contemp.," 203; *Post*, I, 103; II, 198; bibl. in *Lambert*, VII, 24; *Valroger*, "Celtés," p. 546; *D. Vaissette*, VIII, 385.

⁵ "Gairethinx," meaning assembly of armed free men ("gaira" or "ger" means lance), and approval by this assembly ("vapnatak"), cf. *Schroeder*, 24, 41. *Pappenheim*, 29: "Garethinx" means general assembly; "Liut.," 73.

⁶ With regard to enfranchisement, "Roth.," 224: "per gaida et gisil." "Gisil" means surety. "Gaida" means: 1st, according to some, "sagitta": *P. Diac.*, "H. Lang.," I, 13; "Gloss. Matrit.," 29. — 2d, according to others, "aidos" ("Roth.," 259), "sacramentales": *Pappenheim*, 31. Cf. *Daresté*, "Et.," 110; *Kohler*, "Z. V. R.," V, 427; *Schroeder*, 222. As to what the "Thinx" was intended for and its final disappearance, cf. *Palumbo*, 276.

vention of a "gisel" or surety, although it did not mention this formality because the act was not connected with the adoption.¹ The Laws of Liutprand, § 4, made it still simpler by reducing the whole to the "carta" or written report. The doer of the "Thingatio" bound himself not to dispose of his possessions to the prejudice of the rights conferred upon the heir which he appointed for himself, — rights which were the same as those of a legitimate child; however, he was at liberty to alienate his property in case of necessity; still, the heir then had the power to prevent the alienation by supplying him with support. The unexpected birth of a child revoked the act, and in the same way ingratitude did so in cases where it would have allowed of the disinheriting of a lawful son.²

§ 488. **The Same.** — (B) Under the name of "*affatomie*" ("L. em." t. 46), "*adfathamire*,"³ the Salic Law describes a transaction which is perhaps derived from adoption, but which differs very much therefrom, owing to its exclusively patrimonial character. It consists in three separate acts: 1st. At the "mallus" which has been summoned by the "thunginus" the donor throws the "festuca" at the breast of a third party,⁴ by this means performing a symbolical transfer of his inheritance;⁵ at the same time he declares that he wishes to give all or part of his fortune to another person whom he designates. — 2d. The person who has received the "festuca" goes and takes up his residence in the house of the donor, receives three guests, who eat pap with him and thank him for his welcome; and this is a taking possession of

¹ "Cod. Théod.," 8, 12, 1, 2; "Roth.," 172; "L. Rom. Cur.," 8, 5.

² "Roth.," 168 *et seq.* Cf. 156, 362; "Liut.," 57; "Areg.," 10; *Geffcken*, 178 (bibl.).

³ A word which seems to mean "embrace" by allusion to the old rites of adoption: see *Kern*, "L. Sal.," ed. *Hessels*. Other texts: "Cap. extrav. L. Sal.," 8; Capitulary of 819, 10; "Rib.," 48, 49; "Form. Merkel," 16, 24, 25; *Lindebr.*, 13; *Marculte*, I, 12; "App. Marc.," 47; "Form. imp.," 38; *Du Cange*, see "*Affatomare*."

⁴ According to an interpretation which would seem to be fairly reasonable, but which is hard to reconcile with the text, the third party is eliminated; the entire transaction takes place between the donor and the donee; the latter receives the "festuca" and then installs himself in the house of the donor and finally returns to him with the "festuca" the right of enjoyment of his possession: *Glasson*, III, 37.

⁵ It has been pointed out that there was one thing lacking in the alienation for the benefit of the person interposed: the surrender by him. This must have been an intentional hiatus; in not relinquishing his possessions the donor reserved to himself the power of keeping them: *R. Caillemer*, p. 258. *Post*, "Donationes post obitum," "Testamentary Execution." But neither is the surrender of the property by the person interposed mentioned. And, furthermore, could not the heirs of the donor make use of the lack of this surrender in order to get the property away from the beneficiary?

the property which has been transferred to him.¹—3d. Within a year, in the presence of the king or at the “*mallus legitimus*,” by means of the throwing of the “*festuca*,” he gives the heir who has been appointed the inheritance of which he has become the owner.

The most striking thing about this description is that the ceremony of appointing an heir (“*affatomie*”) consists in a giving by a person who is interposed, and that it takes place in the “*mallus*.” Whether one carry it out in the “*mallus*” or in the presence of the king may depend as to whether one’s object is publicity or one needs the approval of public authority in order to validate the act; it is probable that both the “*mallus*” and the king originally had an active part,² but the silence of the law leads one to suppose that their part had become passive. It is more difficult to account for the intervention of a third party.³ It would be very easy to understand if, as has been asserted,⁴ the third party had only to transmit the property with which he had been invested, after the death of the donor; in this we could see a proceeding designed: 1st, to avoid the rule which forbids gifts made to take place after death, because here everything took place between the living; 2d, and at the same time, in order to allow the donor to keep until his death the enjoyment of his possessions, because the third party who receives them is an accommodating friend, who has no reason to keep them himself when he promises to allow the donor to have them. Unfortunately, this plausible opinion is condemned by the text of the Salic Law; it is not said in so many words that restitution must take place within a year of the death of the donor, but it is said that it must take place within a year, which can only be understood to mean the year which follows the fact of which one is speaking, — that is to say, the transfer of the property to the person who is interposed.

As for our view, we would propose by way of conjecture the following explanation:⁵ The ceremony of appointing an heir would

¹ “*Sessio*,” of an indeterminate length of time; consequently, “*sessio trid-uana*” (three days and three nights): *Geffcken*, 182 (bibl.).

² *Lambert*, p. 30 (bibl.). Will “*calatis comitiis*,” cf. *Gerard*, “*Man. de Dr. Rom.*,” p. 789. 3d ed. At Unterwalden ratification of acts of last will by the public authorities: *Lardy*, *op. cit.*, p. 263; *Huber*, IV, 609; Statute of Ivree (fourteenth century) in “*L. Munic.*,” I, 1134. Cf. rights of the “*vicini*” and of the king.

³ Cf. at Rome “*familiæ emtor*,” a trust.

⁴ *Heusler*, *op. cit.*

⁵ Was not the interposition of third parties intended to evade the law and to allow one to make a gift for the benefit of persons under a disability? —

take place in the majority of instances, like the Lombard "thinx," in the case of the old man without children who was anxious to have some one who could administer his interests after he was gone, who could give him the care which his age demanded, and who could take the place of a son to him. He could not attain this object if he did not transfer his inheritance to this person during his lifetime, for, as representation was not admitted, the heir appointed could not perform a single act affecting the property of the donor. But how was he to carry out this transfer, which was indispensable to him? (a) The beneficiary may be absent at the time when the donor makes up his mind to it. In such a case as this, direct transfer is not possible, and yet at the same time the act will not admit of being put off, because the donor is exposed to the danger of death or feels that his end is drawing near. The interposing of another person is here found to be necessary. But this case does not seem to us to have been the most frequent one. (b) Ordinarily, the beneficiary was present, or, if he was away, the act could be postponed until his return. In this case the presence of the intermediary was justified by three motives: 1st. His intervention served to notify third parties that the donor gave up possession of his property; if the latter had been satisfied to deal directly with the beneficiary, if he had called him to him in order that they should live together, the situation of affairs would not have been obvious; the installation of a third party

For *Schroeder*, p. 344, the presence of an intermediary in the Salic Law could be accounted for in the same way as that of the "gisel" in the Lombard "thinx"; but the latter is hard enough to understand, for adoption by handing over of weapons takes place ordinarily without any intermediary (*cf.*, however, *Girard*, "Man. de Dr. Rom.," pp. 115, 173; enfranchisement "per quartam manum" among the Lombards). The Salic ceremony of appointing an heir has rather a patrimonial character, and the third party interposed takes possession of the property of the donor; perhaps one might say that the "gisel" also acquires from the natural father the power over the person of the adopted son, and that he transmits it to the adopting father. — According to *R. Schmidt*, p. 73, the taking possession carried out by an intermediary would be a legal demand addressed to third parties who have rights, to assert them over the possessions of the donor (that is to say, to the relatives of the latter); they should in some way be summoned to come before the "mallus" in order to raise their claims there, under penalty of being barred. But we do not see why the presence of an intermediary should be necessary in order to attain this result. It is very likely that some connection exists between the period of twelve months allowed for restitution of the property and the old one-year tenure. "Ante XII menses" can scarcely mean at the end of the year, and yet this translation has been offered because the expiration of this period extinguishes any possible claims which the relatives or the true owner may have. Perhaps, on the other hand, what they meant to say was that the intermediary could not keep the property during a whole year, because, if he did so, he would have acquired the indefeasible ownership of it.

in the house of the donor gave evidence of the fact that the latter had deprived himself of possession. 2d. The intermediary ought to take an interest in the carrying out of the gift, and was morally responsible for it. 3d. The donor deprived himself of the right of revoking the act and carried it out in a public manner and by means of an intermediary.—Whatever the theory may be, from the time of the transfer which was executed for his benefit, the beneficiary found himself with respect to the donor in the same position as a son; he was appointed heir (“heredem appellare”).¹ Everything leads one to believe that the title which was thus conferred was irrevocable (excepting in case of expulsion from the family, just as in the case of a lawful son).² The Salic ceremony of appointing an heir seems to have soon disappeared from practice, for the Frankish statutes do not mention these formalities; it degenerated into a direct transfer, that is to say, into a mere delivery,³ and became confused with gifts “*causa mortis*” or covenants pertaining to a succession, which we are about to deal with.⁴ Perhaps, however, the intermediary in this ceremony of appointing an heir is to be once more found in the testamentary executor of early times, or, at least, the precedent of the Frankish law has contributed towards having testamentary execution accepted in practice.

§ 489. **Covenants pertaining to Succession.**—In the guise of a will, the law of the Frankish period makes use especially of contracts, or, to put it better, of conveyances “*inter vivos*,” which confer “*hic et nunc*” rights which are irrevocable, but whose final carrying out is postponed until the death of the donor; such are recalls to succession,⁵ appointments by contract, mutual gifts between spouses,⁶ “*post obitum*” gifts, with the reservation of the usufruct or tenure at will. The first of these acts presents a

¹ “Rib.,” 48, 49; “Cap. l. Rib. add.,” 803, 8; “Roth.,” 174.

² How was the intermediary to be compelled to carry out what he had to do?

³ “Rib.,” 48: He who has neither sons nor daughters may give all his “*facultas*” in the presence of the king either to his spouse or to a near relative or to a stranger under the form of an adoption by right of heir (“*adoptare in hereditate*”) or “*adfatus*” in writing (“*scripturarum series*”) or by delivery before witnesses. “Cap. leg. Sal. add.,” 819, 10: “*de affatome dixerunt quod traditio fuisset.*”

⁴ “Rib.,” 49: “*adfatus*” between spouses; the survivor can only make a disposal for religious purposes or because of pressing necessity; after his death the possessions which have been given to him return to the lawful heirs. Cf. “Gifts ‘*inter vivos*,’” “Dower.”

⁵ Rozière, “Form.,” nos. 130 *et seq.*: “*hereditariæ*”; Auffroy, p. 215.

⁶ Demuth, “Wechselseitig. Verfüg. von Todesw.,” 1901 (“Unters.” by Gierke).

very great similarity to the early "adoptio in heredum."¹ The others are more like gifts "inter vivos" of some particular object, although they more often than not affect a number of possessions. Whether they were gifts "post obitum"² or gifts with the reserve of the usufruct,³ there were always deliveries; and, as they were ordinarily intended for a church or a monastery, the donor proceeded by means of the "traditio cartæ," — for example, by placing the deed of gift upon the altar or the shrine of a saint.⁴ The beneficiary acquired the property of the donor, but could not exercise his rights until the death of the latter; who thus continued to retain it and to enjoy it. Whether the gift were made "post obitum" or with the reservation of the usufruct, the result was the same; the donor retained the life ownership of the property transferred,⁵ the donee acquired a future ownership, a right to future possession, which was absolute and which could not be attacked.⁶ In order better to define the rights of the donee a rent was often paid to him by the donor.⁷ Here we have a remarkable example of that limited ownership in point of

¹ For example, the daughter called back to a succession acquires the same rights as a son.

² *Hübner*, p. 11 (sources) and *passim*; *Rozière*, "Form.," 212 *et seq.*; "Cart. de Redon," nos. 137, 140, 149, etc.; see *D. Vaissette*, *passim*.

³ "Possidere usufructuario ordine, sub usu beneficio," etc.: *Marculte*, 2, 3, 5. Examples in *Hübner*, p. 76 *et seq.* "Tenure at will," "benefice": *Rozière*, nos. 319 *et seq.* Cf. *Bondroit*, "Les Precariæ verbo Regis," 1900. The reservation of the usufruct may be made for the benefit of the donor, of his widow, or of his children.

⁴ Delivery "per cartam" seems to be sufficient of itself without any giving up or putting in possession. The formulæ contain the word "trado" without mentioning the "se exitum dicere": "Alam.," 1; "Bai.," *Caillemer*, 313.

⁵ *Hübner*, p. 149, systematically contrasts these two sorts of deeds, but the documents do not make any very great distinction between them, and their practical effect is the same. The donor who has possession of the property which has been given him can abuse his position and transmit it to third parties; but in this case the donees in the same way as the relatives have a period of a year and a day within which to make complaint. In case the donee dies before the donor his heirs only profit by the gift as an exceptional thing: *post*, "Gifts 'inter vivos'"; "Ass. de Jérus.," "C. des B.," 116; *Heusler*, II, 635, n. 9; *R. Caillemer*, p. 274.

⁶ The donor could reserve the right of revoking his gift, not at his own pleasure, but if some particular event took place, — if he should survive such and such a happening, if he should have a son. *Heusler*, has maintained that even in the absence of such reservations as these the donor was not bound (*cf.* the gift "mortis causa" at Rome), "Gewere," p. 472; but in his "Inst.," II, 121, he seems to give up this idea and to consider the right of the donee as irrevocable. To the same effect is *Hübner*, p. 47. The delivery "per cartam" having taken place in due form, it is clear that the donor has absolutely deprived himself of the property. As to confirmations ("renovationes," "iterationes") *cf. ibid.*, p. 57; *Brunner*, "Urk.," p. 266. On the Capitularies of 803, 6, and 818, 819, see *Brunner*, "Urk.," 278; *Hübner*, 63; *R. Caillemer*, 371.

⁷ *Hübner*, p. 116.

time which the old law erected in many cases, for example, for the benefit of the mortgagor, the guardian, the widow with a jointure, the beneficiary, and still others.¹

§ 490. **Gifts "pro anima" and Share of the Dead.**² — In pagan Germany there seems to have existed the custom of dividing the movables of the deceased into three parts, one-third for the widow, one-third for the children, and one-third for the dead. The objects which went to make up this last third were burned or entombed with the corpse, so as to be of use to him in the life beyond the grave. After the conversion to Christianity the division into thirds persisted for a long time in many places, but the disposal of the share of the dead changed; it was employed in pious works, "pro remedio animæ"; this was the share of the Church.³ It was conferred upon the Church either by means of gifts in the nature of those which we have just been discussing, or by means of unilateral declarations made by a sick man upon his deathbed when it was impossible for him to carry out the gifts in fact.⁴ But in the tenth or the eleventh century these gifts are only efficacious when testamentary executors are interposed. It is under this form of alms, of the pious legacy, that the will reappears in the Christian practice, as a completion of the confession "in extremis."

§ 491. **Testamentary Executors**, who were unknown in the Roman legislation, but not in the Byzantine law,⁵ make their ap-

¹ As to this conception of a limited ownership, of an ownership for life distinct from the Roman usufruct, cf. *Heusler*, II, 13; *Huber*, "Gewere," 54; *Champeaux*, "Vestitura," 146; *R. Caillmer*, 338.

² *Brunner*, "Z. S. S.," 1898, "G. A.," 107 ("Todtentheil"); "Akad. Berlin," 1849, 191. Guardians for the dead, *R. Caillmer*, 360.

³ "Novella" of *Leo*; *Zacharie de Lingenthal*, "Gesch. d. Griech. Röm. R.," p. 116. Sicilian law: *Brandileone*, "Dir. Rom., n. Leggi Normanne," 1884, p. 136, and Italian Statutes; *Tamassia*, "Arch. Giur.," 1885, p. 5, n. 2; "Ass. d'Antioche," ch. I, p. 49. Anglo-Norman law: Commentary on the "Summa," c. 31, fo. 37 b, ed. of the "Gr. Cout. de Norm.," of 1523 (cited by *Brunner*); "Cout. de Norm.," 1583, 392, 418; "T. A. C., Norm.," 5, 4, 5; "T. A. C., Bret.," 207; *Blackstone*, II, 33. Same custom among the Scandinavians and the Russians.

⁴ "Seelgeräte" ("animæ consulitur"), "Geschäfte," "Gemächde": *Auffroy*, 350; *Heusler*, II, 642; *Stobbe*, V, 205; *Pollock and Mailland*, II, 316. *Auffroy*, p. 406, cf. 350, 603, shows how difficult it was to realize these gifts "in extremis," as the transfer of ownership could only take place by means of the wishes of the deceased; his heirs were the ones that had to carry it out. Penal clauses, canonical penalties against them. Cf. *Zacharie de Lingenthal*, p. 180. On the other hand, deathbed gifts are looked upon with suspicion. (*Glanville*, VII, 1, 4; they are only void if they affect lands): "Sachsensp.," I, 52, 2. Cf. "Liut.," 6; *Heusler*, II, 198.

⁵ *Zacharie de Lingenthal*, "Gesch. d. Griech. Röm. R.," p. 138 (2d ed.) "Cod. Just.," "de episc.," 28, 48. "Novella," 131, 11. Cf. *Dig.*, 17 and 88, "de leg.," II; "ad Sc. Treb.," 78, 1; "Mand.," 12 and 13. "Novella" of *Leo the Philosopher* by *Manuel Commenus*. It is found again in the *Mahome-*

pearance in the Frankish deeds of the eighth century;¹ and after this period they figure in almost every will.² They are still mentioned in the Civil Code, Art. 1025. Roman³ or Germanic⁴ precedents for this institution have been sought for; but if the latter especially made its formation more easy, it is no less true that it owed all its importance to religious ideas,⁵ and that it was first regulated by the decisions of the ecclesiastical courts and by the canon law. It served to realize gifts "pro anima." The Roman will had disappeared, and with it the heir who was appointed and charged with carrying out the last wishes of the deceased. As the heirs at law could not be relied on, and as means of compulsion against them were lacking, — for example, when the donor had contented himself with a unilateral declaration of will,⁶ — recourse was had to the interposing of third persons.

tan law: *Hedaya* (twelfth century), 52, 7; *R. Caillemer*, 680; *Lambert*, 15 (bibl.).

¹ **Names for Executors.** — "Eleemosynarius," a man of charity, a monk distributing alms to the poor, a testamentary executor charged with creating pious foundations (ninth century), "aumosnier" (thirteenth, fourteenth centuries), "Wadiator," "Gadiator" (tenth, eleventh centuries), allusion to their appointment by the "wadium," "gagiers" (thirteenth century). "Fidejussor," "tutor" (tenth, eleventh centuries); "spondarius" (testamentary guardian or executor), "Toulouse," 6, 82, 83. "Vormund," "momper," "advocatus"; "salmann," "manufidelis" ("Treuhänder"), Germany, "Feumain," Flanders, "Erogator," distributor of property, "dispensator" (eighth century), "distributor," "fideicommissarius" (tenth century) and (abbreviation) "commissarius." "Executor" (twelfth century). In Spain, "cabeçalero" ("cabeça," meaning function). *Thévenin*, "Texts," see Table; *Du Cange*, *ibid.* — Cf. the "mund" of the Anglo-Saxon will or "cwide"; *Pollock and Maitland*, *loc. cit.*

² See, for example, *Tuetey*, *op. cit.* — Texts: *G. Durand*, "Spec.," II, 2, 13; *Beaumanoir*, 12, 26 *et seq.*; *P. de Fontaines*, 488; "Olim," Table, see "Executor," "Eleemos.," "Summa Norm.," 59, 12 and Table, see "Eleemos.," *Glanville*, VII, 6; *Boutaric*, I, 17 and 20; *Masuer*, 30, 39 (bibl.); *Loysel*, 314; "Siete Part.," 10, 10; "Baumgartenberg. Formelbuch" (thirteenth century), in "Fontes Rer. Austr. Diplom.," XXV, 1866.

³ "Deutsch Vorläufer d. heut. Testamentsvollstrecker in Röm. R.," 1899; *Collinet*, "N. R. H.," 1894, 573.

⁴ Cf. the intermediary in the appointment of an heir, *ante*. See in *Lambert*, 75, a comparison with the surrender to use of will, of copyholds in English law.

⁵ So absolute seemed the necessity for testamentary execution from the religious point of view in the Middle Ages that, if there were no testamentary executors (because none had been appointed: *Desmares*, 68, 328; "Siete Part.," 6, 10, 5; death or refusal: "Capit. Ital.," 790, I, 93; *Beaumanoir*, 12, 1, 27, 60, discharged, etc.) the bishop became a **legal executor**, and, if he himself could not fulfill this office, he designated an **appointed executor** in place of himself (cf. legal guardianship or guardianship by appointment). In the time of *Beaumanoir*, 12, 27, the civil authorities were also competent: "Ass. de Jér.," "C. des B.," 185. In England the ecclesiastical courts designated an administrator "cum testamento annexo": *Blackstone*, II, 32; "Summa Norm.," 19, 6.

⁶ Cf. the "Salmann." Other cases in which the naming of an executor is in-

During his lifetime the donor granted his possessions as a matter of form to third parties (almoners, executors, cf. "Salmannen"); he kept them in fact, — that is, kept the enjoyment of them; but these third parties became the owners and were charged with transferring them after his death¹ to a church or a monastery, to do acts of charity in order to redeem his sins, and to assure a suitable burial for his body and eternal salvation for his soul. The purely religious part which was originally played by executors was enlarged when the will appeared in practice and when the people no longer limited themselves to dispositions "pro anima";² they paid the debts, made good the damages caused by the deceased ("male ablata," torts done), indemnified those who made complaints ("clamores") against him,³ paid off the legacies and upheld the validity of the will,⁴ and, not satisfied with being the liquidators⁵ and, as it were, the guardians of the succession, they were seen sometimes to become the testamentary guardians of the minor children of the deceased. Thus the institution took on a secular aspect. It is easy to understand that the seigniorial judges should have disputed the jurisdiction of testamentary execution with the ecclesiastical judges, until the time when the secularization having taken place, ecclesiastical courts lost all jurisdiction in this matter (sixteenth century).⁶

However, when once people had become accustomed to having the entire inheritance pass to legatees by the intervention of executors, the appointment of an heir in the Roman sense became

dispensable: (a) taken unawares by death, one only has time to choose some friend to carry out the transfer "super altere"; (b) one wishes to have the gift made on the date of the funeral (pagan idea). We also find gifts "causa mortis" made by means of a third person being interposed.

¹ Sometimes executors "inter vivos."

² One can appoint a third party to make one's will ("will by agent"), but the canon law decided that this third party only had one right, and that was to confer the property of the succession upon the poor or to repartition this property "causæ piæ": Dig. X, 3, 26, 13; 5, 40, 18; *Pertile*, IV, 44; "Fuero Real," 3, 5, 6; "L. de Toro," 32; *F. de Vizcaya*, 21, 3. England: John Lackland, 1216; "Fleta," II, 62, 13; *Britton*, 28. France: "Bullet. hist. et phil.," 1898, p. 376 (in 1286); *Desmares*, 49; "T. A. C., Bret.," 326; *Masuer*, 33, 38; *Furgole*, "Test.," 10, 4, 51; *Pertile*, IV, 45; *Pasquier*, "Doc. rel. à Boussagues," p. 29.

³ *R. Caillmer*, p. 74.

⁴ In England the first duty of executors after having had the funeral of the testator attended to is to have his will proved by the judge ("probatio"; from this comes the Court of Probate, 1857, merged in 1875 into a single Supreme Court). On the Continent the proof and the formalities of publishing the will are especially incumbent upon the notary and the heir.

⁵ *Beaumanoir*, 12, 31, 58: procedure of liquidation; "Olim," II, 255, etc. Cf. *Blackstone*, II, 32.

⁶ *Loyzel*, 316; *Pasquier*, 472; *Pithou*, "Lib. de l'Egl. Gall.," 24, 25; Council of Trent, s. 22, c. 7.

customary. From this time dates the decline of testamentary execution. Creditors and legatees were sufficiently protected against the ill-will of heirs, and, as the property passed directly to the latter, it was they, so it seemed, who were bound to pay the debts and legacies.¹ Executorship fell into disuse in countries of written law. It was kept up in the countries of Customs, where the appointment of an heir had difficulty in making its way, and where the heirs of the blood sought to avoid the clauses of the will which took away their estate; but the rôle of executors was limited to the payment of legacies. They have not disappeared in the existing law (Law of the 7th Nivôse, year V, Civil Code, 1025).²

The rights and the powers of the executor have varied according to the part played by him.³ The earliest executor is a sort of heir; he becomes owner⁴ of the properties of the deceased through delivery.⁵ At the death the possession of them comes to him of absolute right; he has the seisin, collects and profits by the issue, pays the legacies and the debts out of the movables, and transmits

¹ "Gr. Cout.," p. 369 (they carry out the will provided surety has been furnished). *Bracton*, fo., 407b: actions on behalf of and against the heirs, and not against the executors. *Beaumanoir*, 12, 2: the heirs dispute the seisin with them.

² Cf. legatees charged with transmitting the property of the deceased to charitable establishments and with carrying out certain works, etc. Auguste Comte charged thirteen executors to watch over his spiritual work; and one of them, P. Lefitte, carried it on.

³ Executors have often been considered as agents acting in the name of the deceased; but the truth of the matter is that they act in their own names and are invested with powers of their own (cf. "Guardians"). The old Germanic law did not admit of representation: *ante*; *R. Caillemer*, 131. After the revival of the will, as soon as alienation by agents is allowed, there is a tendency among the Romanists and the canonists to make of the executor an agent "post mortem," without this tendency being fully realized; thus the executor could keep the seisin of the movables: *Beaumanoir*, 12, 26; he represented the person of the deceased: *Dig. X*, 3, 26, 19; *Auffroy*, 367.

⁴ The nature of the right of executors is all the more difficult to define because their powers vary greatly; sometimes they are charged with the distribution of the property of the testator as they may see fit, sometimes the deed naming them limits their rights, sometimes they only receive special pieces of property, and sometimes they are executors of the residuary estate.

⁵ Must we say, as we did with regard to the "Salmann," that the donor keeps certain rights over the property when he makes a delivery without any giving up of possession ("resignatio")? *Heusler*, I, 218; *R. Caillemer*, 258. Or must we then reject this idea, although it conforms with the majority of the texts ("Cart. Sen.," VII, 34, 30. *Contra*: will of Aelfred, 928, in *Baluze*, "Capit.," II, 1532), because these rights would then pass to the heirs, and because the "traditio cartæ" is complete of itself (without even the "se exitum dicere")? Cf. appointment of an heir and gift "post obitum." Can the "lex traditionis" be opposed to third parties? "Gr. Cout.," p. 233 (the testator gives up his possession by the delivery of the will). Cf. *Beautemps-Beaupré*, "Cout. d'Anjou," IV, 221; *Caillemer*, 324 *et seq.* — From the delivery comes the word "Salmann."

the ownership of the lands to the legatees.¹ With rights as extensive as these, abuses were to be feared. How were they avoided? The deceased chose the executor among those of his relatives or his friends of whom he could be sure. In order to avert the chances of death and to establish a control, he ordinarily appointed several executors.² The obligation of conscience to which they were bound was undoubtedly fortified by an obligation which was valid in the eyes of the civil law ("fides facta"). Finally, the religious and civil authorities did not remain indifferent to their administration; the bishop and the judge watched over it. Their powers were limited, they were compelled to have an authorization for important acts, and they had to furnish the same guarantees as guardians,³ — an inventory, a surety, sometimes an oath, and the rendering of accounts.⁴ After the twelfth century, with the revival of the will, they no longer have the hereditary possessions delivered to them, but they are appointed by the will⁵ and there is a tendency for them to become nothing more than posthumous agents with the special powers which are derived from their former situation.⁶ Their seisin is restricted to movables; it only lasts during a year and a day after the death; it carries with it the prerogatives relating to possession, but one cannot say that it is, as it was formerly, an expression of the right of ownership, for it does not exclude the heir's right of ownership.⁷

¹ Can the seisin of the executor be transmitted to his heirs? Contradictory texts. Yes, in English law, no, in the canon law and according to the Customs. The agency does not pass to the heirs of the agent: *Beaumanoir*, 12, 28.

² Plurality of executors: on principle, collective action was required of them; but there were clauses in derogation of this rule, and in the end the power of each one of them to act alone was admitted: *Beaumanoir*, 12, 58; *Pasquier*, "Doc. rel. à la Seign. de Boussagues," p. 40. Joint tenancy in English law.

³ The functions of the executor are: (1) gratuitous, but it is customary for the testator to bequeath him something; (2) optional (the office of a friend rather than a public function), but once they have been accepted, one can no longer give them up as an agent would do: Commentary on "Cod. Just.," 1, 3, 28; *Bartole*, on Dig., 31, 1; *Beaumanoir*, 12, 26, 57; "T. A. C., Bret.," 324.

⁴ *Beaumanoir*, 12, 29 *et seq.*; "Gr. Cout.," II, 40; *Desmares*, 50, 71, 121; *Loyse*, 314 *et seq.* The remainder belongs originally to the executors, who were charged with distributing it as they might wish in charities (*Joinville*, "Hist. de St. Louis," 34; "Siete Part.," 6, 10, 13), and then to the heir (*Beaumanoir*, 12, 33, 56). In England the residue has become the property of the executor: *Blackstone*, II, 32.

⁵ Already during the barbarian period in Italy, in Septimania, and in Catalonia ("Wis.," 2, 5, 10 *et seq.*; "Novella" of Valentinian, III, 4, 2) the will continues to exist and the executors are named without delivery. Wills of clericals. — Cf. *Schulze*, p. 151 *et seq.*

⁶ Great importance still in England and in Germany.

⁷ *Loyse*, 314; *Beaumanoir*, 12, 2, 14 (movables, immovables); "Paris," 297; "Orléans," 290; *Dumoulin*, on "Paris," 95: "non est verus possessor et nisi procurator tantum"; *Pasquier*, "Inst.," 472. — In England the seisin has

§ 492. **The Will**, properly so called,¹ a unilateral deed which is often secret and always revocable, involving the disposal of present and future possessions to take effect after death, finally made its reappearance about the twelfth century² under the pressure of practical needs and as a consequence of the general changes undergone by legislation (lessening of the rights of the family and of those of the lord). The revival of Roman law only made the more easy an evolution which would have taken place independently of it. From a religious act, which it was at first, the will, in the course of its development, became half secularized. After having recommended his soul to God and his body to a church to which he left by way of burial fee some movable object (for example, a horse), provided for his funeral expenses, made provision

always been restricted to the personal property (excepting since 1897), but it is not limited to a year; on the other hand, it is only at the end of a year that one can exercise measures of compulsion against the executors. On the Continent the length of time the seisin lasts is not more than a year from the thirteenth century on (*G. Durand*, 89; cf. his "Const., Acad. Sc. Montp.," 1900, p. 109); this was admitted in the interest of the heirs as a consequence of particular clauses. The Church accommodated itself to this result because it sought to insure a rapid execution of the will, and it already imposed upon the executors rather short periods. Cf. *Caillemer*, p. 418. As to the investment, at the will of the executors, of the income of the prebends which accrued within a year of the death of the titular ("annus gratiæ"), cf. *ibid.*, p. 412. The German proverb: "The priest lives one year after his death."

¹ A series of wills from the barbarian period on, in the Cartularies and other collections. The authenticity of some of them is disputed (for example, that of Saint Césaire d'Arles, a short will of Saint Remy: "N. Archiv.," 1899; "Rev. bénédict.," *id.*). Many are found in the proofs of the "Hist. de Languedoc" by *D. Vaissette*, etc. *Thévenin*, "Textes," nos. 76, 99, etc.; *Du Cange*, see "Testamentum"; *Tuetey*, "Test. enreg. au Parl. de Paris sous Charles VI," 1880 (unpublished); *Molard*, "Test. des XII^e, XIII^e, XIV^e siècles" ("Arch. de l'Yonne"); "Bull. du Comité des Trav. hist.," 1884, p. 224; "R. h. Dr.," XIV, 529, etc.; "B. Ch.," I, 3, 282; *Pasquier*, "Doc. rel. à la Seign. de Boussagues," 1901; Wills of Philip Augustus, of St. Louis, etc.; *Isambert*, see Table; *Beaumanoir*, 12, 58 (model); *Boularic*, p. 873, etc.; *Auffroy*, p. 679 (and *passim*); *R. Caillemer*, p. 687 (bibl.); *Heulhard*, "Rabelais Légiste et le Testament de Cuspidius," 1888; *Girard*, "Textes," p. 722 et seq.; *Engelmann*, "Les Test. Coutumiers au XV^e siècle," 1903 (Thesis).

² *St. Paul*, "Hebr.," ix, 16. On the revival of the will cf. *Auffroy*, pp. 423; *R. Caillemer*, pp. 288, 313; "Cart. de Cluny," V, 109 (in 1100), 510; "St. P. de Chartres," II, 370; *Yves de Ch.*, "Deer.," XVI, 115; *Gratian*, II, 12, 5. The tendency is manifested earlier in the southern territory of the Visigoths; it is possible, even, that there was no interruption there in the use of the will: "Wis.," 4, 2, 4; 2, 5; Act of 1128, which reproduces it; *D. Vaissette*, see no. 499; "L. Burg.," 43, 60 (cf. "L. Rom. Cur.," 26, 1: declaration "in die mortis," translation in *Marcule*, II, 17; "Carta Sen.," 42, 45; "L. Saxon.," 62; "Alam.," I; "Bai.," 15, 10); "Brachyl.," II, 19, 32; "Petrus," IV, 19 (custom). — As to the Lombard law, cf. "Liut.," 6; "Aist.," 3, and on these texts see bibl. in *Caillemer*, 289; *Palumbo*, 301; *Schulze*, 14; *Auffroy*, 135, 279, 514; *Glasson*, III, 177; VIII, 540. English law: *Pollock and Maitland*, II, 314 et seq. (from the Anglo-Saxon "evide" to the will of modern times). *Rymer*, "Fœdera," I, 47 (Will of Henry II, 1182); *Huber*, IV, 608 to 667 (Switzerland); *Zacharie de Lingenthal*, "Gesch. d. Griech. R.," p. 124 et seq.

for the salvation of his soul (foundation of masses, anniversaries, charities or legacies), the testator regulated the disposal of his possessions as a whole and in particulars. Very important consequences were the result of this change.

§ 493. **The Same.** — (I) *Jurisdiction.* The lay courts contested with the ecclesiastical courts for jurisdiction over wills (thirteenth century) and finally kept this jurisdiction entirely to themselves (sixteenth century).¹

§ 494. **The Same.** — (II) *Capacity to make a will or to receive by will* was regulated in the same way as the capacity to leave or take an intestate succession, except for a few peculiarities, with the object of better assuring the freedom of the testator and the prevention of undue influence. The reversion to the lord of possessions granted by him to his vassals, copyholders, or serfs, was an obstacle to the exercise of the right to make a will, especially as far as these latter were concerned, who were only authorized to dispose of five sous for the salvation of their soul. The rights of succession to the estate of deceased aliens, of succession to the estate of an intestate bastard, and of confiscation, produced results which were analogous to those of the inalienability of a serf's property.² Those who were still under a disability (for lack of an inheritance or lack of desire to make a will) were those civilly dead, monks, sons of a family in the South, minors under custody or guardianship in the North, madmen, and prodigals.³ In countries of written law a person who has not attained puberty cannot make a will; in the countries of Customs one must be twenty years old in order to make a will of one's movables and acquests, and twenty-

¹ From the tenth to the twelfth century the ecclesiastical judges had the exclusive jurisdiction in the matter of wills, excepting, perhaps, in the south, where at a very early time in all cases the civil tribunals had a concurrent jurisdiction. In the sixteenth century the latter courts once more became the only ones that were competent: *Loysel*, 316; "Comp.," 1a, 3, 22; Dig. X, 3, 26; *Sextus*, III, 11; "Cart. de St.-Père de Chartres," II, p. 313 (towards 1100, Bishop as arbitrator); pp. 278, 306, 425 (towards 1120 he becomes the Judge); "T. A. C., Norm.," 1, 57, 2; "Olim," II, 55, 255, 335; *Beaumanoir*, 11, 10; 12, 1, 14, 27, 60; *J. Le Coq.*, 93; *Boutaric*, II, 1; *Auffroy*, pp. 357, 385, 396, 485, 635; *Viollet*, 864.

² Rights of the lord, cf. "mortuarium," in English "heriot," *Pollock and Mailland*, I, 293; *Pertile*, IV, 18. Numerous provisions in municipal charters granting the right to bequeath by will. Aliens may give "inter vivos," but not by will.

³ "Brachylogus," II, 20; "Petrus," I, 26; *G. Durand*, "Spec.," II, 2, 12; *Beaumanoir*, 12, 3, 45; "Toulouse," 147 *et seq.*; "Montpellier," 54 (married daughter); "Carcass.," 40; *Auffroy*, 526. Cf. "Jostice," 12, 1, 20, 25; "Et. de St. Louis," I, 28; XC, 133; "Summa Norm.," 22, 9; *Loysel*, 302; "Paris," 293 *et seq.* As to the married woman: *Viollet*, 866. Bastards: *Pasquier*, 398; *Argou*, II, 12. Cf. *Blackstone*, II, 32; *Stobbe*, § 303; *Pertile*, § 122.

five in order to make a will of a fifth of one's personal belongings; at least, this is so in the later stages of the law.¹ Those who are under a disability to receive by way of a will are, as a general thing, people in mortmain,² spouses from one another, and illegitimate children.³

§ 495. **The Same.** — (III) *The appointment of an heir of the Roman law reappeared.* (a) *Countries of written law.*⁴ It is there found towards the middle of the twelfth century; it became at once a general custom. There are local Customs, like that of Toulouse, which do not regard it as necessary; but, at least in the fourteenth century, it becomes a necessary condition for the validity of the act,⁵ and the heir who is appointed has a right to one-fourth, by way of portion, which he can distribute, or a portion of one-fourth which he can keep out of the inheritance which is affected by a trust.⁶ (b) *Countries of Customs.* The appointment of an heir was still unknown in the time of Beaumanoir;⁷ it is not valid even as a legacy, according to certain of the Customs of the sixteenth century;⁸ others, for example that of Paris (1580), do not look upon it as being indispensable and give it at the most the effects of a "universal" legacy.⁹

¹ "Paris," 293, 294, and Customs that are silent. *Boutaric*, I, 103.

² *Loysel*, 75, 76. Edict of August, 1749; *D'Aguesseau*, "Œuvres," XIII, ed. *Pard.*, Theses: *Serville*, 1898; *Mourmant*, 1900; *Bondroit*, "De Capac. possid. eccl.," 1900 (Merovingian period). — Ecclesiastics may bequeath by will, may inherit, and may receive legacies, but not monks: *Loysel*, 343 *et seq.*

³ *Cf. post*, "Gifts." Legacies from one spouse to another: *Beaumanoir*, 12, 4, 10, 22; "Et. de St. Louis," I, 118. — Special disabilities: *Argou*, II, 12 (Declaration of 1549, etc.; jurisprudence); II, 15; Civil Code, 901 *et seq.*

⁴ "Petrus," I, 16, 18; "Usat. Barchin.," 76; "Montpellier," 56; "Toulouse," 123; "Ass. de Jér.," "C. des B.," 184; *Auffroy*, p. 489. *Cf. Palumbo*, 358; *Argou*, II, 13, disinheriting.

⁵ *G. Durand*, "Specul.," II, 2, 18; *Auffroy*, p. 638; *Pasquier*, "Doc. rel. à la Seign. de Boussagues," p. 15 (in 1260); *Serres*, "Inst.," II, 14, 26. The codicil, differing in this from the will, cannot include the appointment of an heir; the distinction is made in countries of written law, whereas in countries of Customs the will is in substance and in its form merely a codicil: *Viollet*, 900; *Pertile*, IV, 15. As to the employment of the codicil clause, *cf. Ferrière*, *Guyot*; *Argou*, II, 17; *Auffroy*, 603. As to the Roman law, see *Girard*, p. 850.

⁶ "Petrus," I, 15; "Brachylog.," II, 29 *et seq.*; *G. Durand*, "Specul.," II, 2, 12, 33; IV, 2, 16; Dig. X, 3, 26, 18. These shares of one-fourth may, moreover, be done away with by will or codicil: *G. Durand*, II, 2, 12, 47; *Serres*, "Inst.," II, 22; *Argou*, II, 12 (appointment of the one of the children whom the surviving spouse shall choose; *cf. substitution*). *Cf. Zacharie de Lingenthal*, p. 177.

⁷ *P. de Fontaines*, 15, 7; 23, 16; "Jostice," 12, 21, 11 and 15; *Beaumanoir*, 12, 19; "Layettes du Trés. des Chartes," III, no. 3661 (in 1248); *R. Caillemer*, p. 207.

⁸ "Paris, N. C.," 299; *cf.* "A. C.," 120; *Loysel*, 304, 813; *Ferrière*, see "Inst. d'Hér.," *Bucherellus*, "Inst.," p. 254; *Viollet*, 899; "Navarre," 27, 31 (seisin).

⁹ As to special legacies, *cf. Pothier*, VIII, 138. Implied mortgage of legatees,

§ 496. **The Same.** — (IV) *Different forms of wills.* (A) *The canon will.*¹ As the most important thing of all was the salvation of the soul of the testator, the Custom of the Church showed itself not very exacting as to the validity of this act. (a) It was first of all satisfied with a verbal declaration made in the presence of two or three witnesses (instead of the seven or five of the Roman law), for, according to the Gospel, "In ore duorum vel trium testimonium stet omne verbum."² (b) The parish priest of the locality more often took part in this because the will was a sequel to a confession. His services became obligatory. There was seen in him not only a scribe who was proving by means of writing the last wishes of the deceased, but a sort of public officer charged with watching over the regularity of the act and with making sure of its fulfilment.³ After the death the procedure of "publicatio" or "probatio," ending in a report, was often required in order officially to establish and put beyond all discussion the last wishes of people who were dying.⁴ The canon will, at least under its written form, was still upheld by the Ordinance of 1735, Art. 25, in those localities where the Customs authorized it.⁵ This was a measure which was justified by practical necessity, for many localities had no notaries, and in an urgent case it was necessary to make a will before the parish priest, or, otherwise, not make a will at all. Aside from such cases as these, it must be admitted that so much simplicity for an act as serious as this was full of disadvantages, because it left the field clear for frauds and abuses. Every effort of the civil legislation tended to sur-

L. 1, "Cod. Just.," "Comm. de lég.," see *Ferrière* (bibl.). Legacy of something belonging to another: *Beaumanoir*, 12, 46; *Argou*, II, 15. Increase: *ibid.*; *Fleury*, "Inst.," I, 313 *et seq.*; *Masuer*, 24; *Boutaric*, I, 105.

¹ *Thomas*, *op. cit.*; *Viollot*, 895; *Glasson*, VII, 541; *Auffroy*, 441. Cf. "L. Wis.," 2, 5, 10 *et seq.*; *Tardif*, "Dr. privé au XIII^e siècle," p. 66; *Blackstone*, II, 23, 32.

² "Matthew," xviii, 16; *Gratian*, 2, 13, 2, 4: "Ultima, voluntas defuncti modis omnibus conservetur"; Dig. X, 3, 26, 4, 10 (Alexander III, 1170); "Toulouse," 123; "Petrus," IV, 10; "Montpellier," 52; "Carcassonne," 38; "Ass. de Jér.," "C. des B.," 184, 201; *Beaumanoir*, 12, 9, 40; "Gr. Cout.," II 40; *Pasquier*, "Inst.," p. 446; Ordinance of May, 1579; *Loysel*, 301; *Palumbo*, 373.

³ Council of Albi, 1244, c. 37 (*Labbe*, XI, 2370).

⁴ Thirteenth century. Cf. "L. Wisig.," 2, 5, 12; *D. Vaissette*, 8, 1293 (in 1251); Council of Avignon, 1279, c. 14, etc.; *G. Durand*, "Spec.," II, 2, 12, 9; *Auffroy*, 448, 519, 599, 656; *Stobbe*, V, 37; *Pollock and Maitland*, II, 339. Cf. publication in Italy: *Pertile*, IV, 30; "Paris," 293 (registers for baptisms, marriages, wills and burials); "Lib. Instrum. Memor." (Montpellier), p. 194 *et seq.*

⁵ Depositing of the deed with the notary of the locality after the death of the testator.

round it with formalities, that is to say, with guarantees of sincerity.

§ 497. **The Same.** — (B) *Modern state of law.*¹ The forms of the will are not the same in countries of written law and in countries of Customs.² The Ordinance of August, 1735,³ kept its regulations on this point in two different parts.⁴ 1st. The **Holographic will**,⁵ which is the most simple of all because it is sufficient if it is dated, written, and signed by the hand of the testator. In the thirteenth and fourteenth centuries the affixing of the notarial seal was required in order to make it valid;⁶ after that the signature of the testator took its place. An exception in countries of written law, it seems to have been little used in countries of Customs.⁷ — 2d. **Nuncupative will**, or verbal will of the countries of written law.⁸ This consisted in a declaration made in the presence of five or seven witnesses.⁹ It was perfectly logical to admit it at a time when the rule, "Witnesses are preferred to writings," was followed. When the opposite principle was adopted, "Writings are preferred to witnesses," it should have been abolished; this was only done

¹ Registration of wills: Edict of June, 1581, Arts. IV and VII; Edicts of 1693, 1703; Oct. 29, 1720; Oct. 17, 1721. Cf. Registration of Gifts: *Viollet*, 903; "Papyrus of Ravenna," *Girard, loc. cit.*; "Form. Wis.," 21, 25; *Thévenin*, no. 18; *Palumbo*, 150, 273. — With the Germanic and Customary practice in the matter of the transfer of the ownership of immovables seem to be connected the Customs of Flanders, which require legal formalities (ratification, acknowledgment and registration), at least in order that the testamentary heir should be invested with the ownership: *Boutaric*, I, 103; *Britz*, 912; *Struve*, "Jurisp. for.," II, 15. Cf. *Demuth*, "Wechsels, Verfüg.," 25; *Huber*, IV, 608 *et seq.* The intervention of the court or the public authorities is very frequently met with in the Germanic countries.

² *Halm*, "De div. Test. form.," 1817; *Hommel*, "De Script. in Test. nunc.," 1729; *Nettelbladt*, "De Test. nuncup. in Script. red.," 1758; *Viollet*, 890; *Pertile*, IV, 25; *Stobbe*, § 304; *Masuer*, 32; *Mich. Grassus*, "Sentent. de Success.," 1603; "Parfait Notaire," I, 11.

³ Declarations of 1745, 1751, and 1783. Authors cited *supra*; "Recueil des Quest. prop."

⁴ Peculiarities: the blind, soldiers, a will made at sea, in times of plague, etc. Cf. *Ferrière*; "Ord." of 1735, 27 *et seq.*; Civil Code, 961; *Argou*, II, 12, 17.

⁵ "Novella" of Valentinian, III, 4, 2. All the epitomes of the Breviary deal with it: "L. Wis.," 2, 5, 11, 13, 14; *De Greve*, "De Test. hol.," 1825; "Navarre," 27, 22. — Cf. also "testamentum parentum inter liberos."

⁶ *Beaumanoir*, 12, 9: authentic seals; *Auffroy*, pp. 600, 650 (seal of the Mayor of La Rochelle); *Bucherellus*, "Inst.," p. 188; *Lamoignon*, "Arr.," "Test.," 49 *et seq.*; "Ord." of January, 1629, 126 (not enforced); 1735, 1, 3, 16.

⁷ *Ferrière*, on "Paris," 289. The opening of the will before the judge and depositing it with a notary: *Ferrière*, see "Ouverture"; cf. *Boutaric*, p. 873.

⁸ "Novella" of Théod., II, 2, 1; *G. Durand*, "Spec.," II, 2, 12, 39; *Viollet*, 893; *Auffroy*, 651.

⁹ Seven for the will and five for the codicil: "Wis.," 2, 5, 12; "Burg.," 60; "Brachyl.," 2, 19, 32. Example in *Auffroy*, p. 513; *Boutaric*, I, 105; *Serres*, II, 10. As to witnesses to wills, cf. *R. Caillemer*, p. 87; "Ord." of 1735, 39 *et seq.*

by the Ordinance of 1735, Art. 1.¹ — 3d. **Will by public deed.** — (a) *Written nuncupative will*² of countries of written law.³ This was a declaration made by the testator in the presence of seven witnesses, including a notary, who wrote it down at the dictation of the testator.⁴ — (b) *Formal will* of the countries of Customs. This consisted in a declaration (dictated) made in the presence of two notaries, or of one notary and two witnesses, and taken down in writing by either of the two notaries or by the single notary. This is the will of the canon law secularized; but the courts, reacting against the spirit of the canon legislation, called for a great deal of strictness in passing upon its validity; the most minute formalities prescribed in the case of notarial deeds must be observed, under penalty of nullity.⁵ — 4th. **Mystic will**, or secret will of countries of written law, borrowed from the legal system of the Lower Empire (tripartite wills). The testator presents to seven witnesses, including a notary, a paper folded and sealed, declaring at the same time that therein are contained his last wishes; the notary draws up a minute upon the envelope (act of subscription).⁶

§ 498. **The Same.** — (V) *Revocation of wills.* (a) *Express.* This results, in countries of Customs, from a notarial deed, or one under private seal, whereas in the South a new will is necessary, following the Roman law. (b) *Implied.* This would take place by means of any change of will manifested in a way which was not equivocal: inconsistency with a previous will, alienation of possessions which had been bequeathed, or an enmity sprung up between the testator and the heir who had been appointed. In the South the custom of the appointment of an heir results in every valid will revoking all preceding wills, even if its provisions are

¹ *Pasquier*, "Inst.," p. 467 (out of use since the "Ord." of 1566).

² *D. Vaissette*, VIII, 1292. Use of the codicil clause: *G. Durand*, "Spec.," 2, 2, 12, 9, 18. For **Codicils** five witnesses were sufficient: *Argou*, II, 17. *Cf. Girard*, p. 805 (will "apud acta"). As to the subscribing of witnesses, *cf. ibid.*, p. 804; *Giry*, "Diplom.," p. 601. As to codicils, "Tract. univ. jur.," VIII.

³ *Fons*, "Acad. lég. Toul.," XI, 14; *Viолlet*, 893; "Lib. Instr. Mem.," 172 *et seq.*

⁴ For a long time the scribe who drew up the will was not a public officer: *Giry*, "Diplomat.," p. 826 (ninth and eleventh centuries); "Wis.," 2, 5, 10. Some of the Customs were satisfied with three or four witnesses, and these need not include a parish priest or notary: *Loysel*, 301; "Bourbon," 289.

⁵ "Paris," 289 (and Commentaries); *Pasquier*, "Inst.," p. 469; Civil Code, 971.

⁶ "Novella" of Théod., II, 9 (in 439); "Inst. Just.," 2, 10, 3; "Burg.," 43, 60; *D. Vaissette*, VIII, 1293 (in 1251); *G. Durand*, "Spec.," II, 2, 12; *Serres*, "Inst.," II, 10. — *Cf. Pertile*, IV, 29; Civil Code, 976.

reconcilable with theirs.¹ Formerly, under the influence of the old ideas as to irrevocability of covenants relating to succession, certain impediments to freedom to revoke wills were tolerated; for example, it was allowed to covenant that a will could not be revoked excepting under certain conditions (**clauses in derogation**), a later will would only be valid if it began with formulæ such as "Beatus vir qui timet dominum."² The Ordinance of 1735, Art. 76, abolished this custom. When by means of the same deed two persons had made a will for each other's benefit (**conjunctive wills**)³ one of them could not revoke the provisions which they had made without notifying the revocation to the other, evidently so that the latter could do the same on his part. This double deed, which did not accord with the Roman conception of the will, recalls the "interdonatio" of the barbarian period, and, like the latter, is especially made use of between spouses.⁴ Art. 77 of the Ordinance of 1735 forbade it.

¹ *Beaumanoir*, 12, 41 *et seq.*; *Auffroy*, p. 488 (acts of 1022, etc.). Cf. revocation of gifts: see *Ferrière*; *Fleury*, "Inst.," I, 313. The judge may hold a will as being revoked should there be posthumous children: *Argou*, II, 13; *Chaisemartin*, p. 434.

² "Entendez-vous bien," etc.; "Lib. Instr.," 202; see *Ferrière*.

³ *Stobbe*, V, 250 (bibl. and details): "testamenta simultanea, reciproca, mutua, correspectiva"; *Harmann*, "Erbvertr. u. gemeinschaftlich. Testam.," 1860. Cf. mutual gifts and partition among ascendants. Hesitation and diversity upon the theory of conjunctive wills. *Post*, "Contractual Appointments."

⁴ "Nov." Valent., III, 4, 1 (epit.); *Pardessus*, "Diplom.," I, 136 (in 572); "Papyrus of Ravenna," in *Marini*, "Papir. dipl.," no. 75; *Thévenin*, "Textes," nos. 18, 40 *et seq.*; *Marculte*, II, 17; *Schulze*, p. 29; *Huber*, IV, 632.

TOPIC 5. GIFTS "INTER VIVOS" AND "CAUSA MORTIS"

§ 499. The Formula of Loysel.	§ 503. Incapacity to give and to receive.
§ 500. Gifts during the Barbarian Period.	§ 504. Gifts between Spouses.
§ 501. To give and to withhold is not Valid.	§ 505. Mutual Gifts.
§ 502. Formalities.	§ 506. Revocation of Gifts.
	§ 507. The Gift "causa mortis."

§ 499. **The Formula of Loysel**, 662, "Everyone [of sufficient age] can dispose of his possessions at his pleasure by gift 'inter vivos,' according to the opinion of all our French doctors," is just the opposite of the very old law. Even in the time of Loysel it is far from being accurate. In the very old law the gift runs too much counter to the rights of the family or those of the superior owners, for it to be authorized "de plano"; and when these rights became weaker it was still looked upon with disfavor. It ran counter to many restrictions: (a) The rule, "To give and to withhold is not valid"; (b) special formalities; (c) special disabilities; (d) theory of the legal share. This mere enumeration shows how far they were from freedom of giving; the theorists of the school of natural law may in vain proclaim that the gift is an "act recognized by the law of nations" and an indispensable attribute of ownership;¹ it is easy to see that it could scarcely have been treated otherwise, starting with the idea that this was an act of the civil law.²

§ 500. **Gifts during the Barbarian Period.**³ — The gift "inter vivos" is carried out by handing over (delivery);⁴ but, as applied to immovables, it has a personal character which has made it differ greatly from the Roman gift.⁵ It is rather a gratuitous lend-

¹ *Pothier*, no. 4; *Pasquier*, "Inst.," p. 327.

² It was, however, less dangerous for the family than the will, for there is a certain repugnance for gifts "inter vivos," and to-day there are only five such gifts for every hundred wills.

³ *Viолет*, "Dr. public," I, 320; *Thévenin*, "Textes," Table, see "Donations" (various clauses). Cf. deeds in *D. Vaissette*, "Cartul.," etc.

⁴ Gifts by means of a promise do not seem to have been possible. The formal contract would not have bound the heirs; the extent of its application was limited (giving of surety, etc.): *Thévenin*, nos. 40, 69, 75, 83, 132 (solemn forms). Cf. *Salvioli*, "Publicata n. vendita," 1895.

⁵ This is what was proved by *Brunner*, "Landschenk. d. Merow.," 1885 ("Forsch.," p. 4); *Tamassia*, "Don. more salario," 1901; *Bondroit*, "Precariæ Verbo Regis," 1901; *Guilhiermoz*, "Orig. de la Nobl.," p. 104; *Marignan*, "Et. s. la Civilis. Franç.," I; *Daresté*, "Et.," p. 329, 63.

ing than an absolute gratuity. Thus the possessions given do not pass to the heirs of the donee (*cf.* Frankish benefices), unless there is an expressed clause, and the tendency is always in the direction of the limitation of inheritance and the reversion to the donor.¹ If the gift is made to an heir, it constitutes an advancement of inheritance; and one can understand that at the death of the donor it would come back to increase his estate. The reversion pertaining to succession is only a natural application of these ideas.² The donee has not the right to dispose of the possessions given unless there is a clause which authorizes him to do so, or unless he has the special permission of the donor.³ Frequently, the gift is made with a certain object, for example, on condition of services; if this object is not realized, the donor takes back his possessions.⁴ To sum up, the gift only conveys a limited ownership; ⁵ its effects, even against third parties, depend upon the clauses which it contains, upon the "lex donationis."⁶

So little could gifts be counted upon, that the Lombard law devised an expedient to render them permanent. It required for the formation of a gift a counter-giving on the part of the donee;⁷

¹ *Cf.* English law. Necessity of the clause "sibi et heredibus suis." If they said "sibi aut heredibus" there would be a reversion to the donor: *Glanville*, 7, 1, 2; *Bracton*, fo. 17b and 92b; *Pollock and Maitland*, II, 24; "Valenciennes," 1619, Art. 108. Sweden: *Amira*, "N. O.," I, 510, 550 (Vestrogots: the vendor also has the right to take back the property sold). Frisia: *Richtofen*, "Fries, Rechtsq." (gifts to illegitimate children). "Sedan," 116. Bavaria: "M. G. H., L. L.," III, 460, c. 8. *Cf.* as to this, exclusion of women from the Salic land and succession to fiefs, *ante*. — In our own time, *cf.* bestowal of some grade of some order of knighthood.

² "L. long. Car.," 106; *Schroeder*, 221.

³ Deeds including the clause: "Quicquid exinde facere volueris, liberam habeas potestatem." In others the donor adds: "ex permissio nostro." *Marculfe*, I, 14, 31; *Brunner*, p. 12 (gifts of the Bavarian dukes); *cf.* "Bai.," 1, 1. Confirmation of gifts by the Frankish kings: *Greg. Tours*, 9, 42; 10, 31, etc.; "Cart. de Redon," no. 144; "Burg.," 1, 3. — In our day, *cf.* gift of a book with dedication.

⁴ "Roth.," 225 (to generalize); "Wis.," 5, 3, 1, 3; 5, 2, 4; *Greg. Tours*, 8, 22 (*Bodigiselus*); 9, 35 (*Waddo*); "F. Vat.," 275. Pretensions of royalty over the domains granted to the churches and the abbies: *Loening*, "D. Kirch.," I, 300; *Vanderkindere*, "Introd. à l'Hist. de Belg.," p. 279; *Marignan*, "Et. s. la Civilis. Fr.," I; *Bondroit*, "De Capacit. possid. eccles.," 1900; *Vauthier*, "Pers. morales," p. 80, 95.

⁵ One also finds at this period gifts of the absolute ownership that are irrevocable and inheritable (*cf.* "F. Vat.," 275), in this following the example of the Roman law. But the old Germanic conception, the rights of the family or of the grantor are more in favor of gifts of a limited ownership: *cf.* *Reverdy*, p. 336.

⁶ The difficulty is to explain why the "lex donationis" could be opposed to third parties. *Cf.* *Albertu*, II, 18; "Et. de St. Louis," I, 117.

⁷ *Val de Lièvre*, "Launegild u. Wadia," 1877; "Z. S. S.," 1883, "G. A.," 15 (bibl.); *Pappenheim*, "Launeg. u. Gaireth.," 1882; ("Unters.," by *Gierke*); *Havel*, "N. R. H.," 1878, 255; *Schupfer*, "Arch. Giur.," 1883, 507; *cf.* "Ann. d.

after having received the possessions with which he was presented, he should give to the donor some object of small value (a ring, a cloak, etc.),¹ called "Launegild," that is to say, to a certain extent, value in exchange. By this means he changed the gift into an act involving exchange, an exchange which was *even-handed*; and acts of this nature are the only ones which the old legislation sanctioned. If there was no "Launegild," the property which had been given could be taken back; once the "Launegild" had been given, the gift was irrevocable and the donor was bound to guarantee it (if there was any eviction, "reddat ferquido," *i. e.* "similem"). The "Launegild" degenerated in the thirteenth century into earnest money to confirm a transaction.²

§ 501. **To give and to withhold is not Valid.**³ — The gift, little by little, lost its personal character in order to revert back to the Roman type. Everything contributed to this result, — a new conception of the gift, implying that the donor deprived himself absolutely, the simpleness of this solution, the method of realization, the revival of the will, opposition between deeds "causa mortis" and deeds "inter vivos," — to say nothing of the Roman-

Giur. Ital., 1871; *Franken*, "Pfandr.," 59; *Esmein*, "Contrats," p. 13; *Palumbo*, "Test.," 254; *Schroeder*, 294; *Heusler*, I, 80; II, 254; *Brunner*, "Forsch.," 624, 3; *Wodon*, "Forme," p. 197.

¹ "Lohn," compensation; "Geld," money. Cf. "Widerdonum," recompense: "Form. s. Roth.," 184. Indispensable in the case of a gift, the "Launegild" is also applied to other acts (delivery of the wife to the husband, adoption, emancipation, transactions, etc.), perhaps by an extension of its use, in the case of a gift. Cf. *Schroeder*, *loc. cit.* There is some question about this in the Edict of Rotharis, 175, 184; *Thévenin*, nos. 48, 59, 61. This is an old usage, "cawerfeda," allowing one to dispose of one's possessions privately, and not an expedient devised to take the place of gifts "per gairethinx," which fell into disuse when the popular diet became an assembly of the foremost men (at the latest in the eighth century). In the thirteenth century Car. de Tocco states that the "Launegild" was no longer in use.

² Various systems besides that which is set forth in the texts: 1st. A mark of the donee's gratitude (*Val de Lièvre*, who gave up this idea), which cannot be reconciled with the "Launegild requirere" of the texts. 2d. A symbol of the consideration for the gift, like the price in a sale (*Pappenheim*), but the symbol expressed the very opposite of the idea of gratuitousness. 3d. The confirmatory earnest money of the Roman law (*Beseler*) or the "constitutoria," earnest money of the Germanic law (*Sohm*, etc.). But the earnest money is given before the execution of the contract. 4th. A means of protecting gifts from being attacked by relatives of the donor by transforming them into deeds with a consideration. But deeds with a consideration themselves could be attacked. It is simpler to say that this is a counterpart of exchange which was intended to make the deed irrevocable on the part of the donor: "in omnibus contractibus," says the Lombard law, "permutatio continetur." Cf. "venditio nummo uno" of the Roman law.

³ *A. Desjardines*, "R. crit.," XXXIII, 207; *Chénon*, "R. Canon.," 1899 (a question of law in the tenth century). Theses: *Reverdy*, p. 193; *Constant*, 1889, etc.; *Stobbe*, V, 186.

canonic influence. Just as in the past, delivery was always required, and one can say that there was no gift without the donor's giving up possession. This rule resulted from the fact that the simple agreement to give was not obligatory, — "To promise and to keep the promise are two things";¹ in order to produce the effect it had to be carried out (*cf.* real contracts);² now, the carrying out here consisted in the transfer before the lord, by means of the vesting and divesting in such a way that it was difficult for the donor to withhold in his own possession the thing given, just as it was difficult for him to take it away from the donee (strictly speaking, he would need, in order to do this, to have recourse to the same formalities, but in the opposite way). To this state of law corresponds the maxim, "To give and to withhold is not valid";³ it expresses the necessity of delivery without absolutely implying irrevocability. In fact, the books of maxims of the thirteenth century authorize the donor to insert in the deed a clause, allowing him to take back the property given (to give to one's "*rapiau*"),⁴ and in the sixteenth century the validity of this clause in certain cases is still being discussed.⁵

During the period of the drawing up of the Customs delivery was no longer demanded with so much strictness, but, by way of set-off, they were very extreme on the question of irrevocability.

(A) Contracts being formed "*solo consensu*," the agreement to give became binding. But if this rule was admitted as far as promises to pay a sum of money or to pay a rent were concerned, it was not the same with gifts affecting immovables.⁶ It is only at

¹ "Ass. de Jér." *J. d'Idelin*, 144 (gift in words, but not in deed); "*Clef de la H.-C.*," 194; "*C. des B.*," 214 (a gift is invalid without the seisin of the thing); *Glawville*, VII, 1; *Bracton*, fo. 11, 38 *et seq.*; "*Fleta*," III, 3; *Blackstone*, II, 20, 30. The English texts almost confuse gifts and alienation. Naples, *cf. Pertile*, IV, 585; "*Sachsensp.*," I, 52 (legal "*Auflassung*"); *Lattes*, p. 225; *De Mony*, "*Comtes de Foix*," II, 16, 371.

² They could have been satisfied with a partial carrying out, earnest money, etc., as in the case of ordinary contracts.

³ "A. C., Champagne," Art. 44: necessity of divesting and investing at law; if the donor keeps the inheritance without paying any quit-rent to the donee, the gift will be invalid as against the heir of the donor at the death of the latter; by the common law and by the "*Coutume de Champagne*," "To give and to withhold is invalid"; "*Gr. Cout.*," II, 28 (*cf.* sale); *Loysel*, 659; "*Paris A. C.*," 160; "*N. C.*," 273 to 275 (to give and to withhold means that the donor remains in possession until his death). — As to movables, manual gift. Annexed State: "*Ord.*" of 1731, 15; *Duval*, "*De Reb. dub.*," 2; *P. Bressolles*, "*Dons manuels*," 1882.

⁴ *Beaumanoir*, 12, 39; 34, 2; "*Ass. de Jérus.*," "*Abr. C. des B.*," I, 35; "*L. d. Droiz*," 321.

⁵ Opinion of *Charondas le Caron*, on "*Paris*," 275 (charge of the debts).

⁶ *Delalande*, on "*Orléans*," 283; *Ragueau*, on "*Berry*," 7, 1; *Buridan*, on "*Reims*," 238; *D. du Pont*, on "*Blois*," 269; see *Guyot*. The "*Cod. Théod.*,"

the end of the eighteenth century that it was recognized that such gifts gave rise to a personal action against the donor with the effect of compelling him to transfer the ownership.¹ This transaction had itself become more simple. Instead of vesting and divesting before the lord, they were satisfied with a real delivery to the grantee, and even with fictitious delivery, following the law of the Customs. But this change had great difficulty in being accepted as far as gifts were concerned;² at one time real delivery was always required, and at another time certain forms of fictitious delivery — such as the withholding of the usufruct — were tolerated; but others were rejected — such as the clause of disseisin-seisin — because they seemed to run too directly counter to the old Customary rule.³ At last, however, fictitious delivery was held sufficient,⁴ and there was nothing to prevent the donor from keeping the thing given in his own possession, — for example, as usufructuary or farm tenant. — (B) The maxim, "To give and to withhold is not valid," which had ceased to be understood as relating to the necessity of a real delivery, no longer had anything in view excepting the **irrevocability of the gift**.⁵ This meant that the donor could reserve neither the ownership of the things given nor the right to deprive the donee of them whenever he saw fit to do so (for example, by inserting in the deed a condition of recall,⁶ by imposing upon the donee the charge of his own future debts, by giving him property to be acquired in the future, that is to say, property which it depended upon himself to acquire.)⁷

8, 12, 1, seems to require the actual delivery "*advocata vicinitate*" for the validity of gifts. Although Justinian made the covenant to give a binding one, this innovation was only known in France after the twelfth century: "Montpellier," p. 74; *Beaumanoir*, 12, 39; 30, 38; 80, 9; "T. A. C., Bret.," 318, 319; *Esmein*, "Contrats," pp. 183, 189.

¹ *Ferrière*, on "Paris," 273; *Ricard*, 879; *Pothier*, no. 77; "Ord." of 1731, 5.

² Certain Customs always require real delivery (customs of seisin and of public nams): "Reims," 231; "Laon," 53; "Sedan," 109; "Senlis," 212; "Valois," 130, etc.

³ *Ricard*, 940; *Pothier*, no. 251; *Ferrière*, on "Paris," 275; *Masuer*, 24.

⁴ *Loysel*, 746; *Pothier*, no. 67, Civil Code, 938.

⁵ *Beaumanoir*, 12, 39 (irrevocability unless there be a clause to the contrary): *Boutaric*, 1, 45; "Cout. Not.," 143; "Gr. Cout.," 2, 8. Confirmations: "L. d. Dr.," no. 479, 982; *Desmares*, 248, 371. Cf. "Toulouse," 186 *et seq.*; "Montpellier," 74; *Tardif*, "Dr. privé au XIII^e siècle," p. 70.

⁶ This irrevocability did not go so far as to apply to accidental conditions or those independent of the will of the donor in general (ingratitude, subsequent birth of children): *Ricard*, nos. 1038, 1046. Cf. the clause: "I give you my house should I die before you."

⁷ Reservation by the donor of the right to dispose of something included within the gift or of a fixed sum to be taken out of the possessions given (charged with the carrying out of the last will of the donor). In such a case as this there are two distinct gifts, — one being void and the other valid (cf.

These reservations annulled the entire gift.¹ It seems as though it was because they rendered the gift not very sincere and ran the risk of becoming a source of difficulties; if they did not take the trouble of annulling the sale under these same circumstances, it is because scarcely any sales of this nature are ever presented in practice.² Our old authors justified the rule, "To give and to withhold is not valid," by another consideration;³ in their opinion its principal usefulness consisted in preventing heedless gifts which were prejudicial to families; in fact, by compelling the donors entirely to deprive themselves, to strip themselves of their means of livelihood and all power to revoke what they had done, they were restrained by their own interests; "He who gives what is his before dying is getting ready soon to suffer greatly." This reasoning is based on a very just remark, which is that it costs little to strip one's heirs and a great deal to strip oneself. But, if it was apparently right, as long as the donor was obliged physically to dispossess himself of the property given, it lost almost all of its force when this was no longer required. We can say more exactly that it was the reason which was set up for a long time against recognizing fictitious delivery in matters of gifts.

§ 502. **Formalities.** — 1st. *Notarial deed.* The Ordinance of

"L. d. Dr.," 479). Gifts of possessions to be acquired in the future were lawful in countries of written law upon condition that the donor had reserved for himself, in order that he might make a will, one-twentieth of his possessions: *Furgole*, on "Ord." of 1731, 15. *Id.*, in Italy; *Pertile*, IV, 586. *Cf. post*, "Contractual Appointment."

¹ *Domat*, "Loix civ.," I, 10; "Ord." of 1731, 15; *D'Aguesseau*, "Lettres," in "Œuvres," XII, 308; *Pothier*, no. 79; Civil Code, 943; *Grenier*, "Tr. des Don.," 1812 (historical discussion).

² Exceptions in the case where the gift would ordinarily be carried out: mutual gift, gift by contract of marriage, etc.

³ The reservation only affected testamentary gifts; the legal share also allowed of the reduction of gifts in the interest of the nearest relatives; those who were not entitled to the legal share benefited by the obstacle which was brought to bear upon gifts by the rule, "To give and to withhold is not valid." It seems as though it would have been more simple to prohibit gifts; but the rights of the family were not sufficiently strong to permit them to think that they could go as far as that; the juriconsults of the eighteenth century give expression to this idea in a slightly different manner by saying that no one dared to interfere with a natural right like the freedom of giving. In the preceding centuries there had been no scruple as to the prohibition of alienation (see intervention of the relatives, "Breispruchsrecht," etc.); even after these rules had disappeared the spirit of the old law was not disarmed; the axiom, "To give and to withhold," etc., was used to protect the interests of the family, and from thence came the requirements pointed out in the texts on the subject of delivery. Various explanations: *Coquille*, "Inst.," "Don.," *Ricard*, no. 900; *Ferrière*, on "Paris," 273. *Cf.* criticisms by *Desjardins*, *op. cit.*

1731, 1, by compelling the intervention of a notary, only sanctioned an old Custom whose need was felt all the more as the irrevocability of gifts become better established.¹ — 2d. *Solemnity of the acceptance*. This is another requirement which simply bears witness to the disfavor with which gifts were looked upon. The Ordinance of 1731 here again limits itself to putting into a law a practice which had already been accepted, a clause which was customary in the proceedings of notaries.² — 3d. *Entry* upon the public registers of the deed of gift.³ This formality was borrowed from the Roman legislation⁴ and introduced into our law by the

¹ "Protest. du Parl. de Toulouse," "Questions," p. 57; *Pothier*, no. 130. Delivery takes the place of the authenticated deed in the case of manual gifts of movables. — Italy: gift before judges, the town council or a notary, *Pertile*, IV, 585.

² The acceptance should be formal and expressed. Cf. Roman texts: *Dig.*, 39, 5, 19, 2; "Dec. Cap. Tol.," 384; *Pothier*, no. 47. A separate deed? Cf. "Ord." of 1539, 132; Declaration of 1549; *Reverdy*, p. 227.

³ *Quicherat*, "B. Ch.," 1860, 440; *Martel*, "Enreg. dans les Gesta Munic.," 1877; *Renaud*, "R. de Lég.," 1872, 233; *Brunner*, "R. G. d. Urkunde," p. 139. Theses: *Larnaude*, 1876; *G. Blondel*, 1881; *Lattes*, 225.

⁴ *Entering*, or copying upon public registers ("gesta municipalia," offices of the clerks of the courts), of private deeds was in use at Rome with the object of insuring the preservation of these deeds and of giving them more force ("fides publica," to some extent official character). Under the Lower Empire this formality was made compulsory in the case of gifts "with the object of furnishing proof and publicity." "Cod. Théod.," 3, 5, 1; 8, 12, 1, 3; "F. Vat.," 249. As to Justinian's system, cf. *Girard*, p. 932; *Pertile*, IV, 584. Similar formalities were prescribed in the case of wills after they had been opened: "L. Rom. Vis.," *Paul*, 4, 6, 1; *Girard*, "Textes," 729. The entering of gifts and wills was still practiced in Frankish Gaul at the beginning of the ninth century (*Rozière*, 221; Will of Bertrann, Bishop of Mans, 612, in *Par-dessus*, "Dipl.," no. 230; gift of Harwich d'Angers to the Abbey of Prüm, 804, in *Martène*, "Ampl. Coll.," I, 54; Charters of Noirmoutiers, "N. R. H.," 1898, 763). Traces of it are still to be found in the tenth century: *Thévenin*, "Textes," 186. This entering was left to the care of an agent, in whom there has been an attempt to see the prototype of a testamentary executor: *R. Caillemer*, *op. cit.*, 19. But it had become optional, and it was abandoned more and more: *Marculte*, II, 3; "Brachyl.," II, 13, 11; *Renaud*, *op. cit.* During the early part of the feudal period it was mentioned in the countries of written law, but with the meaning of a drawing up by a notary. Cf. deeds of 1172, 1211, etc., in *D. Vaissette*, VIII, c. 293. Hesitation in *J. Faber*, "Inst.," fo. 40, ed. 1582. In the fourteenth and fifteenth centuries it was re-introduced into the practice of the South: *Gui Pape*, "Q.," 325, 350, etc.; "Dec. Cap. Tolos.," 382. In the countries of Customs only the registration of alienations arising from the custom of public mortgages was known. In certain communes, — for example, Amiens, — contracts were registered. The "Ord." of 1539 prescribed the entering and registration, — that is to say, that gifts "inter vivos" should be copied in the offices of the clerks of the royal justices of the place. Cf. the formula in *Viollot*, 905. The same with gifts "causa mortis"; "Ord." of 1731, 3. Details in *Ferrière*, "Sc. des Notaires," 17, 4, 5; *Pothier*, no. 86; *Argou*, II, 11; *Serres*, "Inst.," II, 7; *Isambert*, see Table. Wills had to be entered, but not under penalty of annulment: Edict of lay entering of 1703: *Pothier*, "Don. test.," no. 15. As to the inspection or registration of notarial deeds and deeds under private seal, and, consequently, of gifts and wills, cf. the Edict of 1581, which established it for the time being, and then

Ordinance of Villers-Cotterets, 1539, Art. 132, not only in the fiscal interest, but so as to bring to the knowledge of the public the transfer of ownership. This became necessary from the time when the surrender of possession by means of vesting and divesting ceased to be made use of, and when people were contented with fictitious delivery, — that is to say, with a secret transfer of ownership. The right to invoke the lack of registry in order to have the transfer regarded as invalid, was only refused to the donor himself; all other interested parties possessed this right: heirs of the donor, his legatees, his creditors, even by simple contract, later donees, or other grantees who had given a consideration.¹

§ 503. **Incapacity to give and to receive.**² — The system of incapacities,³ which was another check upon the freedom of giving, had the effect of preventing a great number of gifts,⁴ because it affected the very persons for whom gifts were preferably meant, — for example, communities and religious establishments, illegitimate children,⁵ spouses, or concubines.

§ 504. **Gifts between Spouses.**⁶ — In Rome gifts between spouses, which were incompatible with the system of the "manus," were prohibited, even when this system was abandoned, in order to avoid the abuses of influence on the part of one of the spouses ("ne mutuo amore invicem spoliarentur"). In the end, however, it was admitted that they would be valid if the spouse who gave predeceased the other one without revoking the gift, just as testamentary gifts or gifts "causa mortis" would have been.⁷ The countries of written law adhered to these principles.⁸ — In the

the Edict of March, 1693, etc., *Ferrière*, "Sc. des Notaires," 17, 2; *Isambert*, see Table. The Revolution substituted copying for entering (Law of the 11th Brum., year VII) and registration for inspection (Law of Dec. 5-19, 1790; Law of the 22d Frim., year VII): "Code Civil interm.," see "Insin., Transcr., Enreg." — "Comment. s. le Tarif du Contrôle," 1766; *Perrin*, "Th.," 1901.

¹ "Ord." of February, 1566, 58; 1731, 27; Civil Code, 941; *Pothier*, no. 116.

² *Pothier*, VIII, 348; *Ferrière*, see "Incap. de succéder," etc.

³ Very old custom according to which gifts are only possible when made by a person in good health ("sanus et sana mente"): "Schwabensp.," 52; *Huber*, IV, 610. Cf. "Paris," 277; *Stobbe*, V, 185.

⁴ "Cout. Not.," 143; "Paris," 272 (25 years); *B. de Richebourg*, III, 83. Monks, minors, persons under a disability, married women, and foreigners. Relative disabilities: guardians, judges, teachers, confessors, doctors, etc. "Paris," 276; *Beaumanoir*, 54, 5; "Const. Chât.," 81 (in fraud of creditors).

⁵ "A. C., Anjou," ed. *B.-B.*, II, 461; "L. d. Dr.," 770; "Summa Norm.," 35, 2.

⁶ Gifts between concubines: *Loysel*, 127; *Pothier*, "Tr. des Donations entre Mari et Femme," n. 7, ed. *B.*; *Pertile*, § 111; *Schroeder*, p. 728; *Glasson*, VII, 532; *Laboulaye*, *Gide*, etc.

⁷ *Girard*, p. 934; *Esmein*, "Mélanges," p. 49; "Petrus," I, 36.

⁸ "Dec. Cap. Tol.," 262; *Serres*, II, 7; "Siete Part.," 4, 11, 4. Cf. "Mont-

countries of Customs more strictness was shown.¹ The marital "mundium" sometimes, as in England, went so far as to absorb the personality of the wife in that of the husband, which made gifts between spouses impossible. Elsewhere the old system placed the woman in a strict dependence with regard to her husband.² Also, the Custom used its authority to fix the pecuniary relations between spouses, especially in giving them the portion of the survivor and a share in the privileges, so as not to affect the principle of the preservation of property in the family. Attempted deviations from this were deemed to be due to unwise impulse or an abuse of authority. Hence the rule for the nullity of gifts between spouses, whether they were direct or indirect, disguised or made by means of persons interposed.³ Contracts based upon a consideration were also held to be included in the proscription: "Nullum contractum etiam reciprocum facere possunt nisi ex necessitate," says Dumoulin; it was feared that gifts might be hidden under cover of these acts.⁴ Even testamentary gifts came to be treated in the same way as ordinary gifts. The Civil Code (Art. 1096), drawing its inspiration rather from the Roman system, allows of gifts between spouses, but declares that they are revocable. Already the Revolutionary laws of the 5th Brumaire, year II, Art. 2, and of the 17th Nivôse, year II, Art. 2, had broken with tradition by authorizing without reservation gifts between spouses by way of donations or legacies (unless

pellier," 54; "Bergerac," 129; "Poitou," 219; "Angoulême, Guénois," XIII, 52; *Boissonade*, 289.

¹ From what date? Barbarian period. A restrictive tendency in "Liut.," 102: prohibition of gifts made by the husband to the wife for whom the antenuptial gifts (marriage portion and "Morgengabe") should suffice. Other laws are more liberal: "Rib.," 48, 49; "Bai.," 9, 14; "Wis.," 5, 2, 4, 5; *Pardessus*, "L. Sal.," 678. — Feudal period: *P. de Fontaines*, 33, 14; *Beaumanoir*, 12, 4, allowing of legacies from one spouse to another. According to the "Ass. de Jér.," "C. des B.," 173, the husband can only make a gift to his wife at his death or in his will. The "Et. de St. Louis," I, 118, did not allow the wife to make a gift to her husband excepting at her death. The tendency which prevailed resulted in the prohibition of every gift between spouses with the exception of the mutual gift: "Gr. Cout.," II, 32; *Desmares*, 235; *Boutaric*, I, 99; "L. d. Droiz," I, 183.

² Strictly speaking, gifts of the husband to the wife should have been included. The "Cout. de Norm.," 410, even prohibited the mutual gift, but not the will, 422, 429. Cf. "Summa," 100; "Sachsensp.," 31, 2 (the gift by the wife to the husband is not even thought of). However, *Struve*, "Inst.," II, 10, states that in his time gifts between spouses were lawful (legal registration; cf. mutual gift); *Lehr*, "Dr. Angl.," p. 111 (courts of equity).

³ "Cout. Not.," 58; *Desmares*, 232; "Et. de St. Louis," I, 118; "A. C., Anjou," ed. B.-B., see Table; "Paris," 282; "Orléans," 280; *Loysel*, 127; "Conf. des Cout. de Guénois," 648.

⁴ *P. de Fontaines*, p. 113; *Dumoulin*, on "Paris," 156, no. 5.

in excess of the usufruct of half of the property when there were children.¹

§ 505. **Mutual Gifts.** — In use from the Frankish period, under the name of "interdonatio,"² the reciprocal donation between spouses did not cease to be made use of throughout our old law. It had its reason for existence in a system without community ownership and without a portion for the survivor or well-regulated rights of succession. When the community and dower come into existence it loses its usefulness; it is tolerated rather than encouraged, as is proved by the restrictions brought to bear upon its validity. In his "Institutes," Loysel, 128, thus summarizes the rules: "A husband and wife who have no children can mutually give to one another, provided, say some of the Customs, they are alert or equal in health, age and belongings."³ It is this concern for equality which was the salvation of the mutual gift. It already began to make its appearance in the Frankish formulæ, for, if one of the spouses gave the entire inheritance to the other, the latter gave the same in return; but equality in health, age and fortune was not a necessary requisite for the gift to be valid. This gift might be general or special, of ownership or of enjoyment. At the same time, the existence of children, which at first did not prevent the spouses from making donations to one another,⁴ was always an obstacle to the giving of ownership. Even if there were no children, the mere giving of the use for life was generally preferred. From the fourteenth century there was a tendency to have the mutual gift affect only movables and property acquired jointly. In the sixteenth century the Customs of Paris no longer allowed anything more than gifts of the usufruct of that portion of the community property which would come back to each spouse.⁵ In the earliest times the mutual gift could not be

¹ Gifts are no longer revocable nor void: *Vermeil*, "Code des Succ.," cited by *Troplong*, "Don.," no. 2648; *Boissonade*, p. 323; *Sagnac*, p. 298.

² *Rozière*, "Form.," 245 *et seq.*; *Thévenin*, "Textes," 40, 82, 132. Cf. Gift "post obitum"; "Adfatimus" of the "L. Rib.," 49; *Brunner*, "Z. S. S., G. A.," 1885, 79; *Stobbe*, V, 193.

³ "Cout. Not.," 58; "Gr. Cout.," II, 32; "Paris A. C.," 155; "N. C.," 280; "Anjou," 328, etc.

⁴ "Paris," 281. Mutual gifts in the marriage contract of children: *Boissonade*, 259.

⁵ *Rozière*, *op. and loc. cit.*; "Cout. Not.," 58 (for life or for him and his heirs); "Gr. Cout.," p. 321 (all possessions); *Desmares*, 235 (movables and jointly acquired property); "Paris," 280; "Prevôt de la J.," II, 233; Law of 17 Niv., year II, 13 (reduction to usufruct of half of the possessions if there are children). The person receiving a mutual gift, and who received a portion of the community, was held for the corresponding debts, but only for the in-

made without delivery;¹ the spouses invested one another, put one another in possession of the property which they possessed themselves;² also, the survivor did not have to ask their delivery from the heirs of the predeceased spouse and the gift was absolutely irrevocable.³ In the final state of the law this is no longer so: "The mutual gift does not confer seisin";⁴ from whence it follows that the heirs have to make delivery, and the irrevocability, while it subsists on principle, becomes weakened. Both spouses acting together can revoke the mutual gift;⁵ it is simply forbidden one of them acting alone to annul the donation which has been made.⁶ The condition of survivorship assimilated the mutual gift to gifts "causa mortis." Moreover, almost as much exaction was shown in relation to its forms as though it had been a matter of a gift "inter vivos."⁷

§ 506. **Revocation of Gifts.** — (I) *Reversion of the inheritance.* — (II) *Ingratitude of the donee.*⁸ Borrowed from the relations which existed between a patron and a freedman, the revocation for ingratitude had become generalized under the Lower Empire and was applied to gifts between persons of any kind.⁹ It passed

terest on them, because he was merely a usufructuary. To the spouse who has been given a mutual gift is applied an old rule, cited in Chap. III, Topic 8, § 417.

¹ Transfer "per cartam," cf. Frankish formulæ and deeds: *Demuth*, 25 *et seq.*

² Cf. *Gift between husband and wife or mutual gift* (Boutaric, I, 99, and p. 885, ed. 1603; see *Guyot, Ragueau; Fasquel*, "Thèse," 1902): (a) *By writing*: this assumed the performance of the formalities; it conferred upon the survivor the usufruct of plebeian tenures and the ownership of the movables left by the predeceased with the charge of giving up a portion to the children should he remarry ("parçon," "fourmorture," see *Guyot; Britz*, 769; cf. also devolution, *ib.*; variations in the Customs of Arras, Lille, etc.). (b) *By the blood* or operation of law, when there had been children born of the marriage. Cf. Customs according to which the community only comes into existence at that time: *Tailliar*, "Rec. d'Actes du XII^e, XIII^e s.," p. CCCI; *Brunner*, "Z. S. S.," 1895; "G. A.," 63. — Ceremony of the kiss in public: "Tour.," 13, etc. — Cf. "Roisin," 84.

³ *Rozière*, *loc. cit.* Cf. "post obitum" gift. See, however, *Thévenin*, 82 (divorce).

⁴ *Loyzel*, 129; "Paris," 284; *contra*: "Bourbon," 277; "Blois," 163; "Dunois," 68.

⁵ Court practice understood the irrevocability decreed by the Law of the 18th Niv., year II, in this sense. As to the Revolutionary law, cf. *Fasquel*, 129; Civil Code, 1097.

⁶ *Contra*, the conjunctive will. Here at least the indirect revocation by means of alienation for a consideration is possible.

⁷ "Ord." of 1231, 30, 46. Notarial deed, registration, but no expressed acceptance. Can the mutual gift be made by means of two separate deeds? The jurisconsults are divided.

⁸ Failure to carry out the charges: *Pothier*, no. 187; *Reverdy*, "Thèse," p. 349.

⁹ "Cod. Just.," 8, 56, 9 and 10; *Girard*, p. 922.

into the old French law, at first on condition of royal letters, and later without this condition. As it was a penalty, it only affected the guilty donee, and not the third party who had negotiated with him, and who had not participated in his fault.¹ — (III) *Unexpected birth of children*. Another trace of the Roman rules relating to gifts from a patron to a freedman ("lex si unquam").² The revocation because of the unexpected birth of children was looked upon by St. Augustine as being in conformity with the Christian ideas.³ It had no difficulty in maintaining itself in the countries of written law. As it was in harmony with the Germanic conception of the gift⁴ and with the interest of the family, the countries of Customs also adopted it. Our old authors justified it by rather weak reasons: The donor would not have made the gift, "si cogitasset de liberis"; he did not know "that affection which nature puts in the breast of fathers." These aphorisms did not tally very well with facts, because the donor might have had children and have plainly foreseen that he would have others. In reality, the unexpected birth of children was an implied condition subsequent which had been changed into the form of an obligatory rule in the interest of the family. Since that time the commentators have been fighting over the matter of revocations (onerous gifts, mutual gifts, gifts in favor of marriage) and over the effects of the former ("ipso jure" or by judgment, "ex nunc" or "ex tunc").⁵ The controversy was sharp, especially with regard to gifts by contract of marriage; a celebrated decision of 1551 determined that they should be revocable of absolute right.⁶

¹ "L. d. Dr.," 135, 197, etc.; *Boutaric*, I, 45; *Pothier*, no. 180; Civil Code, 955.

² "Cod. Just.," 8, 56, "de revoc. don.," 8 (in 355); cf. "F. Vat.," 272.

³ "Dec. Grat.," 2, 17, 3, 43.

⁴ Edict of Rotharis, 171; *Stobbe*, V, 177; *Heusler*, "Gewere," 475.

⁵ One may judge as to how uncertain this doctrine was by the verbal commentary upon the "Lex si unquam" in which Tiraqueau loses himself amid the difficulties of the subject.

⁶ This Order of the Parliament of Paris, April 12, 1551, was handed down in a case in which Dumoulin was a party. Wishing to devote himself entirely to the study of law, he had made a gift of all his possessions to his brother, Ferry Dumoulin (October, 1531); but in 1538 he married Louise de Beldon, and, having had a child by her, he petitioned for a rescission of the gift by obtaining letters from the Chancery. The Parliament decided in his favor. It was thenceforth held that gifts made in a marriage contract by a person who was not bound to furnish a marriage portion should be revoked of absolute right (although, following the example of Dumoulin, people often obtained letters of rescission). The revocation took place "ex tunc": but Dumoulin consented that the property which had been restored to him should be encumbered secondarily with a mortgage guaranteeing the dower of his nephews; this kindly concession on his part gave rise to misunderstandings and disagree-

§ 507. **The Gift "causa mortis,"** which was to be distinguished from the old "post obitum" gift, after the twelfth century recovered the same characteristics that it had had in the Roman law. Although a true contract like the gift "inter vivos," and although it assumed as its consequence acceptance on the part of the donee, it was none the less revocable in imitation of the will, (a) by the predecease of the donee; (b) at the will of the donor. Thenceforth it did not mean the immediate dispossessing of the donor, but only a dispossessing which was to take place at his death.¹ Only five witnesses were required for its execution (instead of the seven which were necessary to the validity of the will), which resulted in its being treated rather like a codicil. It was only made use of in countries of written law and for the benefit of sons of the family who did not have capacity to make wills.² In the countries of Customs it had become confused with the will.³ The Ordinance of 1731, Art. 3, being based upon this practice, decided that in the future gifts "causa mortis" would only be valid if they were clothed with the same forms as the will, which was perhaps not to forbid them,⁴ but which was most certainly to take away all their usefulness.⁵ Civil Code, 893.

ments to which the "Ord." of 1731 sought to put an end in its Art. 39. Cf. the Civil Code, 930; *Coquille*, on "Niv.," "Don.," 13; *Papon*, "Arr.," 2, 1, 20; *Pasquier*, "Inst.," *Dumoulin*, "De Don. in Contr. matr.," "Opera," III, 513, ed. 1681; *Brodeau*, "Vie de Dumoulin," p. 60; *Aubépin*, "Infl. de Dumoulin" ("R. crit.," 1855), detailed bibl. — As to countries of written law, cf. *Furgole*, "Don.," 11, 10; *Maynard*, VI, 60, 8; *Reverdy*, 357.

¹ The Edict of February, 1549, does not make it necessary to register them: *Gui Pape*, 325, 610.

² "Dec. Cap. Tol.," 454; *Serres*, "Inst.," II, 12 and 7. According to the "Ord." of 1731, the clause of gift "causa mortis" validated the will of the son of the family.

³ "L. d. Dr.," 116; *Boutaric*, I, 45; *Laurière*, on *Loysel*, 667; Order of 1639; *Ricard*, "Don.," II, 37; "Paris," 292; according to Art. 277, gifts made while "in extremis" were only looked upon as being of the same validity as gifts "causa mortis"; the "Ord." of February, 1731, Art. 4, even refused to give them this effect.

⁴ *Merlin*, "Rép.," see "Don. à Cause de Mort"; *Masuer*, 24, 23.

⁵ Cf. gift of property to be acquired in the future, gifts between spouses: See "Code Civ. interm."

TOPIC 6. COVENANTS RELATING TO INHERITANCE

§ 508. Covenants upon Future Succession.	§ 511. The Abdication of Possessions.
§ 509. Renunciations of a Future Inheritance.	§ 512. Partition by Ascendants.
§ 510. Appointment by Contract.	§ 513. Substitutions in Trust (Entails).

§ 508. **Covenants upon Future Succession**,¹ which were forbidden at Rome as being immoral, because, it was said, they might arouse criminal hopes and contain a "votum mortis,"² were, on the other hand, frequent in our feudal and monarchic society. They were derived from the old usage of disposing of one's inheritance by contract. But we have seen that a reaction against this practice had taken place in the Roman spirit, resulting in the dividing of gifts into two groups, — wills, and gifts "inter vivos." One of the results of this reaction was to isolate covenants relating to inheritance and to restrict them to marriage contracts, where the feudal and family spirit made use of them until the very end, in order to resist the modern tendencies; in that field they have been preserved even to our day in the interest of marriage. In these covenants, of which the principal ones are the renunciation of a future inheritance, stipulations relating to personal belongings in the inheritance,³ and appointments by contract, we will include abdication of possessions and entails, although these latter did not necessarily play a part in contracts of marriage.

§ 509. **Renunciations of a Future Inheritance**,⁴ which were proscribed by the Revolutionary laws,⁵ contributed in our old

¹ *Pothier*, II, 62; ed. *B.*; *Dumoulin*, "Cons.," 15, 2, 3. Gradual appearance under the Lower Empire: "Cod. Just.," 2, 3, 30 (the consent of the deceased validates the contract already entered into between his heir and a third party and relating to his succession).

² *P. de Fontaines*, 15, 7; *Masuer*, 28, 9; *G. Coquille*, on "Niv.," 27, 12; *Favre*, "De Err. pragm.," 38, 6, 6; "Ord." of 1731, 13. — Cf. "Dec. Cap. Tol.," 453.

³ It is stipulated that certain possessions which should have been owned in common shall belong to one or the other of the spouses and his or her heirs (fictitious personal belongings): see *Ferrière*.

⁴ "N. R. H.," 1888, 348, 320; *Lebrun*, "Succ.," 3, 8, 1; *Pothier*, "Suc.," VIII, 30, ed. *B.*; *Gide*, "Cond. des Femmes," 394; *Huber*, IV, 666; *Stobbe*, V, 296, 315, n. 24 (bibl.). On the German law of princes, cf. especially *Schulze*, "Erb. und Familiennr.," 1871; *Heffter*, "Sonderr. d. Häuser Deutschl.," 1871; *Pappermann*, "De Ordine quo Feminae," etc., 1868.

⁵ Law of the 5th Brum., year II, Art. 14; Law of the 17th Niv., year II, Art. 11. The Civil Code has maintained this prohibition in Art. 791. Out-

society, like the right of primogeniture and entails, to the preservation of the inheritance of old families; in fact, they only took place ordinarily for the benefit of the eldest son.¹ In days when emancipation and marriage ceased to be of themselves causes of exclusion from a succession, the spirit of the family still had enough strength to obtain from younger sons or daughters renunciations to the rights which they had just acquired, and which were contrary to the old Custom.² Outside of contracts of marriage and contracts made by other heirs, they were rare, or even forbidden.³ They were made in the form of unilateral declarations in the presence of the assembled relatives;⁴ the custom of fortifying them by means of an oath contributed not a little towards having them upheld as being valid, in spite of the Roman rules.⁵ The consequence of this renunciation varied; it was made subordinate to the payment of a marriage portion or a promised grant to a younger branch; it was void in the case of the predecease of the relative or the line for the benefit of which it had taken place,⁶ or, again, if the person renouncing

side of reasons of a political nature which have been responsible for their condemnation we can say that they are very dangerous; it is very seldom that they are made freely and with full knowledge.

¹ Sometimes for the benefit of brothers or agnates. They affected the succession of the father or the mother, sometimes also that of the brothers. They were generally contained in the marriage contract of the party making the renunciation, but if he were of age they also formed a part of the marriage contract of the eldest son or of the brothers and sisters.

² *Stobbe*, V, 97; *Bereng. Fernand*, "Op.," 527; *Boucheul*, p. 336; *Argou*, III, 17.

³ *Contra*, German law. With the consent of the deceased the heir may grant his hereditary rights to a third party: *Pothier*, III, 206 (sale of rights of succession). Cf. "*Schwabensp.*," 35; *Stobbe*, V, 296 (renunciation at law with certain symbols); "*Sachsensp.*," I, 13; *Huber*, IV, 664, 667.

The Covenant "*de Hereditate tertii viventis*" is a contract between the heir and a grantee carrying with it for the heir the obligation to transfer his rights of succession at the death of his ancestor; thus he must accept this succession; however, if the grantee is an heir of subsequent degree, the heir granting to him can renounce the succession so that the grantee may benefit by the renunciation. The daughter who has a marriage portion and who renounces the succession of her relatives can neither accept nor renounce after they are dead; the succession does not open for her benefit. Cf., however, practical difficulties in *Boucheul*, *loc. cit.*

⁴ Without the beneficiary's having to accept (any more than at the time when daughters, younger children, or the emancipated children were excluded from the succession). The German practice, which generalized renunciations of succession, made of them a contract between the deceased and the heir presumptive. Whether it be a contract or a declaration, it is effective as against third parties.

⁵ *Sexte*, I, 18, 2. Practical difficulties: *Stobbe*, V, 307.

⁶ Controversy between the "*Erbtochter*," descendant of the last male agnate, and the heirs of the man making the renunciation ("*Regredienterben*"): *Stobbe*, *ibid.* Cf. the clause, "*Bis auf ledigen Anfall*." *Boucheul*, p. 353: renunciation with a reservation of the royal escheat (the sister succeeds to

was recalled to the succession by the deceased.¹ Did the renunciation bind the descendants and the heirs of the person renouncing? This point was disputed,² but the daughter who had a marriage portion and who renounced did it ordinarily as affecting herself and her descendants; it was implied if no express declaration were made.³

§ 510. **Appointment by Contract**, or appointment of an heir by contract, conflicts at one and the same time with the Customary rule, "The appointment of an heir is not valid," and with the principles of the written law according to which the appointment of an heir can only be contained in a will, that is to say, in a deed which is revocable.⁴ The "adfatus" was scarcely anything else in the law of the Ripuarians,⁵ and the formulæ designated a recall to succession by that name.⁶ During the feudal

her brother in the interest which she has renounced in the inheritance of her father should he die without children, and she also receives a collateral succession in which the paternal inheritance plays a part).

¹ The **Recalling to Succession**, which could be carried out by will or by contract, could always be revoked unless it had been made in a marriage contract (cf. appointment by contract). This does not assume the consent of the eldest son or of the brothers who have an interest. Its effect is to restore to the person renouncing, his rights of succession upon intestacy; however, there were many who were only willing to consider this as a legacy: *Loyzel*, 310, 341.

² Cf. the Romanists, *Balde*, *Bartole*, cited by *Goden*, "Consil.," no. 97.

³ Cf. the Salic Law, t. I. In the same way appointment by contract, which is the counterpart of a renunciation to future inheritance, benefits the appointee and his unborn children.

⁴ Texts: *Laurière*, I, 24, etc. (in 1044); *D. Vaissette*, VIII, 385 (in 1185); "Anjou," ed. *B.-B.*, 62; *Masuer*, 32, 6; "Bourb.," 219; "Niv.," 27, 12; "Poitou," 216; "Auvergne," 15; "Marche," 248, etc.; *Loyzel*, 308 et seq.; *Lamoignon*, 39, 2; *Guyot*, "Sect.," 1; "Ord." of 1560, 59; of Feb., 1566, 57; of 1731, 17; of 1747, 12, 14; *Auffroy*, 402; "Berry," 8, 5.

⁵ Uncertainties as to the origin and the date of the appointment by contract: *Beseler*, II, 174; *Stobbe*, V, 190. Cf. the old opinions: 1st. *Roman origin*. The "Novella," 19, of Leo the Philosopher (which was only known in France through the translation of Agylæus in 1560). Cf. "Cod. Théod.," 11, 24, 2; "Cod. Just.," 2, 3, 15, 19, 30; Dig., 39, 5, 29, 2; 45, 1, 61. — L. 19, "Cod. Just.," "de pactis" (military will, and thus a privileged one). *Basnage*, *Laurière*, *Merlin*. — 2d. *Feudal origin*. "L. Feud.," II, 29 (morganatic marriage); *Lebrun*, "Succ.," 3, 2, 3, etc. Cf. *Montesquieu*, "Espr. des Lois," 31, 34 (at first only nobles); *Laboulaye*, "Cond. des Femmes," p. 391. — *Decius*, "Cons.," 225: "Sub tali pacto nobiles inveniunt nobiliores per quos nobilitas crescit"; *Baluze*, "Hist. de la Maison d'Auv." (Act of 1425); *Automne*, "Conf.," s. l. 15 "C. de pactis." — 3d. *Germanic origin*. Cf. the text. — Under its final form the appointment by contract dates from the feudal and customary period; but the law of that period especially made use of the Germanic precedents.

⁶ "Aoste," III, 20; *Pertile*, IV, 10. Let us liken mutual gifts between spouses to them: *Huber*, IV, 663; *Stobbe*, I, 192; the "Erbverbrüderungen" of the higher German nobility (an alliance between two families; if one dies out the other succeeds to it), *ib.*, V, 194, 277 et seq. As to the "Einkindschaft," cf. *Stobbe*, II, 247; *Heusler*, I, 234; *Ferrière*, see "Rappel" (bibl.); *Boucheul*, p. 271.

period there appeared clauses which were related to the right of primogeniture: "Declaration to proclaim an eldest son and principal heir,"¹ "promise of equality."² It was especially for the benefit of noble families, and to assure what was due to a fief, that the appointment by contract was brought about.³ During the decadence of the nobility it was justified less because of its feudal aspect than because of its matrimonial aspect; it seemed to be a happy reconciliation of two contrary interests, that of the grantor who did not expect actually to deprive himself, and that of the beneficiary for whom, in order that he might found a new family, the frail hopes which the will holds out were not sufficient. The Revolution forbade this appointment because of its aristocratic and feudal character.⁴ Even though the Civil Code re-established it, Art. 1082, it did not dare call it by its former name; the former appointment by contract has lost this suspicious designation and is called a gift of future possessions.

In the very old law the appointment by contract was effected by means of delivery.⁵ Also, it was irrevocable, and at the death of the person making the appointment the donee found himself in possession of the latter's property without having the power of renouncing it, because he had accepted it beforehand. The burden of debts did not pass to him unless there was an express clause to this effect (*cf.* testamentary executors).⁶ According

¹ *Laurière*, I, no. 30; V, 111; *Ricard*, 1064; *Argou*, III, 10.

² There are certain differences between the appointment of an heir properly so called and its variations: (a) recalling to succession, see note 1, p. 718; (b) a declaration of the eldest son which guarantees him his hereditary portion of the present possessions (and not merely his legal share): this does not prevent the property from being disposed of for a consideration: *Loysel*, 309; (c) promise of equality, — that is to say, not to favor any of his children to the detriment of the others, which, however, allows of gifts for the benefit of strangers: "Nov.," 19, of Leo; *Lebrun*, 3, 2, 12; *Coquille*, on "Niv.," 12; *Ferrière*, on "Paris," 318; *Boucheul*, 5, no. 28.

³ *Cf.* appointment of an heir charged with taking the name and bearing the arms of the grantor. Letters of the king are necessary in order to change one's name, but not to join one's name to that of the grantor.

⁴ Law of March 7, 1793; 5th Brum., year II; 17th Niv., year II; 22d Vent., year II; re-enacted on the 18th Pluv., year V; 4th Germ., year VII; "Code civil interm.," see Table; *Aron*, "N. R. H.," 1901, 448 *et seq.* *Cf.* Prussian Code, 1, 12, § 617.

⁵ *Dronke*, "Cod. Fuld.," 115-119; *cf.* 104; "Schwabenspiegel," 22; Dig. X, 2, 13, 9; *Heusler*, II, 637; *Pertile*, IV, 8; *Stobbe*, V, 178 ("Salmann"), 180, 181, 189 ("Auflassung," intervention of the public authorities).

⁶ *Cf.* transmission of hereditary debts. If it was difficult to admit that "universal" successors were held for the debts of their ancestors, it was all the more difficult to admit it for successors by some special right, such as donees. At the most, the latter could only be required to pay present debts (existing at the time of the gift) if they were bound to do so by a clause in the deed, either expressed or implied (that is to say, resulting from the general character

to the final theory, which was rather unsettled on certain points, the appointment by contract is defined as "an irrevocable gift of succession,"¹ and it is made by means of a clause in the contract of marriage,² for the benefit of the spouses alone, or of one of them,³ and of the children who may be born of the marriage.⁴

of the gift). The man appointed by contract seems to have had from the very outset, from the point of view of debts, the same position as the heir at law. Cf. the Lombard "thinx." After that he finally came to be considered as being held "ultra vires." Cf. *Loyseau*, "Déguerpiss.," I, 11; *Ricard*, no. 1522; *Duplessis*, "Don.," s. 6; *Lebrun*, "Succ.," 3, 2, 41; *Laurière*, I, 244; *Pothier*, "Succ.," 5, 2, 3; *Ferrière*, on "Paris," 334; *Stobbe*, V, 184. Moreover, neither the gift of present possessions nor the gift of future possessions had the effect of releasing the donor; he remained open to the prosecution of his creditors and could be subjected to personal arrest.—Cf. as to the modern German theory of transfer of debts, *Delbrück*, "Uebern. fremd. Schuld.," 1853; *Saleilles*, "Th. de l'Oblig.," 1890; *Gaudemet*, "Thèse," 1898.

¹ Wholly or partly, but by "universal" right. "Post obitum" gifts also frequently had this characteristic; they affected a domain or a village with its farmers, its rights of enjoyment, and its chapel, or all the possessions present and future. Cf., however, *Beseler*, I, 161, 175; *Loersch and Schr.*, "Urk.," no. 63 (57); *Hübner*, "Don. post obit.," The German law contrasts the "Erbvertrag" (appointment of an heir) with the "Vermächtnissvertrag" (appointment of a legatee): *Huber*, *op. cit.*; *Stobbe*, V, 298.

² Formerly it was possible outside of a marriage contract, — for example, "Auvergne," 15, 1, in the charter of an association, *Benedicti*, "in cap. Rayn.," see "Dus hab.," 200. Thus is to be accounted for the power of bringing in a third party — for example, a brother of the appointee — to share in the advantages arising from the appointment: *Stobbe*, V, 277. (The German law also admits of them outside of contracts of marriage.) Cf. *P. de Fontaines*, 15, 7; *Masuer*, 32, 13; 28, 9; *Bugnyon*, "De lég. abr.," I, 226.

³ Not only the father and mother (or one of them) could appoint their children when they married them, but collaterals and third parties could also do it. Gifts made by contract of marriage by one of the future spouses to the other, whether mutual or not, affecting a few possessions or all, or a portion of their present and future inheritance, are valid (because there is no suspicion of compulsion or of undue influence), must be registered (just like mutual gifts between spouses made during the marriage) and cannot be reduced to one-fifth of the personal belongings. Cf. *post*, "Reservation," "Marriage Contract."

⁴ If it were made at the time of the marriage, the appointment should naturally benefit the children that might be born from the marriage. This is what happened when the spouses or one of them had received the benefit of the appointment during their lifetime. But if the appointee should die before the person making the appointment, would the children of the former take the succession in his stead as soon as it opened? Cf. as to this, Topic 4, § 499, of this chapter (lapsing in this case if there were no children). An expressed clause must have been necessary first of all; "Et. de St. Louis," I, 119: "I give to you two and to your heirs who shall issue from you two." Afterwards it came to be implied. Difficulties arose as to its nature and its consequences: a common trust-entail according to the general opinion; cf. direct transfer, entail in trust (which could be expressed). The Romanists implied a stipulation made by the notary for the benefit of the unborn child: *Boerius*, "Decis.," 172; *Gai Pape*, 67. To the contrary: Ordinance of Villers-Cotterets, 1539, 133; of Feb., 1731, 5; *Louet*, "D.," 51; *Ed. Lambert*, "Stipul. pour Autrui," 1893, § 165. The Ordinance of 1735, 49, decides that the heir appointed by will should be conceived at the time of the death of the testator, but does not prohibit special legacies for the benefit of those not conceived at

Our old authors set their wits to work without much success in trying to make this sort of appointment fit within the classical terms; it was a gift "inter vivos" for some¹ and "causa mortis" for others,² a double gift of possessions present and future, according to some of them, an amphibious act, a contract and a will at one and the same time, says Furgole, giving it up in despair. Not one of these conceptions agrees with the effects which it was given in practice. Its object was to guarantee the title of heir to the beneficiary. It is irrevocable because it arises from a contract upon the faith of which the marriage has been carried out, and which is "the statute of two families." Though the title of heir cannot be taken away from the person who has received it, any more by will than by any other deed,³ it is otherwise with regard to the emolument attached to this title. The person making the appointment reserves besides the enjoyment of his possessions the right to dispose of them privately (sales, debts, and even small gifts),⁴ which caused Laurière to say, "Of all the snares which one can set by means of a contract of marriage (and they are numerous) there is none to be feared more than appointments by contract." Against this danger there was no protection excepting through moral guarantees, the honesty of the one making the appointment, the natural attachment which the latter felt for his possessions, and the right of recovery in case there were fraud. During the lifetime of the grantor the person appointed had no rights. At the death of the former the latter was "ipso jure" in possession of the property which made up the inheritance, just as an heir at law would have been, and was held for the debts "ultra vires," except that he was able to renounce, or even to accept by inventory.⁵ In the countries of written law, where the appointment by contract was likened to a gift of present and future that time. On the condition, "si nascatur," cf. Favre, "De Error pragmat.," 33, 8, 18.

¹ *Lebrun*, III, 2, 6; *Pothier*, I, 534; *Bourjon*, V, 3. Consequences: (a) registration (controversy); (b) prohibition of alienation for a consideration; the "Ord." of 1731, 12, dispenses with an expressed acceptance; and, 19, 20, with registration (at least in the direct line); (c) it is not subject to the reservation; (d) and it can be disposed of (alien, person in mortmain, bastard, son of the family, etc.).

² *Ricard*, no. 971; *Laurière*, c. 2. *Renusson*, "Propres," III, 2, 33, cites for this *Bacquet*, whom he disputes. The appointor gives nothing during his lifetime. The gift lapses if the appointee dies before the appointor. — Cf. "post obitum" gifts (where the donor could not survive the donee, ordinarily a legal person).

³ *Boerius*, "Dec.," 204. Ingratitude? Birth of children? "Petrus," I, 7.

⁴ Reservation, cf. *Stobbe*, V. 177, 191.

⁵ He should have been treated rather as a testamentary heir.

possessions,¹ it was admitted that the person appointed could escape from debts incurred after the contract of marriage by renouncing any possessions which had been acquired after that time. This appointment was also held as being absolutely irrevocable, that is to say, the person making the appointment had no right to dispose of his present possessions even for a consideration.

§ 511. **The Abdication of Possessions** is not connected with the Roman will "inter liberos," but rather with barbarian institutions. Among the Burgundians the children have a right during the lifetime of the father to a portion of the family community belongings; the father cannot alienate anything without having made a partition and conferred their shares upon them.² With greater reason general usage³ authorizes parents who have become old, or have been affected by a permanent infirmity,⁴ and who are consequently incapable of administering their patrimony, to abdicate their position of head of the family, like a functionary who retires, in order to give the position to their descendants,⁵ — that is to say, to people who are younger and more fit; their succession vested by way of anticipation⁶ ("to resign one's activity," "to

¹ The cumulative gift of present and future possessions was looked upon in countries of written law as containing two gifts placed together, — one of present possessions (which gave the immediate seisin), the other of future possessions, which had the same effect as an appointment by contract, because one might accept or refuse it, etc.: *Henrys*, I, 4, q. 183; *Furgole*, on Ordinance of 1731, Art. 17. In countries of Customs it was not split up; there was only seen in it one gift, conferring upon the donee a right of option which went into effect at the death of the donor; he could be satisfied with the present possessions at the time of the gift (and in this case he did not pay debts accruing afterwards), or take the entire gift in a mass, and, assuming this, the gift had the effect of an appointment by contract in that which concerned present possessions as well as in that which concerned future possessions: *Pothier*, I, 357; "Ord." of 1731, 17.

² "Burg.," I, 24, 5; 51; 74, 3; 78, 1 (as to the history of this law, cf. *Zeumer*, "N. Arch. f. ält. D. G.," 25, 258); *Schroeder*, p. 273; *Ficker*, "Erbenf.," I, 271; II, 123, 358; III, 380; V, 104; V, 185; *Viollet*, 818. Cf. emancipation, reservation: "Sachsensp.," I, 14. "Watschar," "Swascara," meaning "propria portio" (portion which had been released by this partition); *Heusler*, I, 241; *Amira*, 122. — Ancient custom of pillaging the possessions left by the dead: *Post*, II, 173; "Festg. f. Dernburg" (Berlin), 47.

³ "Form Andec.," 57, 34; *Marculfe*, II, 11; *F. Merkel*, 24; *Rozière*, "Form.," no. 166 et seq.; *D. Vaissette*, V., no. 102. In Friesland, "evelganc" ("übel," sick man); *Noordeveir*, "Regtsoudheden," 255; *Grimm*, "R. A.," 486, 563.

⁴ Primitive societies in which the old men are allowed to die of hunger, where they commit suicide or their children kill them and eat them from filial piety: *Derüker*, "Races," p. 286; *Grimm*, loc. cit.; *Post*, II, 172.

⁵ Rarely to others. Interest of the family, and even of the lord: "L. Feud.," II, 14.

⁶ Other systems as to the nature of the resignation. Sale, innominate contract (because of the charges); gift "sub modo," gift "mortis causa"; "divisio

make oneself dead"). Those who acquired the inheritance bound themselves in return to furnish those resigning it with sustenance (provisions, necessities), with care and a decent burial.¹

In the earliest times the abdication of possessions required a delivery of the entire inheritance;² it meant actual and irrevocable relinquishment,³ or, at least, it was only subject to revocation if the beneficiaries did not fulfill the duties which were incumbent upon them (for example, if they refused to feed and support their parent). In the later law the practice becomes altered owing to various causes: lack of cohesion in the family, possibility of acting through a representative, and simplification of delivery. The individualistic idea comes to light in the maxim, "The father does not undress before going to bed," and results in new combinations which sometimes replace the abdication of possessions (for example, a partnership between the parents and the children) and sometimes limit its bearing (reserve of a portion of the possessions). In the majority of the French Customs general abdication persisted, but it became revocable. Although it was based upon a contract,⁴ it was treated like a will (without, however, going so far as to require the same forms). The authority of the father, the respect which was due to parents, profited thereby, but at the price of great disadvantages when the possessions had passed into the hands of third parties; for the result of revocation was to deprive purchasers, and it might take place as a consequence of a fraudulent understanding between parents and children. An attempt was made at least to protect the interest of third parties by means of certain provisions of publicity.⁵

According to the earliest ideas, abdication of possessions was a sort of deprivation of civil rights, a sort of civil death; the ascendant who lived with his children under the same roof and *parentum inter liberos*: *Stobbe*, V, 400. Thus differing from covenants upon future succession, everything takes place "*inter vivos*" and the consequences of the transaction are immediate.

¹ Lodging, board, "*Allentheil*," "*Leibzucht*," etc. As to the nature of these rights, cf. *Stobbe*, V, 408; *Lalou*, "*Thèse*," 1900; *Heusler*, II, 534.

² The giving up takes place as a general right. Cf., however, "*Bret., N. C.*," 537.

³ Thus in Brittany and some other customs: *D'Argentré*, 266, c. 4.

⁴ Which the heirs were free to accept. The partition among ascendants was not a contract.

⁵ The resignation often took place in order to avoid the payment of the tallage, or, at least, to have the one making it put at the end of the list among the sick; the conditions requisite for this were a notarial deed ratified by the representatives, published at the time of the sermon or at the close of the church service, notice being given to the collectors. Controversy as to the registration: *Boullenois*, "*Q.*," 10.

who was reduced to an inferior station could not acquire any new possessions nor contract any new debts. According to the law of the second period, he loses his possessions but keeps his capacity; thus he can have possessions to come, and future debts which call for a settlement at his death. Practice was doubtful. Many authorized the descendants to keep the present possessions at the same time that they renounced future possessions, (that is to say, those which had been acquired after the abdication).¹ As far as debts are concerned, the descendants were held ("intra vires")² for the debts in the present, but not for future debts in the case where they renounced.³ There was nothing to prevent the man who was abdicating his possessions from proceeding himself to make partition of them among those to whom he surrendered them, but nothing compelled him to do this; in any case it was necessary to follow the same rules as though partition had taken place after his death. If he must carry out the partition of his property⁴ he had to distribute all of it among all his heirs,⁵ in conformity with the Custom,⁶ and this under penalty of nullity.⁷

The practice of abdication of possessions was not abolished by the Revolutionary laws; but, in order to make partition, it was necessary to act in conformity with the new regulation with

¹ Vacant succession: *Pothier, op. cit.; Boullenois, "Q.,"* 11.

² *Huber, IV, 668 ("intra vires"); Stobbe, V, 398.*

³ And if the deed of resignation has been registered.

⁴ *Cf. P. de Fontaines, 34, 2; Beaumanoir, 47, 11; "Artois," 36, 37; Viollet, "Et. de St. Louis," III, 3.*

⁵ Should the equality of shares exist at the time of the resignation, or at the time of the death? Accidental loss? In case of the predecease of the person to whom the property was surrendered, it passed to his children, or, if he had none, to his fellow heirs; if there were none, it returned to the man resigning it.

⁶ Germany: conferring of the patrimony upon the "Ganerben," to the "Anerbe," charged with furnishing "Abfindungen" to his brothers: *Heusler, loc. cit.; Stobbe, V, 401.* In France the right of primogeniture is a clause frequently met with in the partition between ascendants, and it is often by this means that it is introduced. The chronicler, *Dudon de Saint-Quentin, IV, 128*, tells us that Richard I, Duke of Normandy, being at the point of death, in 996, appointed his eldest son as his successor, charging him that he give his brothers sufficient for them to live in an honorable manner. In later law the customary rule was made binding upon the relatives: "T. A. C., Norm.," 10, 2, 3. Distinction between the Customs of reference legacies and those of equality. *Britz, 764*: inequality, which was possible by the advice of the father and mother with the assistance of two relatives.

⁷ Already in the old law we observe a tendency to insist that each heir should have a share in kind of each piece of property in the succession, which results in a partition that is mechanical and unintelligent and of such a nature as greatly to diminish the advantages of partition among ascendants: Civil Code, 834. Existing judicial law has still further exaggerated this. *Cf. treatises by Regnier, Barafort, etc. Glasson, "Réf. soc.," 1889, 209; De Foville, "Le Morcellement," 1885. Theses: Henry, 1895; Caillet, 1900; Mégan, id.*

regard to intestate succession. In the Civil Code, Art. 1075, the name of abdication of possessions has disappeared, but the institution is found therein, confused with partition by ascendants, to which its revocable character had made it similar.¹

§ 512. **Partition by Ascendants.**² — The partition of property made by parents among their children by act of last will presented great practical advantages; it is carried out without expense; the property is distributed in a more intelligent way, taking into account the fitness of each one; and, finally, quarrels between brothers are avoided. The countries of written law,³ and even the countries of Customs,⁴ borrowed this sort of gift from the Roman law.⁵ Whence the name "devises," often given to wills, because it is in wills that they are found.⁶ They were looked upon with favor and were free from the ordinary formalities which were attached to these acts; it was sufficient if "the wishes of the testator were certain and constant"; thus in countries of written law it was permitted as an exception to make use of the holographic will in such cases as these.⁷ The partition could be revoked by the one who made it, just as every testamentary gift,⁸ at least, if it did not form part of a contract of marriage.⁹ At the death of the ascendant the coparceners took the property as heirs at law

¹ Practised in the South, although contrary to the rule: "Nulla viventis hereditas"; the resigning of possessions was there looked upon: (a) as a gift "mortis causa" affecting possessions to be acquired in the future; (b) as a gift "inter vivos" for present possessions (and in this case it is irrevocable and must be expressly accepted and registered). The child who was left out would only have a right to his legal share, for the written law allowed of the favoring of one or several of the heirs.

² *Furgole*, "Test.," 8, 1, 141.

³ "Brachyl.," II, 25; "Liber Instrum. memor.," p. 172 *et seq.*

⁴ "Bret.," 560; "Bourb.," 216; "Poitou," 219; "Niv.," 34, 17; "Bourg.," 7, 6, etc. Some Customs authorized even partitions among collaterals: "Amiens," 94, etc.; *Louet*, "P.," 24.

⁵ (A) "Divisio inter liberos," permitted first of all only to the father because of the "patria potestas" and later to the mother and the ascendants: D., 10, 2, 20, 3; 39, 5; "Cod. Théod.," II, 24; "Cod. Just.," 3, 28, 8; 3, 36, 21, 26 ("Auth. Si modo"); "Nov. Just.," 18, 7, 107, 3. The descendants did not cease to be heirs at law. — (B) "Testamentum inter liberos": "C. J.," 6, 23, 21, 3; "Nov. Just.," 107, 2. Method of distribution creating testamentary heirs, and which dispensed with the formalities required for wills. *Lebrun*, "Succ.," IV, 1, 8, does not distinguish between the "divisio" and the will "inter liberos"; there is a distinction within the meaning of the Customary delivery; at the time when the appointment of an heir disappeared these two kinds of acts became confused.

⁶ See *Ragueau*; cf. *Du Cange*, see "Divisa," "Ordinum"; "Fors de Béarn," ed. *Mazure*, p. 174: "ordi"; *Beaumanoir*, ed. *Salmon*; "Gloss.," see "Devis," "Deviser."

⁷ *Serres*, "Inst.," 2, 10 (p. 219, ed. 1771). Cf. Ordinance of 1735, 17.

⁸ Even when it was signed by the coparceners.

⁹ As, moreover, did the surrender of possessions.

(seisin, obligations "ultra vires"). In countries of Customs the partition was of no effect unless it was made among all the children and unless it affected all the property which the parents possessed at that time.¹ In countries of written law it was not necessary that the shares should be equal,² provided that the lawful share had not been affected in any way.³

§ 513. **Substitutions in Trust** ⁴ (**Entails**) signify a gift contained in a will or in a contract by which the donee (or "one encumbered") is charged with keeping the property which is transmitted to him and giving it up on his death to a third party who is "substituted for him" (to "the one called," "remainder-man"); the latter may in his turn be charged with keeping and giving up to another, and so on, when the substitution is "graduated" or has several degrees.⁵ Thus the grantor regulates the disposal of his inheritance during one or more generations; he disposes of it for the benefit of persons who will not have come into being at the time of his death; he creates a special "ordo successivus," which differs from the customary or legal devolution. These entails were most often made from male to male by way of primogeniture. These constitute a form of "**majorat**," that is to say, giving this last word its broad meaning, trusts which were perpetual and indivisible in favor of the eldest of the family, "major natu." They strengthened the right of primogeniture by keeping the family patrimony intact in spite of the misfortunes, the extravagance or the lack of skill of its head. This was one of the masterpieces of the old organization of the nobility; it has been maintained that England owes to it a part of her greatness; ⁶ in our day, in Germany, its suppression or its preservation is the subject of a lively controversy.

¹ The coparceners divided acquests made after the partition.

² In countries of Customs it is the same according to the customs of the reference legacy; but according to the customs of equality a fairly serious injury (one-sixth in Brittany) means that the act is annulled.

³ Right to the substitute of the legal share.

⁴ [As Brissaud points out in note 6 on "English Law," trust has been rather badly translated by "fidéicommis." The converse is also true in this translation, for the word "fidéicommis" has here been rendered "trust" for want of a better term. The term "entail" has here been used as the nearest equivalent of the ambiguous "substitution." — TRANSL.]

⁵ As to ordinary entails in the case of wards, cf. *Argou, loc. cit.* They are sometimes called *direct* ones as contrasted with the trust-entails which is called an *indirect* one. Substitution in grants to younger branches of a sovereign house, cf. *Pothier, "Fiefs,"* I, 1.

⁶ **English Law.** The history of entails is very complicated. Let us distinguish in this brief outline between the conditional fees of the common law, fees granted by virtue of the Statute "de Donis," and family arrangements

Entails in trust are not very frequently met with in France, nor elsewhere, before the twelfth century,¹ and for the reason,

or settlements which came into existence after the seventeenth century. — (A) Conditional fees were reserved for a certain class of the heirs of the donee (for example, the heirs of the body to the exclusion of the collaterals, the males to the exclusion of the females), upon failure of which class they reverted to the donor (or to his heirs). The grantees sought to prevent this reversion by alienating their fees as soon as a child was born to them, and by buying them back afterwards in order to make them capable of being transmitted to their heirs, whether direct or collateral. — (B) The second Statute of Westminster, 1285, "de donis conditionalibus," revived estates in fee tail (that is to say, limited), for example, in those that are granted with a clause that they shall only pass to the male children of the donee, and upon failure of his male children shall revert to the donor. By degrees entailed possessions were made free, but this scarcely took place before the time of Henry VIII: *Blackstone*, II, 7. Cf. *Pollock and Maitland*, II, 11 *et seq.* As to the reversion (return to the grantor) and the remainder ("remanere," reversion to third parties), *Lehr*, p. 310. — (C) At the beginning of the seventeenth century the patrimonial domain was found to be liable to be split up because the actual owner might alienate it or dispose of it by will; the right of primogeniture by itself was not sufficient to keep this domain intact. Then it was that the upper gentry devised family settlements, by the terms of which the heirs placed themselves in the same position as the one encumbered with an entail. Even to-day it is estimated that more than two-thirds of the soil is subject to this system, the formation of which Blackstone does not seem to have understood. It is true that neither the laws nor Parliament nor the courts were favorable to it; from a legal point of view entails were only lawful if they were for the life of one or more persons in being, together with the life of a person to be born, until that person attained the age of twenty-one years, which was about the same thing as though they were limited to a duration of eighty years; but the English aristocracy renewed these time limited estates in such a way as to make them in fact perpetual: *Boutmy*, "Dévelop. de la Const. en Anglet.," ed. 1898, p. 246. — (D) Cf. the system of *trusts*, — a word which has been rather badly translated by "fidéicommiss": property is intrusted to one person (trustee) in the interest of another ("cestuy que trust"): *Lehr*, p. 268; *Pollock and Maitland*, II, 226; *Pollock*, "Land Laws," 223; "France jud.," 1877-1878, p. 129.

¹ They are to be found in the South as early as the tenth century: *D. Vaissette*, see 255 (in 966); 891 (in 1121); 958 (in 1129); 1173 (in 1154); 1177 (in 1155), etc. Cf. *ibid.*, 237, 238, 241, etc.; "Liber Instr. memor.," p. 172 *et seq.* Sometimes it is forbidden to alienate before the age of twenty-five or thirty years, and sometimes the prohibition is absolute: "Petrus," I, 16; "Montpellier," 56; *Haenel*, "Dissens. domin.," p. 465; *Pasquier*, "Doc. rel. à Boussagues," 1901; Dig. X, 3, 26, 16, 18; *Gui Pape*, 103, 232 (bibl.); "Decis. capellæ tolos.," q. 454, 455; *Boerius*, "Dec.," 38, 147, 156; *Menochius*, "Præs.," 189 (testamentary executors called "fidéicommissarii"); see *Du Cange*; *Auffroy*, "Th.," 500; "Ass. de Jérus.," "Abrégé de la C. de Bourg.," c. 39. — Germany: similar clauses, — for example, if the donee dies without any issue, the property that he has received will go to such and such a person; prohibition to alienate to no matter whom, or to alienate excepting to such and such a person, etc. But frequently these grants are made "zu gesammter Hand" (jointly) with the exclusion of the cognates (examples as early as 1075, "Bair Akad. bist.," 14, 2, 78); the property is indivisible and inalienable; a "Ganerbschaft" is formed (literally co-heir, but really a community); *Schroeder*, 273; *Verdelot*, p. 27. In the fourteenth century the establishment of an order of succession makes its appearance. This is what preceded the family trust of the seventeenth century: *S. Meyer*, "Beitr. z. Gesch. d. Fideic. Subst.," 1878, and "Z. R. G.," XV, 131; *Stobbe*, *loc. cit.*; *Brunner*, "Grundz.," p. 210. *Pertile*, IV, 152, gives an instance of an entail at Bergamo dated 1076

undoubtedly, that until that time the interests of the family were protected by other means. At that time the spread of the Roman law and its trust "*familiæ relictum*" ("ne heres fundum alienaret et ut in familia relinqueret"),¹ and the admission of feudal primogeniture, gave to this institution its essential characteristics. But it had been in force for a long time before this. Without mentioning the family trust which was in use among the Anglo-Saxons in the eighth century,² in the Frankish countries it is not difficult to see in deeds the materials whose amalgamation later formed entails: reservations, and clauses of reversion making the property which was being disposed of inalienable, conferring of this property upon a person and his "*genealogia*," and a regulation of its disposal in case the grantee died without posterity; later on during the feudal period fiefs are conferred upon a certain class of the heirs of the vassal, and during his lifetime the latter cannot alienate the fief.³ With such precedents as this the genesis of entails becomes natural enough.⁴ These entails were a partial restoration, for the benefit of the nobility, of the old organization of the family.⁵ The more the old customs

(*Lupi*, II, 706); "*Stat. Venet.*," 4, 7. In Spain it is established that they existed in 1291.

¹ D., 35, 2, 54; 30, 114, 14, 15 (rescripts of Severus and Antoninus); "*Novella*," 159 (four degrees); *Girard*, pp. 282, 912 (on the trust in general); *Zacharie de Lingenthal*, § 53.

² *Brunner*, "*Zur Rechtsgesch. der Röm. u. Germ. Urkunde*," p. 190 (cited by *Kemble*, 147, 169, 299, 327; "*Ælfred*," 41); *Schroeder*, 285 (before the year 770 the gift of a count to his "*genealogia*"). See as to appanages, their reversion to the domain: *Maffert*, "*Thèse*," 1901.

³ "The fief is not a free piece of property; it is fettered from two points of view: for the benefit of the sovereign and for the benefit of the agnates of the vassal. From this last point of view it is similar to the trust"; *Guilhiermoz*, "*Nobl.*," 200; *Lagonelle*, "*Th.*," 1902.

⁴ As to the Spanish origin of entails, which was formerly generally admitted (see, for example, *Ferrière*), cf. *Pfaff and Hofmann*, *op. cit.*, p. 23. But there existed in Germany and Italy entails that were similar to the "*mayorazgos*" or Spanish estates in tail before the influence of Spain had begun to make itself felt. After the seventeenth century there was a great increase of family trusts in Spain, Laws of Toro, 1505; in Italy, Edict of July 16, 1648, of Charles Emmanuel II, etc.; "*Cost. Piemont.*," 1770, VI. In Germany cf. the Prussian "*Landrecht*" and the majority of the Codes of the last century. Cf. also on this subject, England.

⁵ **German Law.** The theory of family trusts became well established in the seventeenth century, and especially in the writings of *Knipschildt*. This author likens entailed property to "*Stammgüter*"; they were formed either by will or by contract (thus differing from the Roman trust); the devolution of the property takes place "*ex pacto et providentia majorum*." The restriction of entails to four degrees ("*Nov.*," 159) is not admitted; they are perpetual, for the object is to maintain the power of the family indefinitely. For this same reason property is ordinarily entailed for the benefit of the males and the eldest of the males (contrary to the Roman law). In time the "*Stammgüter*" and entailed property came to be distinguished; the latter

became altered, the more frequent became these entails, at least among those whose power depended upon them. They made the patrimony inheritable, indivisible, inalienable and incapable of being distrained upon, which was a striking return to the past; they only gave the head of the family a limited right of ownership, as was his status in the early times; his debts remained personal to him and did not encumber the property of which he had been the depositary, — another archaic rule; and, finally, at his death his property passed to heirs who were chosen independently of his wishes, and in former times this was also done in the same way. In the more modern law, at least in France, this conception little by little lost ground, and the legislation of the monarchic period rather looked upon entails with disfavor, seeing in them a “nursery for lawsuits,” and it modified to a certain extent the system of property affected by them.

The entail is not the result of the law or the Custom, but of a declaration of will, testament or contract; in Germany the approval of the sovereign or the law has been sometimes furthermore required. It especially affects immovables, although movables are found to be included in entails of general application; and in our day trusts of capital are sometimes created. The wishes of the grantor are often the determining factor in that which concerns the naming of the remainder-man; sometimes the entail is made for the benefit of the family of the person encumbered, and sometimes for the benefit of the member of the family whom the one encumbered shall choose;¹ most often the property is kept for the male agnates alone, and the trust estate is transmitted entirely according to the systems of *seniority* (for the benefit of the eldest of the family), of the “majorat” (“sensu stricto,” for the benefit of the oldest among the most nearly related with-

assumed a special grant; the former were established by the law or the Custom; the “Stammgüt” is alienable and can be distrained upon in certain cases; the entailed property cannot be (but this difference became less); the inheritance of the “Stammgüt” follows the common law and does not take place “ex pacto et providentia majorum.” The “Grundechte,” § 18, of the Parliament of Frankfort, in 1848, abolished trusts, but their decision did not have a very lasting effect. The existing Civil Code leaves to the local legislative bodies the care of regulating this matter. In 1895 there were in Prussia only about 2,000,000 “hectares” subject to trusts out of nearly 35,000,000 that are contained in the territory of this country: *Blondel*, “Popul. rurales de l’All.,” p. 435 (bibl.); *Régnier*, “Thèse,” 1900 (“Distinctions de Classes dans la Société Allemande actuelle”).

¹ *Brillon*, see *Ferrière*; *Vulson*, *op. cit.*; *Guyot*, see “Choix,” “Ord.” of 1735, 62 *et seq.*

out representation).¹ The remainder-man inherits "ex pacto et providentia majorum"; he does not take the inheritable property of the man encumbered, but that of the donor, which means that the acts of the man encumbered cannot on principle be set up against him. The man encumbered, or the actual titulary of the trust, has the full ownership of the property in trust (dominion and user);² he has the possession and the enjoyment; he is even authorized to change the cultivation, etc.; he exercises the honors and dignities attached to this property. It is only asked of him that he shall not compromise the rights of the remaindermen. Thus he must administer after the manner of a good father of a family, under penalty of having to pay damages. He cannot alienate the property in trust.³ If he does so, there are two possible solutions of the matter: either to let the alienation stand until his death or to consider him as being deprived of *his* rights and to allow the immediate vesting of the rights in remainder; this last solution would be more in conformity with the spirit of the institution, but it has not been conceded in France, under the pretext that it was sufficient in the interests of the family that the remainder-man could take the trust estate when the trust should vest for his benefit. One may ask if the consent of the remainder-men could validate the alienation; in fact, it is a very rare thing in the case of "graduated" trusts that all later in line can give their consent; in case this did happen the French jurisconsults decided that the alienation would be valid, although it would be possible to see in this a renunciation of future succession by the remainder-man. The remainder-man in tail has in fact a right of succession, an expectant estate, which may be compared to the reservation; if he should survive the one encumbered, he takes the trust property, and, just as an heir at law, he should be seised by operation of law; but the Ordinance of 1747 (40, 1) treats him as a legatee and compels him to ask for delivery at the hands of the one encumbered (or from his heirs). The latter restores the hereditary property, excepting a life share and the heir's quarter of the estate in countries of written law. During

¹ Sometimes it was customary to grant an appanage to the younger sons of the family whom the trust had disinherited: *Pertile*, IV, 156; *Maffert*, "Apanages," "Thèse," 1901.

² Controversy, cf. *Stobbe*, II, 562. See appanages. — As to the possessions of the stock, "Stammgüter," of the families of the higher nobility and the question of the juridical status of these families, cf. *Verdelot*, p. 109 *et seq.* (bibl.).

³ Cf., however, the trust "de eo quod supererit." — As to clauses of inalienability, cf. the Theses of *Besnus*, 1899; *Fourrier*, 1900; *Henrys*, V, 49.

the life of the man encumbered the next in line could at the most perform acts for preserving the inheritance; an inventory made previous to the entry upon the enjoyment of the estate by the one encumbered, the sale of movables affected by the trusts, would suffice ordinarily to protect the interests of the successor; if there was any waste which amounted to a destruction of buildings, the latter could have a bond furnished him or have himself put in possession. In case of an action being brought against the one encumbered which affected the property in trust, the judgment could only be set up against the remainder-man if the public ministry had intervened; and, again, the latter had the power to protect himself by means of the civil petition against proceedings in which he had not been a party.

Entails were justified during the monarchic period by two reasons: 1st. The interest of children and their posterity; the father and mother who had a son who was a spendthrift prevented him by means of an entail from ruining himself; the entail was then a sort of domestic conservator, without scandal, but also without surety.¹ 2d. The interest of the nobility; "in the great houses whose possessions consisted of lands, entails have become almost necessary because of the tremendous expenses forced upon the lords who have to uphold illustrious names and fill an occupation which is worthy of their birth"; they appear thus as being an indispensable complement of the right of primogeniture.²—But these results were only obtained at the price of great disadvantages, as long as entails could be perpetual and secret. *Perpetual*: the property under these was excluded from trade; and if only this mass of property was a great one, a serious obstacle to the development of public wealth resulted therefrom.³ *Secret*: under which the man encumbered passed for the absolute owner and because of this enjoyed a fictitious credit. His position was a snare which invited public confidence; very few resisted the temptation to abuse the

¹ "Lex si Furioso," Dig., 27, 10, 16. Cf. "Official Disinheriting," Ferrière, see "Subst."

² Verdelot, p. 247, analyzes the recent German writings for and against trusts. Cf. Petiet, "Thèse," 1901; Rey, "Noblesse," "Thèse," 1902.

³ Mahometan law: alongside of the "melk" ownership (similar to our individual ownership) there exists the "wakf" or "habous," a piece of property dedicated in perpetuity to some charitable work, a sort of endowment, but with this peculiarity, that it goes first of all into the hands of the intermediary grantees, who are designated by the grantor. This has been compared to entailed property: Lescure, "Th.," 1900 (bibl.); Dareste, "Nouv. Et.," 344.

good faith of third parties; if the old families kept their property, it was only with the shame of a bankruptcy in each generation. Guy Coquille (on "Niv.," 23, 10) deplores the fate of the defrauded creditors and abused sons-in-law, "who so often found the inheritance which they thought was very rich to be good-for-nothing."¹ The Old Régime had to remedy this evil: (a) the Ordinance of Orléans, 1560, 59, limited entails to two degrees, not including the first holder;² (b) various edicts or ordinances of the sixteenth century,³ especially the Ordinance of Moulins, 1566, Art. 57, provided for the publicity of entails; they had to be read in court and registered.⁴ But these laws were hardly effective; they were not in force in the provinces which had been newly added to France; certain of their provisions were disputed, for example, the one about the reckoning of degrees;⁵ the Parliaments of the South maintained entails to the fourth degree. Finally, it was decided — very late — to establish a uniform legislation in this matter; this was the work of the Ordinance of August, 1747, which did little more than codify the previously existing law to correct and settle the decisions, but which, without making much of an innovation, none the less rendered great services by cutting short a large number of litigations.⁶

Abolished by the Revolution out of hatred for feudalism (D. 25 Oct., 14 Nov., 1792)⁷ entails were also prohibited on principle by

¹ Provisions in the interest of creditors by Pope Clement VIII: *Pertile*, IV, 159.

² The "Ord." of 1650 only provided for the future; the "Ord." of Moulins, February, 1566, Article 57, limited to four degrees entails which had been created previous to it. Cf. the Edict of 1598 of Charles Emmanuel I for Piedmont. Maria Theresa restricted them to two degrees: *Pertile*, IV, 162.

Perpetual entails were still possible, provided letters patent had been obtained from the king, and even these letters were not necessary in the case of a peer's duchy. Edict of May, 1771, on peerages: *Thévenot*, p. 463.

³ 1539, 1553, 1566, 1690. Cf. *Isambert*, see Table; *Argou*, II, 14.

⁴ Provisions as to publication in Italy since 1491: *Pertile*, IV, 159. Cf. as to Germany, *Stobbe*, *op. cit.*

⁵ "Ord." of 1629, Art. 124 *et seq.*

⁶ *D'Aguiseau* did not think very well of entails: "The absolute abolition of all trusts," said he, "would perhaps be the best law of any . . . but I fear that in order to arrive at it, especially in the countries of written law, it would be necessary to begin by reforming the individuals; and this would be the work of a single individual, who himself would have need of being reformed." Letter of June 24, 1730. *Montaigne*, II, 8, rises up against entails limited to the male line, which "we take," says he, "too seriously, and by means of which we propose to give our names a ridiculous eternity." *Montesquieu*, "Espr. des Lois," V, 9. In the seventeenth century P. Navarretta and Diego de Saavedra also criticise entails: *Adami*, "Leggi. s. Manimorte," p. 13; *Flammer*, "Dr. civil de Genève," p. 20; *Fenet*, XII, 516.

⁷ *Sagnac*, p. 224. Cf. *Du Casse*, "Mém. du roi Joseph II," 299 (1856). —

the Civil Code, Art. 896, because of this motive and because of economic reasons¹ (the interest of agriculture, of credit, and of the circulation of property, etc.).²

Abolition in Tuscany in 1782: *Pertile*, IV, 162. — A few customs, "Norm.," "Auv.," "Niv.," already prohibited their being made by will: *Bretonnier*, *op. cit.*, *in fine*; "Code Civil interm.," see Table. The Romanists held them to be "odiosa" (Alciat, etc.).

¹ *Aron*, "N. R. H.," 1901, 586.

² *Previous legislation.* — (A) **Estates in tail** (Decree of March 30, 1806; Senate Decree of Oct. 14, 1806; March 1, 1808) for the benefit of the new nobility created by Napoleon. The possessions forming the endowment of the new titles were effected by perpetual entails and they were transmitted from male to male in order of primogeniture. They were forbidden for the future and practically abolished as to the past by the Laws of May 12, 1835, and May 7, 1749: *Rondonneau*, "Coll. des Lois Conc. des Maj.," 1808; *Desquiron*, "Comm. s. le Statut de 1808," 1809; *Merlin*, see "Maj."; *Valette*, "Rapp. s. Loi 1849." — (B) **Entails allowed.** The Civil Code itself permitted as an exception "officious" entails, provided that they did not create any inequalities between children (Art. 1048). Under the Restoration there was some question of re-establishing the right of primogeniture. The Law of May 17, 1826 (repealed in 1849) authorized entails for the benefit of one child.

TOPIC 7. RESERVATION AND LEGAL SHARE

§ 514. Barbarian Legislation.	§ 517. By what Right did one collect the Legal Share?
§ 515. Feudal and Customary Law.	§ 518. The Revolution and the Civil Code.
§ 516. The "Legal Share" ("légitime").	

§ 514. **Barbarian Legislation.** — The point of departure, at least for the present purpose, of the evolution of the Germanic law, is the inalienability of the family inheritance.¹ In time this was gotten away from in various ways. Among the Burgundians, the Alamans and the Bavarians, the father and the children lived in a community;² although the head of the family, the father could not alienate the possessions which were jointly owned;³ but he had the power to make a partition with his children;⁴ by

¹ Ficker denies this, and maintains that the freedom of alienation existed originally in the law, but that it was limited by customs at the outset and afterwards by legislation. The arguments on this point which he draws from the barbarian laws have been refuted, especially by Brunner. Cf. "L. Thur.," 54, and "Alam.," which are explained by "Bai.," I (the free man can dispose of his property for the benefit of anybody he chooses; but it is understood that this means provided the customary conditions are all fulfilled, — for example, that there has been a partition). Cf. the Capitulary of 818-819. — On this disputed question cf. a summing up of the various opinions in *Adler*, p. 3. To-day there is an ever increasing tendency to admit that the reservation is, like the law of succession itself, an outcome of the primitive family community; the "Gemeinschaftsrecht" becomes changed into "Wartrecht," into "Erbrecht." Danish law: cf. *Matzen*, "For. or. Danske Retshistorie," I, 19. Swedish law, cf. *Beauchet*, "N. R. H.," 1900, 601 (family ownership). Cf. Mahometan law, *Hanoteau*, "Kabylie," II; *Zeys*, "Le Nil."

² "Ganerbschaft" (cf. the German translation of the Capitulary of 818-819: "Coheres," meaning "geanervo"), "Hausgenossenschaft," "Gemeinderschaft," etc.: "Burg.," I, 24, 51; "Bai.," I; *Schmoller*, "Die ält. Arbeitsgenossenschaften u. d. ält. agrarische Familienwirthschaft" ("Jahrb. f. Gesetzgeb.," 1890); *Miaskowski*, "Problem des Grundbesitzvertheilung," 1890.

³ There is unity of joint ownership, "zu gesamnter Hand," that is to say, all the members of the community must participate, at least in the alienation of the immovables. Details and bibl. in *Verdelot*, "Thèse," p. 15 *et seq.* After the death of the father the community does not cease; sometimes there take place "Mutschierungen" or partitions in fact of the usufruct between the members of the community without its unity being broken. Cf. partitions of the kingdom under the Merovingians and the Carolingians (the same title, "Rex Francorum" for each king; increase; reckoning of the years of the reign dating from the accession, even with regard to shares which had increased, etc.). Cf. also descent, appanage, and collective investiture of fiefs. As to the maxim, "Was in der Were verstirbt, das erbt wieder an die Were," *Freund*, 1880, cf. *Chaisemartin*, p. 445; *Grimm*, 556, 602.

⁴ The Law of the Burgundians does not say that children can compel their father to partition; it is otherwise in the "Schwabenspiegel," I, 59; *Heusler*, I, 240; II, 439. Must we assume that during the period of the barbarian laws the male children and those who had attained their majority had not

this means he acquired the right of disposing of his share.¹ Perhaps, even, it was not rare in such a case as this for the near relatives to be asked to approve of the alienation,² as was the case among the Saxons, who at the period when their law was drawn up do not seem to have had any family communities.³ Among the Franks⁴ and elsewhere both the Saxon custom of the consent of the relatives living out of the community, and the communities of near relatives living under the same roof,⁵ are once more to be found. Under the influence of religious ideas⁶ these very old rules were not conformed with; one might even think that they were entirely abandoned, for one reads at the head of Chapter 6 of the Capitulary of 818, 819, "Ut omnis homo liber⁷ potestatem habeat, ubicumque voluerit, res suas dare pro salute animæ suæ." Practically, this formula means that if the grantor lives in a community he will nevertheless be able to make a grant for the benefit of the Church; the public authority (the count or "missus") would force the recalcitrant members of the community to partition with

only the right to demand their share of the common patrimony in case of a partition, but also the right to compel their father to make a partition? This no doubt depends upon what period we are considering. Capitulary of 818-819, c. 6; "Z. S. S., G. A.," 1895, 229.

¹ "Todtheilung" (partition), "Watschar" (portion).

² Cf. especially the analysis of Bavarian deeds in *Adler op. cit.* Those in which the relatives are mentioned are almost as numerous as those in which they do not play a part. Their absence may be because the grantor is the last of his family; he has no posterity, no relatives. Their intervention is to be accounted for by the existence of a community, or, if it has been dissolved, by the necessity of establishing the fact that they have been given their share; the Customs, which are more strict than the law, taking into account family solidarity, widen the circle of the relatives: "propinqui consenserunt, ego, fratres et proximi tradiderunt convocata parentum turba," etc. In 770, Poapo, "vir nobilis," calls together his relatives and submits to them a difference which he has with his sons on the subject of a gift which he wishes to make to a church (perhaps this deals with a special custom peculiar to the nobility).

³ As to the Saxon law and the "Beispruchsrecht," cf. § 339, *supra*, and notes.

⁴ *Pardessus*, "Dipl.," no. 559; "Sal. em.," 14, 11; Capitulary of 805, 22; 820, 3; 816, 5; 818, 819, 11 and 6 (I, 125, 292, 267, 283). Cf. *Brunner, op. cit.*; *Kohler*, p. 234 (various texts). According to *Ficker*, IV, 204, 372, if there were no reservation ("Wartrecht") among the Salians the mother's "dos" was appropriated for the children; to the contrary, *Brunner, op. cit.*—Cf. "L. Rib.," 48, 49.

⁵ "Roth.," 167; see *Grimoald*, etc.; *Thévenin*, no. 79.

⁶ Citations of the Fathers of the Church in *Loening*, "D. Kirchenr.," I, 220; II, 38, 685. Salvien advises the faithful to give all their possessions for the salvation of their souls and not to trouble about their relatives ("nemo conjunctior quam vos ipsi"). Others, more scrupulous, do not wish the family to be stripped. St. Augustine prescribes that the Church should be accounted as one more child. *Rozière*, "Form.," 175: Gifts "ad loca sanctorum" (preambles).

⁷ The man who is not free cannot alienate to any one outside of the domain.

the Church benefiting as the grantee, or, if partition was impossible for the time being, the Church would enter temporarily into the community, in order to exercise therein the rights of the grantor.¹ Already, the law of the Burgundians, Title 1, authorized the father to make a grant before any partition, which was contrary to the old rule;² this old rule only remained in force with regard to a certain category of possessions, the share of the Burgundian tenant in the partition of lands with the Gallo-Roman owner ("terra sortis titulo adquisita"). Furthermore, the law of the Saxons dispensed with the consent of the relatives to alienations for the benefit of the Church and the king. In specially conceding the privilege of the Church,³ the barbarian legislation is far from freedom of alienation. Sometimes this was only permitted with the approval of near relatives,⁴ sometimes the head of the family was only free to make a grant of a portion of the inheritance which he administered,⁵ either of the share of one child — and then the quantity which could be disposed of varied⁶ — or of a fixed quantity, one-fifth among the Visigoths,⁷ one-third among the Salian

¹ For example, as long as the children are minors, *cf.* "Sal.," 73; *Schroeder*, pp. 264, 320; *Adler*, "Ehel. Güterr.," 1893 (*cf.* "Z. S. S., G. A.," 1895, 229).

² The father who could not alienate before he had made a partition with his sons (Tit. 24-51), acquired through a later law (amendment of Tit. 1) the right to dispose of his property before the partition: *Brunner*, *op. cit.* To the contrary, *Ficker*, I, 272. If one of the children died before his father his share would revert to his father (Tit. 51, 2), who once more became its owner, but without the power of alienating it; thus his other sons would have a sort of reservation over this share. Tit. 78 changes the limited ownership of the father into a mere enjoyment and gives the bare ownership to the brothers; if one of them should die before the father his children would succeed to his property, whereas, according to Tit. 51, they would not have been able to compete with their uncles.

³ *Cf.* p. 437, note 3. Protestations against the not very scrupulous clericals who stripped families (Capitularies). The feudal system resulted in forbidding on principle the disposing of immovables for the benefit of "mainforte" or of "mainmorte" ("nec militi, nec clerico"). As to this prohibition and the means used to evade it, *cf.* § 515; *Agen*, 25.

⁴ *Cf.*, however, the formulæ stating that each one can dispose of his possessions: "Andec.," 36, 45; *Rozière*, 131, 205.

⁵ The portion reserved to the son is called the "Falcidia": *Lindenbrog*, 72; see *Du Cange*; *Zanetti*, "Legge Romana reticacoirese," p. 120.

⁶ The father who has two sons can dispose of one-third of his possessions; the one who has three, of one-fourth, etc. Lombards: *Pertile*, IV, 104; "Roth.," 154-171; "Liut.," 65, 101-113, "Aist.," 1-13; "Areg.," 14. According to *Pappenheim*, "Z. S. S., G. A.," 1901, 389, the hereditary share of the children and of the father must have been absolutely incapable of being disposed of during the time of Rotharis (*Contra*, *Ficker*, II, 356); it is only in the eighteenth century, perhaps as a consequence of "Liut.," 113, that it became divided into a disposable portion and the reservation: *Brunner*, "Reg. farf.," p. 10 ("Mitth. d. Inst. f. oest. Gesch.," II, 1). As to the rights of daughters, *cf.* *Brunner*, "Z. S. S., G. A.," 21, 6.

⁷ Quantity which appears at first in a retouch by *Leovigild* of an "Antiqua,"

Franks, and one-half among the Burgundians.¹ In this last case the reservation is only mentioned as being for the benefit of the descendants.² We have already seen that disinheriting is very exceptional.³ Gifts were sometimes for the benefit of the Church or third parties, and sometimes for the spouse of the one making the grant, or for one of his children, or one of his heirs. For each one of these grantees a special rule, due to favor or distrust, was conceived of; but the incoherent provisions of the barbarian laws hardly enable one to make out their growth excepting in that which concerns the Church and the spouse. To judge from them according to their general spirit, they must rather have tolerated reference-legacies or special advancements ("melioratio") to one of the children than gifts to strangers of such a nature as to strip the family. But the spirit of equality already made itself felt and was sometimes in conflict with this result.⁴ Among the Burgundians, the Alamans and the Bavarians, third parties and children were placed upon the same footing. Among the Ripuarians it was forbidden to give one of the children more than twelve sous outside of his share, and the Salians do not seem to have known any reference-legacy other than the gift made to a daughter upon the day of her wedding, or to a son the day when his hair was cut for the first time. Among the Visigoths the amount which could be disposed of for the benefit of children,

5, 2, 4, *cf.* 5, 2, 5, and "Cod. Euric," 319, and which *Chindaswind* generalizes, 4, 5, 1 and 2, in abrogating an old law of Euric which we do not possess, and which had introduced the freedom of alienation among the Visigoths (in what terms? Disinheritance "pro levi culpa" was not permitted formerly); the innovation of Euric can scarcely be accounted for, excepting by the influence of the Roman law or of the Church: *Brunner, loc. cit.*; *Ficker*, IV, 104; *Zeumer*, "N. Arch.," 26, 139. The reservation is first of all conferred upon the children out of the property given by the husband to the wife (*Leovigild*), and then out of the "dos" (*Chindaswind*), and finally out of all the property excepting the acquests made during the marriage, the booty of war and royal gifts ("Wis.," 4, 2, 16; 145, 2, 2; *Euric*, 305). *Erwig* only makes the reservation affect the husband's personal belongings (4, 5, 1, *cf.* 2, 1, 6; 3, 1, 9).

¹ *Arg.*, "Form. Andec.," 58. The marriage portion among the Salians is one-third: "T. A. C., Norm.," 89; "T. A. C., Bret.," 41; "Compil. de us. Andeg.," 43; *Ficker*, IV, 382, 394.—*Cf.* § 490, *supra* (the share of the dead; division of the patrimony into three parts,—one for the dead, another for the widow, and a third for the children); *Dareste*, "Nouv. Et.," 304; "Burg.," 51, 1; 53, 2; 75; *Ficker*, II, 123.

² Communities among brothers are, however, not a rare thing. On the hereditary rights of the father and mother *cf.* "Z. S. S.," 1901, "G. A.," 374.

³ "Wis.," 4, 5, 1; "Alam.," 1; "Sax.," 82; "Roth.," 166; "Liut.," 5, 19, 57; "Z. S. S.," 1901, "G. A.," 385; *Anség.*, II, 31; "F. Capit.," III, 326. *Cf.* "Schwabenspiegel," ed. *Matile*, VIII, 28 ("a man makes his son a monk").

⁴ *Cf.* "Cod. Théod.," 3, 8, 2: right of favoring one child in the case of a second marriage. *Majorien* abolishes it ("Nov.," 6, 8); *Severus*, I, 1, *id.*

which was one-tenth (instead of one-fifth as for third parties), was increased by Erwig¹ to one-third of the possessions.

§ 515. **Feudal and Customary Law.** — Out of these precedents² there arose³ the **Customary reservation**,⁴ a new and a little less powerful form of the right of relatives. This is to gratuitous alienations what the repurchase by a person of the same lineage is to alienations for a consideration. Like the latter, it is re-

¹ "Wis.," 4, 5, 1 and 2, 18; "Rib.," 59, 9. Cf. "Sal.," 100 (ed. *Hessels*); *Geffcken*, p. 253, bibl.; *Schroeder*, p. 319; "Burg.," 1 and 86. Among the Bavarians, *Adler*, p. 121; *Marculfe*, 2, 12, 14. Among the Lombards cf. "Liut.," 101, 113; *Pertile*, IV, 129, 104. — The *Roz.* formulæ, 166 *et seq.*, contemplated gifts by reference legacy ("absque consortium") for the benefit of one son or grandson (reference to the "L. Rom. Wis.," 2, 24, 1, int.). — As to illegitimate children see *Rozière*, "Form.," 130; *Brunner*, "Grundz.," p. 200.

² In many places the old usages persisted: "A. C., Artois," 23, 1 (alienation at the pleasure of the heir); 1509, Art. 50; 1544, Arts. 76, 77; "Boulenois, A. C.," 73; "N. C.," 124; "Reims," 1481, Art. 54, 106; "Bayonne," 70; "Béarn," 1552; cf. ed. *Mazure*, Art. 178; *Labourt*, 5, 1; *Soule*, 17, 1; 26, 4; *Kohler*, *loc. cit.*; *Britz*, p. 724 (at Valenciennes one gave up the seisin to a fictitious grantee). The "Coutume de Lille" and a few others only allowed of the disposal of income and personal belongings. — Prohibition of disposing of immovables by will, *Glanville*, 7, 5, 4; cf. "T. A. C., Norm.," 57, 4 *et seq.* — Disfavor with which wills were looked upon by our old juriconsults of the seventeenth and eighteenth centuries (proceedings to which they give rise, arbitrary character of their provisions); *Domat*, "Loix civ.," 4, 8; *Le Brun*, "Succ.," — "There is always a complaint as to wills, and never as to successions"; *Meaupou*: "I should desire to do away with wills and entails"; *Flammermont*, "Le Chanc. Meaupou," p. 618.

³ The origin of the reservation is neither in the Roman law nor in the Feudal law. Cf., however, *Glasson*, VII, 555. But it is from the feudal system of ownership that the prohibition of alienating to persons "de mainmorte" or "de mainforte" is derived ("nec militi, nec clerico, nec domni religionis," *D. Vaissette*, V, 891), which prohibition is an important restriction upon the right of disposal, looked upon in the eighteenth century as established in the interest of the State and in that of the family. Cf. the preamble of the Edict of August, 1749 (prohibition of provisions of last will for the benefit of persons in "mortmain," necessity for the authorization by letters patent of acquisitions for a consideration; the ratification of Parliament is sufficient for pious or charitable foundations (masses or obituaries, charity schools, etc.). Cf. Civil Code, 910 (administrative reservation): "T. A. C., Norm.," 57; *Adami*, "Racc. d. Leggi s. le manimorte"; *Britz*, 519; *Tissier*, "Tr. des Dons et Legs aux Etabliss. publics," 1896. Theses: especially *Coulondre*, 1886; *Pitois*, 1890; *G. de Lapradelle*, 1895. Cf. frequent allusions in the Customs to the consideration of piety or pity. — As to the restrictions upon alienation in the interest of the feudal lord, cf. *Auffroy*, pp. 461, 527, 615, 663. Indivisibility of fiefs, cf. *J. d'Idelin*, c. 144 *et seq.*; "Gr. Cout. de Norm.," 36; *Guilhiermoz*, "Orig. de la Nobl.," p. 200; *Maffert*, "Apanages," "Thèse," 1900; *Lagouelle*, "Thèse," 1902, p. 227 (Normandy).

⁴ *Customary reservations*, allusion to the divergencies in the Customs of *customary legal share* (*Pothier*, "Don. entre vifs," no. 245), as contrasted with the *legal share of the law* (Roman). *Legal share of compassion* for the benefit of younger children when all the father's possessions are encumbered with an entail for the benefit of the eldest: "Novella," 39, 1; *Boissonade*, p. 314 (bibl.). German law: "Pflichttheil," legal share; "Notherben," necessary heirs. Russia: indisposability even by gift of the patrimonial possessions: *Lehr*, "Dr. Civ. Russe," II, 44.

stricted to personal belongings; movables and acquests having been left to the free disposition of individuals,¹ contrary to the old law. It allows relatives of the same lineage to keep the personal belongings which have been disposed of by will² in excess of a certain quantity. It should also, it seems, have authorized them to reclaim possessions of this same nature which had been given "inter vivos"; but, although quite a number of Customs adopted this solution,³ it was rejected by the common law, undoubtedly because gifts — and especially with regard to the impediments with which they were surrounded — seemed less to be feared than did legacies.⁴ The amount of the reservation, that is to say, of the portion of the intestate succession which could not be disposed of by will to the prejudice of the heirs, and which is *reserved* for the latter, varied according to the Customs.⁵ From the thir-

¹ Cf. *Champeaux*, "Gr. Encyclop.," see "Réserve"; *Loysel*, 305; *Beaumanoir*, 12, 3; "Justice," 12, 3, 1 (p. 224); "Cartul de Notre-Dame," no. 177; *Desmares*, 149; "Cout. Not.," 7; "Paris," 292; *Ferrière* on this article; "Confér. des Cout. de Guénois," fo. 682. — Customs in which the reservation affects both personal belongings and acquests: (a) because of a survival of the old law, "Norm.," 418; "Metz," 8, 7; (b) as a consequence of the tendency to confuse the reservation with the legal share: "Bourg.," VII. Customs called those of subrogation, in which, if there are no personal belongings, the reservation affects movables and acquests: "Bret.," 203; "Anjou," 340; "Maine," 352; "Touraine," 238; "Poitou," 181 *et seq.*; "Sens," 68, etc.; *Kohler*, p. 256; *R. de Lacombe*, see "Réserve."

² Gifts by way of reference legacy are hard to reconcile with a system of family joint ownership such as the one that served as a basis for the reservation. On the other hand, they can without difficulty be applied to acquests and movables, and it is especially with regard to these that the legal share must have been introduced. The general tendency of the Customs is to prohibit these gifts, but certain of the Customs authorize them. *P. de Fontaines*, 23, 10, 11, 14, with regard to the legal share allows a child to be left the same that could be left to a stranger. *Beaumanoir*, 12, 3; 14, 13, 15; 70, 5: the father cannot leave more to one child than to another; however, he may give one of them the power of disposing of the movables and acquests: "Olim," II, 807 (no. 170); "T. A. C., Norm.," 10; "Summa Norm.," 35; "Et. de Norm.," pp. 9, 11, 79; "Gr. Cout.," pp. 365, 369, 372; *J. d'Ibelin*, 144, 146, 152; 27, 29; "Clef des Assises," 191 *et seq.*; "C. des Bourg.," 192; "Guénois," fo. 702; *D'Espinay*, "Féod. et Dr. civ.," p. 305; *Boissonnade*, p. 231; *Albert*, p. 513; *Van de Walle*, "Thèse," 1903, p. 161 (Flanders). — *F. de Daroca, Muñoz*, 542.

³ Sometimes by adhering to the Germanic tradition, and sometimes by applying the Roman theory of the legal share. "Blois," 166 ("formerly it was allowable to make a gift 'inter vivos' of all possessions, which custom seemed to be too harsh"); *Kohler*, p. 253 *et seq.* As to the rule, "To give and to withhold is invalid," see texts in *Kohler*, p. 261. Gifts made upon one's deathbed were frequently likened to dispositions of last will, *ibid.*; *Loysel*, 666; "Gr. Cout.," p. 364; "Paris," 277, etc.

⁴ *Glanville*, VII, 1 (prohibition of gifts "in extremis"; "Norm.," 427; *Blackstone*, French translation, III, 327 (heirlooms).

⁵ Importance of the reservation of two-thirds (partition into thirds): "Et. de St. Louis," I, 10, 68; "Touraine," "Anjou," "Maine," "Troyes," etc.; "Bord.," 57 *et seq.* — One-half, "Reims," 1481, Arts. 78, 95; "Laon," 60,

teenth century it is usually **four-fifths** of the personal belongings;¹ only one-fifth may be bequeathed, whatever the number and quality of the heirs who survive.² It is necessary to go back to the time of the death³ in order to see whether the reservation has been impaired or not, and then proceed, if there is occasion to do so, to the curtailment of excessive donations.⁴ The heirs to the personal belongings⁵ (that is to say, the relatives called to the intestate succession) alone have the right, but only upon condition that they have neither renounced nor been excluded,⁶ for the reservation is nothing but the intestate succession less the dis-

etc. — Three-quarters, "Lorraine," 11, 13; "Sedan," etc. — Sometimes there is a distinction made between fiefs and villein tenures: "Noyon," 17, etc. — No reservation, "Luxembourg," 1623, X, 1; "Douai," "Orchies," etc.; *Kohler*, p. 250; *Britz*, p. 725; *Brocher*, 206. — Portugal: the amount which can be disposed of consists of one-fifth of the personal belongings and one-third of the acquets (thirteenth century); and later on of one-third of all the possessions (sixteenth century); *Jordao*, "R. h. Dr.," 1857, 500. Spain, cf. "L. Wis.," Sicily, one-third: *Brünneck*, II, 95.

¹ *P. de Fontaines*, 33, 12, 15; *Beaumanoir*, 12, 3, 5, 6, 17, 18; 44, 55; 14, 15, 31; 70, 5; "Jostice," 12, 3, 1; *Desmares*, 70, 149, 237; "Cout. Not.," VII, 143; "Gr. Cout.," II, 20; "Olim," III, 2, 1010; "A. C., Picardie," 73; "Amiens, A. C.," 4: "An inheritance can only be divided into fifths once," — that is to say that the fifth part can only be given once so long as the inheritance stays in the same family; cf. 1507, 1 and 4; 1567, 46, 57; *Viollot*, "Et. de St. Louis," I, 128 (in 1244). — This system of the **conferred fifth**, which is that of the Ile-de-France and of Orléans, prevailed perhaps because, with its disposable quantity, which did not vary and was not very great, it was more like the old law and at the same time satisfied the new needs that were responsible for the success of the legal share. — *Loysel*, 306; "Valois," 85; *Beaumanoir*, 12, 6; *Auffroy*, p. 619. — Variations in *Boissonade*, p. 258; *Albert*, p. 513. — *Muñoz*, 509; one-fifth for the eldest.

² However, certain Customs drew a distinction according to whether there were or were not children: "Norm.," 414-428; cf. 392; "Eure," 104 *et seq.*; "Maine," 332 *et seq.*; "Anjou," 321 *et seq.*; "Touraine," 233 *et seq.* — On the Norman system of partition by thirds: "T. A. C., Bret.," 206; *Glanville*, VII, 5; *Brünneck*, "Siciliens Stadtr.," II, 6. — *Loysel*, 158: "The proper dower for children is a customary legal share"; *post*, "Dower."

³ For example, to ascertain whether there are or are not children. — *Loysel*, 329: the personal belongings included in the reservation are free and clear of debts; but the "Cout. de Paris," 295, prescribes that the debts shall be paid out of all the possessions, without any distinction.

⁴ The action for curtailment is a real action, for the personal belonging is looked upon as not having left the patrimony of the deceased. The donee would thus not have the power to pay off in money the heir entitled to the reservation in order to keep the immovable. Some Customs only give the person entitled to the reservation a personal right: "Audenarde," 20, 9; "Termonde," 18; "Furdes," 20, 8; *Ferrière*, see "Retranchement."

⁵ (Customs of the stock, etc.). The testator should leave four-fifths of the paternal personal belongings to the paternal relatives and four-fifths of the maternal personal belongings to the maternal relatives.

⁶ *Beaumanoir*, 12, 17: disinheritance does not make one lose the four-fifths of the personal belongings. As to the daughter who lives "luxuriose," "T. A. C., Norm.," 10, or the son who marries without the consent of his father, see *Pertile*, IV, 109; "Usat. Barchin.," 77, 78.

posable quantity.¹ If there are no heirs there is no reservation.² Thus the fate of a particular legacy made in a particular will would depend upon divers circumstances, — variations in what goes to make up the inheritance itself, the existence of heirs, and the ability of the latter to collect the inheritance. The right of those for whom the reservation is made is thus dependent upon events, but it cannot be taken away from them by the deceased, and thus it appears as a survival of the family joint ownership.

§ 516. **The Legal Share** ³ ("légitime"), in use among the Gallo-Romans ⁴ and in countries of written law, ⁵ is a Roman institution

¹ It may be encumbered with an entail (*Laurière*, on *Loyse*, 341); this would not be so with regard to the legal share: *Benedicti*, "Rep. in c. Rayn.," II.

² The most distant collateral has a right to the reservation, but the Treasury has not: "Gr. Cout.," II, 40; "Et. de St. Louis," I, 68.

³ This is the "quarta legitimæ partis" of the Roman law. *Girard*, p. 856 (an amount left to the estimation of the judge originally, and later fixed in imitation of the heir's fourth of that which the heir would have had if there had been an intestacy). As to this amount in the Justinian law *cf. post*.

The heir's fourths ("quarte Falcidie," or the "quarte trebellianique") which the appointed heir could keep, — the former out of legacies, the other out of trusts, — were not admitted in countries of Customs, where the appointment of the heir did not take place. In countries of written law they were applied; better still, the appointed heir, when he was entitled to the legal share, could add to it one of these fourths, excepting if the testator had forbidden it: "Nov.," 1, 2, 3; "Auth., Sed cum test.," *Faber*, "Inst.," fo. 69; *Pasquier*, "Docum. s. Boussagues," p. 29 (in 1334); Dig. X, 3, 26, 16 and 18; *Masuer*, XXXII; *Pasquier*, "Inst.," p. 459; "Ord." of 1735, 56-60. Jurisprudence was hostile to this, excepting in Bordeaux: see *Ferrière*, *Brité*, p. 733; *Brünneck*, p. 99; *Lattes*, p. 265 (bibl.); "Siete Part.," VI, 11.

⁴ The legal share is often incorrectly called "Falcidia": *Paul*, 4, 5, 2, 3; 3, 11; "Cod. Théod.," 5, 1, 4; 2, 19, 1 *et seq.*; "L. Rom. Cur.," 8, 5, etc.; "Nov. Th.," 11, 1, 6; *Papien*, 10, 4; 31, 2; 45, 2, 7; *Zeumer*, "Z. S. S. G. A.," IX, 26; *Stouff*, "N. R. H.," 1887, 273 ("Falcidia" in sales). On the Edict of Theodosius, 33, *cf. Auffroy*, p. 102. The "Papien," 45, 6, refuses to give the "querela inoff. test." to brothers (*cf.* "Cod. Théod.," 2, 19, 1). In the formulae and deeds the "Falcidia" is reserved to the heirs: *Marculfe*, II, 17; *Lindenbr.*, 72; "Touraine," 17; "Andec.," 41; Will of Widerad, 721; of Abbo, 739 ("Falcidie" to a first cousin), etc. Frequently, however, in the preamble of a will there is a statement of the right to dispose freely for the benefit of the Church, of one of the relatives, or of third parties: "Andec.," 37, etc. *Cf.* the barbarian law (father and son coparceners). The "Brachyl.," II, 23, 24, and the "Petrus," I, 12, 18, repeat the system of Justinian in his "Nov.," 18 and 115: the "Falcidie" includes one-third of all the possessions of the ascendants if there are four descendants at least, or one-half if there are more; the ascendants have a fourth; the person entitled to the legal share may be deprived even of his fourth by disinheriting him in those cases provided for by the law. The "Petrus" does not speak of a fourth share for the benefit of the brothers. It does not require that this should be left "jure institutionis." — Italy: *Crespo de Valdaura*, "Obs.," 24 (does not exist in Aragon).

⁵ *Cf.* Romanists, such as *J. Faber*, etc.; *Serres*, II, 17; *Jubien*, "Com. s. les Statuts de Prov.," I, 483; *Henrys*, "Œuvres," see Table; *R. de Lacombe* (bibl.); *Roussilhe*, *op. cit.* — Variations in the Customs of the South. The "querela inoff. test." and the action supplementary to the legal share ("Cod. Théod.," 2, 19, 4; "Cod. Just.," "de inoff. test.," 30) are both admitted. "Bourg.," 1459, 7, 3 (the legal share should be left as a part of the right of

unknown to the Germanic law and to the very old Customary law.¹ It was introduced in the countries of Customs towards the middle of the thirteenth century,² to be made use of in cases where, the deceased having few personal belongings or having none at all, the reservation was nothing or else was insignificant. By giving "by devise all his possessions to strangers and nothing at all to his children," if the latter are poor and if the testator has nothing to reproach them with, he is lacking in the "officium pietatis," in his duty to support them.³ "One should assist one's heirs because of compassion." But it was not necessary in order to do this to annul the will entirely;⁴ they limited themselves to revoking it in

the appointment of the heir under penalty of annulling the will). Cf. "L. Rom. Burg," 45. On the contrary, the "Cout. de Bergerac," 1322, only admits the supplementary action: *Serres*, II, 18; "Bayonne," 11, 9; "Bord N. C.," 57, 63, 75; *Guyot*, "Prétérition."—Restrictions with regard to daughters who have received a marriage portion and who have not always a right to their legal share: *Jarriand*, p. 254; *Auffroy*, p. 665.—Appointment for a small sum: "Montpellier," 55. (the children must be contented with this). "Toulouse," 123, a, b, c, d, ed. *Tardif*: the mother can disinherit her children, the father must leave them at least 5 sous (in order to show that he has not forgotten them): *Tardif*, "Dr. Privé au XIII^e s." p. 68 (error); *Labourg*, XI, 3; *Sole*, 26, 3; "Metz," 8, 8; *Henrys*, 5, 4, 41; "Dec. Cap. Tolos.," 438. "Biscaye": a tree, a "real," or a tile.—Some Customs of the South organize a true reservation: "Bord. A. C.," 59, 94, 145; "N. R. H.," 1890, 400.—Italy (*Pertile*, IV, 105): the Customs often do away with the legal share ("Aoste," V, 9, 53: "In this country there is no form or image of the legal share"); but they do not allow the sons to be left out, and the mother cannot take from them; in Venice the legal share consists of one-third of the possessions.

¹ *P. de Fontaines*, 34, 10: "It would be too cruel and inhuman for anybody to say that a father could give all his chattels, movables and jointly acquired property to any one of his children that he wished . . . this would be contrary to the written laws." Here one sees at once the imprint of the Roman system. Cf. also *Beaumanoir* loc. cit. At Liège a customary third part, *Britz*, p. 726. Cf. also *P. de Fontaines*, 34, 1 et seq. The legal share was all the more necessary for the younger children because the right of primogeniture left them with very little. *Boissonnade*, p. 307.—Cf. "Cout. Not.," "Et. de St. Louis," I, 10.

² *P. de Fontaines*, 34, 30; *Beaumanoir*, 12, 17 et seq., 37; 70, 5; "Jostice," p. 225; "Gr. Cout.," II, 40 (p. 364); "L. d. Dr.," no. 931; *Boutaric*, I, 103, and *Charondas'* notes (Order of 1558, 1583, etc.); "A. C., Paris," silent; "N. C.," 298 (one-half of the hereditary share of each child); *Dumoulin*, "Cons.," 29, 35; *Laurière*, *Ferrière*, on "Paris," 298; *de Guénols*, "Conf. des Cout.," *ibid.*; *Kohler*, p. 272; see *Guyot*, *R. de Lacombe*; *Pothier*, "Don. entre viifs," 212.—Cf. the dower of children; see *Guyot*, § II; "Normandie," 399 (customary third, fitting marriage).

³ *P. de Fontaines* loc. cit.; *Ricard*, "Don.," no. 1463.

⁴ *P. de Fontaines*, 34, 10; *Beaumanoir*, 12, 20. Cf. "querela inoff. test." at Rome, *Girard*, p. 857; and in countries of written law annulment of the will in case the persons entitled to the legal share are passed over. "Ord." of 1735, 51 et seq. In countries of Customs the person entitled to the legal share has never any right to anything excepting his legal share. Cf., however, provisions "ab irato." As to Germany, see *Stobbe*, V, 238.—Jurisprudence, at least after the sixteenth century, had no difficulty in admitting of actions for the annulment of wills for the benefit of the heirs because of

part for the benefit of "needy near relatives," that is to say, descendants and ascendants,¹ or even in the sixteenth century descendants alone.² They were given a *right to maintenance* affecting the movables and acquests, and this right, which was not very exact at first, became fixed after the manner of the Roman legal share. The judge determined the amount (during the period of Beaumanoir) in such a way that the "heirs could live reasonably and have their maintenance according to their condition in life."³ Differing in this from the reservation, which tends to keep the possessions in the family, the legal share is to be accounted for by the duty between near relatives of mutual assistance; it is the supreme accomplishment of the obligation to support.⁴ In the fourteenth century the amount seems to be fixed by custom at half of the movables and property acquired jointly, at least if one is to believe the "Grand Coutumier de France";⁵ this figure is found once more in the sixteenth century in the Custom of Paris.⁶ If the legal share was impaired, the reduction affected gifts⁷ as well as legacies, so as better to assure maintenance to the one who had a right to it. Conversely, the right to the legal share only existed

undue influence or suggestion, by connecting them with the Roman law: *M. Bernard*, "Obs. de Droit," p. 593; see *Ferrière*, *Guyot*; *Domat*, 3, 1, 5, 25; *Pothier*, "Don. test.," no. 96; *Furgole*, "Test.," 5, 3. "Ord." of Aug., 1735, Art. 47. As the Civil Code is silent on this subject, a will could only be annulled to-day for obvious fraud.

¹ *P. de Fontaines*, 34, 11; *Beaumanoir*, 12, 20. Cf. exclusion of ascendants from fiefs and personal belongings: *Glasson*, "Inst. Anglet.," II, 275.

² "Paris," 298; Declaration of Feb., 1731, 34 *et seq.*; see *Ferrière* (bibl.). In countries of written law there is a legal share for the benefit of ascendants (one-third) and even for the benefit of brothers and sisters if the deceased has appointed as heir a "persona turpis." Special jurisprudence of the Parliament of Toulouse, *ibid.*, *Argou*, II, 13; *Boissonade*, 288.

³ *Beaumanoir*, 12, 37; 70, 5. Elsewhere it is suggested that the stranger be given the same share as the child, *Beaumanoir*, 12, 19; *P. de Fontaines*, 34, 10.

⁴ The **obligation to support** existing between relatives is connected with the Roman law by our old authors (see *Ferrière*, bibl.); "Tract. univ. jur.," VIII; *Surdus*, "De Alimentis"; *Ferraris*, "Bibl. Canon.," see "Alim." Also Romanists, such as *Vocat*, etc.; *P. de Vizzcaya*, XXIII, but it was also included in the old Customary law. Theses, for example, *Gény*, etc.

⁵ "Gr. Cout.," II, 40 (p. 364): a text standing by itself; does it contemplate the disposal of his or her share of the community made by one of the spouses?

⁶ "Paris," 298. Cf. "Auth. de triente et semisse"; "Nov.," 18, 115, followed in countries of written law and in some of the Customs ("Reims," "Melun," etc.); "Petrus" I, 10.

⁷ Reduction in the following order: "universal" legacies (or general legacies, no distinction being made), special legacies, gifts "inter vivos" or marriage portions (see *Guyot*, 8, 2), beginning with the most recent one (even gifts to the Church). As to the appointment by contract, see the "Ord." of 1731, 34, 36. Controversy in case of the insolvency of the donee. The real action against third parties who have acquired part of the inheritance. The legal share should be paid in kind.

in case the reservation were insufficient;¹ if four-fifths of the personal belongings were equal to a half of all the possessions (including personal belongings), the person entitled to the legal share could claim nothing out of the movables and property acquired jointly; if the four-fifths were equal to a quarter, the legal share was a quarter; and so on and so forth. Moreover, when there were several persons entitled to the legal share, they did not take the half of the inheritance in one lump in order to partition it among themselves, but each one of them was entitled to half of his hereditary share, because the legal share was individual.

§ 517. **By what Right did one collect the Legal Share?**² — As heir? or as near relative, rather after the manner of a creditor? Two systems here came slowly into existence, the first in countries of written law, and even among many of the jurists of the countries of Customs; the other was rare excepting in countries of Customs. — *First System.* “*Legitima est pars bonorum, non hereditatis.*”³ — The “inheritance” includes the assets and the liabilities which are inheritable; the “properties” are what is left once the debts have been paid, or even that which is outside of the inheritance, such as things already given away. He who has a right to the properties is not seised of them like an heir, is not compelled to accept the possession of the inheritance in order to claim them, and is not held for debts “*ultra vires.*” There is no need to accept the inheritance in order to “take steps for the reduction” of gifts and legacies. One may keep (by way of an exception) the legal share with which one is invested, even though one has received gifts from the deceased, provided one renounces all right of succession. So also one is authorized to keep, if there be occasion to do so, the “disposable quantity” (by the same right as a stranger to whom it had been given would have had); which means that a man might cumulate his legal share and the disposable quantity. The legal share is reckoned upon what remains after having paid the debts and funeral expenses; the one entitled to the legal share is not treated as a preferred creditor; but he is

¹ *Beaumanoir*, 12, 18; *P. de Fontaines*, 34, 10.

² *Aubey and Rau*, VII, § 682; *Demolombe*, XIX, nos. 47 et seq.; *Machelard* “R. h. Dr.,” VIII, 682; XIX, 245 (reproduced in “*Mélanges*”); *Dramard*, “*Bibliogr. du Code Civ.*”

³ *Ricard*, “Don.,” 1463, contrasts the reservation, to which one has a right as heir, and the legal share, “which is especially dependent upon the fact that the beneficiary is one of the children and the obligation which is incumbent upon a father to leave sustenance to those whom he has brought into the world”; *Pothier*, “Don. test.,” no. 189.

not held for the debts of the inheritance out of his own assets (unless he has accepted the inheritance), nor out of properties which have been given him by the deceased and are subject to be reduced, for these do not form a part of the creditor's security.¹

— *Second system.* "*Nemo legitimam habet nisi qui heres est.*"² —

The legal share is confused with the inheritance like the reservation whose complement it is. Thus one is seised of it by operation of law;³ one has a right to it only on assuming the character of heir, and one is held for the debts "*ultra vires*" of the inheritance unless one has accepted under the privilege of inventory. But the logical consequences of this system were not all accepted, even by its partisans. It was admitted that no one could claim his legal share by way of an action for reduction of the possessions which had been bequeathed, unless he assumed the character of heir in the same way as though the reservation was concerned. The child who had received a gift or a legacy should not have been allowed to keep his legal share of the possessions which had been given or bequeathed to him in case he renounced the succession; but he was authorized to do so in imitation of the first system,⁴ and he was allowed to have the cumulation of the disposable share and the legal share.⁵ The person entitled to the legal share did not have to contribute to the debts of the inheritance out of the possessions arising from the reduction; for it was said they only re-entered the inheritance in an entirely relative way, with relation to the inheritance alone, and not with relation to the creditors of the deceased.⁶

§ 518. **The Revolution and the Civil Code.** — Far from contemplating the proclamation of the freedom to make a will (a natural corollary, it would seem, of individual ownership), the Revolutionary Assemblies came almost to suppress the will, — the theoretical lawfulness of which they contested and the effects of which they feared in practice, — to put in its place the new

¹ The action for the attainment of the legal share does not make one the heir. Cf., however, "Nov.," 115 and 92; *Furgole*, "Test.," c. 8.

² *Ricard*, 1117; *Dumoulin*, on "Paris," 125, 1 (I, 884). Cf. "Nov.," 115, c. 3.

³ *Dumoulin*, "Cons.," 36, 12; on "Berry," 18, 3; *Boissonade*, 279.

⁴ *Pothier*, "Don. entre vifs," nos. 217, 226; "Don. test.," no. 189; see *Guyot*, 1, 3; 7, 3. The man who renounces in order to keep the gift that he has received is included in the number upon which the reckoning of the legal share is based: *Boissonade*, p. 292 (difficulties).

⁵ Excepting in the Customs of absolute equality: "Paris," 307; "Orléans," 273; "Ord." of 1731, 34; *Ricard*, "Don.," 979; *Lebrun*, 2, 3, 1; *Pothier*, "Don.," 217. — *Dumoulin's* theory; *Ginoulhiac*, *op. cit.*; *Cuenot*, p. 205.

⁶ *Ricard*, "Don.," 979; *Lebrun*, 2, 3, 1, 39 (Order of 1685).

system which they had inaugurated.¹ A memorable discussion on the right to make a will took place in 1791 in the Constituent Assembly.² Mirabeau (in the discourse which death prevented him from delivering), Tronchet, Dupont de Nemours and Robespierre upheld the thesis of Rousseau's "social contract," that "Ownership dies with the man."³ According to them, the right to make a will is contrary to nature; the freedom to make a will is also as injurious to the State, because it facilitates the formation of the great domains of the aristocracy of nobles, as it is ⁴ fatal to the family because it encourages the despotism of the father over his children,⁵ and because it gives rise to jealousy and hatred between the latter as a consequence of the inequality of fortune. They did not, however, go so far as to propose that the right to make a will should be abolished; but they wished to reduce the amount which could be disposed of, — Mirabeau to one-tenth of the possessions, Tronchet to one-fourth. Cazales and a few orators from the South defended the system of the countries of written law with sufficient energy for the discussion to remain without any immediate results. In their eyes the right to make a will was as natural as the right to sell or mortgage, the effects of which are not limited to the life of the owner. One only works and economizes and acquires wealth in order to be able to dispose freely of the possessions which one has acquired. This is an indispensable attribute and one of the most efficacious sanctions of the paternal power. Finally, the inequality of partitions arouses

¹ *Laferrière*, "Hist. des Principes de la Révol.," p. 222; *Brocher*, p. 291; *Boissonade*, p. 350; *Albert*, p. 643; *Sagnac*, pp. 213, 350; *Aron*, "N. R. H.," 1901, 606.

² Summing up in *Aron*, "N. R. H.," 1901, 478. Cf. "Arch. Parlem.," XXIV.

³ *Montesquieu*, "Esprit des Lois," 26, 6, 15 (the father is not held bound to leave his fortune to his children: he is under no further obligation to them after he has brought them up). The theory of Grotius, according to which intestate succession was nothing more than an implied will, was in favor of the freedom to bequeath by will.

⁴ The Revolutionary laws declared that immoral or unlawful conditions inserted in gifts (contrary to the old law, by which these conditions were annulled) or in wills should be treated as though they had never existed, in order that individuals should not revive in their own interests institutions which had been abolished: Laws of Sept. 5-12, 1791; 5th Brum., year II, Art. 1; 17th Niv., year II, Art. 12; Civil Code, Art. 900; *Bartin*, "Thèse," 1887.

⁵ "He who only respects his father because he hopes for a greater share of his succession comes pretty near to awaiting with impatience the time when he shall take it, and pretty near to hating his father." *Robespierre*, April 5, 1791. It is certain that good sons need no rewards, and that bad sons will always be met with, whether or not there exists freedom to dispose by will. But how many others there are upon whom the prospect of being disinherited has its effect!

the industry of younger sons and allows of extensive farming, which is only advantageous in certain localities. As we see, the question of the right to make a will was bound up, in the thoughts of the members of the Constituent Assembly, with the question of the right of primogeniture and trust-entails.¹ The ideas of Mirabeau and the majority of the members were the inspiration for the laws passed by the Convention, of the 5th Brumaire and the 17th Nivôse, year II. They allowed one to dispose by gift or legacy only of one-tenth of one's possessions if the deceased had heirs in the direct line, and of one-sixteenth if he had collaterals.² This minimum quantity could not be conferred upon one of the heirs by way of a gift as a reference-legacy;³ this had the effect of preventing parents from stripping their children for the benefit of one of them, and it also favored the parceling of the property. The right of granting as a gift was thus found to be reduced to almost nothing. In the reaction which took place against the philosophical and political tendencies of the Constituent Assembly and of the Convention, this system was abandoned in order to substitute for it a compromise between the rights of the individual and those of the family. This was the natural termination of the course of the old legislation, and one which rather agreed with the common opinion. The Law of the 4th Germinal, year VIII (March 25, 1800), allowed one to give or bequeath one-fourth of one's possessions, if there were less than four children; one-fifth if there were four; and so on, reckoning the donee, in order to determine the quantity which could be disposed of, as one child more; gifts by way of reference-legacy for the benefit of those capable of inheriting were authorized. The Civil Code had but to simplify these rules (Art. 913 *et seq.*). This law gives the name of the "reservation" to the portion of the inheritance which cannot be disposed of, understanding by this that it is a fraction of the intestate succession, and that one must be the heir in order to have a right to it. However, the modern institu-

¹ The customary tradition in favor of the preservation of the possessions in the family was first of all based entirely upon the idea of family joint ownership; following this it found a support in the feudal system (right of primogeniture); and finally it seemed to be justified to a certain extent by the interest of the monarchy itself (entails).

² Law of the 5th Brum., year II, Art. 11; Law of the 17th Niv., year II, Art. 16 *et seq.* See for more details, and on the subject of canceling gifts, the authors cited *ante*. As to disinheritance, *Brandt, op. cit.*, p. 88, and Decree of March 7, 1793.

³ Law of the 5th Brum., year II, Art. 9; Law of the 17th Niv., year II, Art. 9.

tion is not justified because of the old idea of the preservation of possessions in the family, but by the duty which near relatives have to sustain and help one another; in fact, the collaterals have no right, the disposable quantity varies according to the number and the quality of the heirs who are interested; and, finally, the reduction affects gifts as well as legacies. This system had only approval in France, until the school of Le Play¹ came to claim the freedom to make a will as it existed in England,² with the object of restoring the paternal authority; and until the socialist schools had attacked the right to make a will, and even intestate succession, because they are hostile to individual ownership.³

¹ Details in *Boissonade*, pp. 362, 664; *Albert*, p. 785. "Thèse" upon the family possessions or the homestead: *Verdelot, Petiet, Serres*, etc.

² **English law.** Freedom of disposal by will, right of primogeniture and substitutions (entails): such are the most noticeable characteristics of the English system of succession of our own times. The freedom to dispose by will has only existed since the time of the Tudors (Statute of Henry VIII allowing one to dispose by will of one's tenures in socage; assimilation under Charles II, of military tenure to socage tenure): *Coke*, "Inst.," II, 32. In the time of *Glanville* (I, 7) it was forbidden to dispose of immovables by will; one could only give "inter vivos" a reasonable portion ("quandam partem terræ") in order to furnish a marriage portion for one's daughter or by way of "frankalmoign," etc. The chattels were divided into three parts, — one for the widow, another for the heirs, and the third for the deceased; it was only this last portion which could be bequeathed (as to this division cf. "Share of the Dead," § 490, *supra*, of this chapter). Among the Anglo-Saxons it was already mentioned by Bede: *Pollock and Maitland*, II, 247. Magna Charta, 1215, c. 20, also gave the widow and children a right to a reasonable share: *Bracton*, fo. 60 *et seq.* If one of the parties does not exist the division still takes place by thirds, and not by halves. But *Bracton* tells us that even in his time in London there existed a special custom allowing relatives to dispose freely of their movable possessions: "Were it not for this," says he, "not a citizen would seek to enrich himself; and his children, who would be sure of having the father's fortune, would live in debauchery." Cf. *Pollock and Maitland*, II 350. Thus it is, no doubt, that through special customs the rule of partition into thirds came to be abandoned. *Fitzherbert* maintains still that the legal share exists by virtue of the "consuetudo regni"; but after his time it is only met with as an exception. As to immovables, for a long time they could only be disposed of, at least by act of last will, by indirect methods and by having recourse to the practice of uses. We have seen that from the time of the Tudors this was quite otherwise. The freedom to dispose by will was thus established in England through a reaction of a national character against its institutions; but in uniting with entails and the right of primogeniture it has lost some of its importance. Cf. *Houard*, "Anc. Lois," I. 244, 288; "Cout. Anglo-Norm.," II, 136, 445; III, 272.

³ *Mentha*, "Le Droit de tester," 1891; *Thiébauld*, "Thèse," 1899 ("Le Principe de la Propriété individuelle devant l'Assemblée Constituante").

CHAPTER FIVE

SYSTEM OF PROPERTY BETWEEN SPOUSES

TOPIC 1. FRANKISH PERIOD.

TOPIC 2. DOWER AND OTHER RIGHTS BY SURVIVORSHIP.

TOPIC 3. SYSTEMS WITHOUT COMMUNITY.

TOPIC 4. SYSTEMS OF COMMUNITY.

TOPIC 1. FRANKISH PERIOD

§ 519. System of the Husband's "Mundium."	§ 524. Dissolution of Marriage.
§ 520. "Pretium Nuptiale" or Germanic Marriage Portion.	§ 525. The Same. — (A) The "Morgengabe."
§ 521. The Gift of the Morning or "Morgengabe."	§ 526. The Same. — (B) The "Pretium."
§ 522. Roman Marriage Portion, "Faderfium," "Maritagium."	§ 527. The Same. — (C) The Disposal of the Share brought by the Wife.
§ 523. Rights of the Husband during the Marriage.	§ 528. Rights of the Wife over Property acquired jointly.

§ 519. **System of the Husband's "Mundium."** — Just as in the old Roman law, where the woman was "in manu mariti," so in the old Germanic law she found herself, body and possessions, under the "mundium" of her husband;¹ this was a natural consequence of the old organization of the family.² In proportion as the latter gives way, — and there is scarcely need to say that evolution has varied according to peoples, and we are here too often limited to systematic outlines, — the rights of the woman come to light, little by little. Sometimes, as in the Roman law, certain possessions are taken out of the husband's power (*separate*

¹ "Cod. Dipl. Langob.," I, 134, no. 74 (in 769); "Cartul. Lang.," no. 16; *Thévenin*, no. 48. The Lombard law here shows us a belated phase of evolution; it is in this form that we make use of it; we do not pretend, as we have been reproached with doing, to generalize its solutions in order to extend them absolutely to other barbarian peoples: *Brandileone*, "Arch. Giur.," 67, 2.

² Cf. especially as to the evolution of the Germanic law, *Heusler*, § 134 (bibl. and discussion of systems). The vigorous synthesis that is found there shows how hard the problem is and how far we are from being in accord as to the details, and even as to the whole.

maintenance); sometimes there is formed a partnership of possessions between the spouses, which is more or less extensive (*community of possessions*); in the former case the rights of the husband are restricted to certain possessions; in the second case they extend over all the possessions. In the primitive system,¹ which is a **system without community**, there can scarcely be any question of the possessions of the wife; there only exists one inheritance, which is in the hands of the husband. But from a very early time — from the time of the establishment of the barbarians, it would seem — three classes of possessions over which the woman has claims are distinguished: the Germanic marriage portion, the gift of the morning, and the marriage portion in the Roman sense, or the share brought by the wife.²

§ 520. "**Pretium Nuptiale**" or Germanic Marriage Portion.³ —

¹ We shall not reconsider the celebrated passage of *Tacitus*, 18, which has been so widely discussed. Cf. "Acad. lég. Toulouse," 1900, 169. And as opposed to it: *Lefebvre*, II, 354; *Meynial*, "N. R. H.," 1898, p. 165 (an interesting analysis of the old Germanic epic poems, the "Eddas," "Gudrun"); I dare not generalize and come to the conclusion with the author that "the woman keeps her possessions and can leave her husband at her will." Brunhild as well as Fredegonde seem to me not to come under the general rule. Cf. as to the Celtic law, *Collinet*, "R. Celt.," 1896, 320.

² One finds a matrimonial system which recalls that of the barbarian laws in the Babylonian Code of Hammurabi, about 2250 B.C.: "Mém. de la Délég. en Perse," IV; "Textes Elamites," 2d series, by V. Scheil, 1902; *Winckler*, "Gesetze Hammurabis," 1902; *Daresté*, "J. des Sav.," 1902; *Meissner*, "Beitr. z. altbabylon. Privatr.," 1893; "Beitr. z. Assyriologie," 1898; "N. R. H.," 1886, 113 (the notes of Bunanitus); *G. Cohn*, "Gesetze Hammurabis" 1903.

³ "Dos," and afterwards, at least in the ninth century (*Thévenin*, nos. 175, 179; "Capitul," see Index "Dotalicium," "Dotarium," "Doarium"). "Donatio nuptialis," "sponsalitia largitas," "sponsalicium." "Antifaetum" (ante-nuptial gift); *Thévenin*, no. 48, "Wittemon," "widem" ("Burg."), "Weotuma" (Anglo-Saxon), "witthum" in the later law, cf. the Gothic "vidan," to bind; "wette" in modern German. Cf. "vidnum, Meta" (Lombard), cf. "Miethe," "Lohn," modern German; "medfio" means "meta-feo" ("pecus"); "Mundsket" (Frisons); "Scaet," "ceap," "gyft" (Anglo-Saxon, meaning "pretium." — "Tanado," "tandono" (etymology? *Brunner op. cit.*, p. 547) only in the Frankish formulæ: *Marculte*, II, 15, 16; *Merkel*, 15, 17, 19, 22; *Bignon*, 6; *Zeumer*, "N. Arch.," VI, 33. — "Arrhæ," *Thévenin*, no. 135; "L. Wis.," see index; *Du Cange*, *id.* Later Catalan documents ("screix," meaning increase) — "Osculum," Roman custom of betrothals: "Cod. Théod.," 3, 5, 5 (6) and *Godefroy*, on this text; *Tertullian*, "de vel. virg.," 10. Syrio-Roman book, 45; *Mitteis*, "Reichsr.," 225; *Rozière*, no. 219; *Zeumer*, "Form.," p. 163; *Thévenin*, no. 177; *F. Viejo*, 5, 1, 4; "osele," "ousclage," see *Ragueau*, *Guyot*, *Viollet*, 421, 810; *Laboulaye*, 130; *Esmein*, "Mél.," 62; *Meynial*, "N. R. H.," 1896, 527; *Stouff*, "N. R. H.," 1887, 249. *Tacitus*, 18; *Tertullian*, "ad uxor.," 2, 8; "Nov. Théod.," I, 14, 1, 4 (gifts "ante nuptias" as contrasted with the "Altera dos"); *Papien*, 21, 3; "Burg.," 62, 2; "Wis.," 3, 2, 8; 5, 3; 6, 1; cf. 4, 5, 2; "Ep. Ægid.," 3, 5, 1 (registration of marriage portion); "L. Rom. Cur.," 24, 20; 26, 1, etc.; "Sal. Cap. extr.," 7, 8; "Rib.," 37; *F. Angers*, 1 ("Dos," meaning "libellus dotis"). *Brunner*, "Fränk. Rom. Dos.," 546, shows how the word "dos" has changed in its meaning and is used in the

(A) This is the purchase price paid by the husband to the relatives of the wife on the occasion of the betrothals in the primitive law.¹ It belonged absolutely to the relatives, and the wife had at first no claim over it; from her husband she received the gift of the morning; from her relatives, a few articles of clothing or ornament; these constituted her entire assets. — (B) But the law of the second stage² reversed the rôles by giving the woman all or a large part of the "pretium,"³ which was changed into a marriage portion (called "ex marito"); whereas the relatives only had a small portion, or were even reduced to the symbolical price, such as the sou and denier among the Franks.⁴ The providing of a marriage portion is none the less always considered as a requisite condition of the validity of the marriage; the wife whose husband has not given her a marriage portion is only a concubine; and the Church compels this doctrine to prevail, so much so that the law of the Ripuarians⁵ and a few other barbarian

barbarian texts to designate the possessions given by the husband to the wife at the time of the marriage; he has especially insisted upon the custom of the Lower Empire, — already pointed out by *Esmein*, "Mél.," p. 66, — which was to appoint as one's marriage portion the antenuptial gift: "Cod. Théod.," 3, 5, 13; "Nov. Théod.," II, 14, 1, 3 (in 439). Thus is to be accounted for the precept of Valentinian III, "Nov.," 34, 9; and of Majorien, "Nov.," 6, 9, according to which the marriage portion should not be less than the antenuptial gift. Cf. "Wis.," 3, 1, 5; Brandileone, "Don. pr. n.," 1892; "Arch. Giur.," 67, 2.

¹ "Sax.," 40; "Bai.," 7, 6; "Wis.," 3, 2, 8; 4, 6; "Burg.," 12; "Alam.," 54, 2; "Æthelbert," 77, 83; "Ina," 31; *Cassiodore*, "Var.," 4, 1; *Procopé*, "De B. G.," IV, 20; *Isidore*, "Orig.," I, 24; *Grimm*, "R. A.," 421. Cf. "mundium" and "meta" in the Lombard laws: *Pertile*, III, 314; "mundr" in the Scandinavian law: *Dareste*, "Etudes," 348, etc.; *Glasson*, "Inst. Anglet.," I, 116; Theses: *Roche*, 1899; *Lafourcade*, 1902; *Joly*, "Dr. familial dans l'Is-lamisme," p. 79.

² A very irregular formation, made with hesitation and survivals, and of very diverse dates according to locality: *Brandileone*, "Arch. Giur.," 67, 2.

³ Marriage portion conferred by delivery (*Rozière*, 220, 228; *Stouff*, account of the "Rappolst. Urk." in the "Ann. de l'Est," 1901; delivery of the marriage portion to the wife with a wisp of straw, with the hands and the mouth, publicly upon the road of the empire) or "per cartam": "Rib.," 37; *Rozière*, 219 *et seq.* ("Libelli dotis"). Cf. *Brunner*, *op. cit.*, and "Röm. und Germ. Urkunde," 1880. Necessity for the "gestis alligatio" for the antenuptial gift, and even for the marriage portion, contrary to the Justinian law, which even dispenses with the necessity for registering the antenuptial gift: "Cod. Théod.," 3, 5 ("Int." and "Epit."); "F. Andec.," 1 ("N. Arch.," XI, 328); "Sen.," 39, 40; "Bitur.," 15; *Rozière*, 221 *et seq.*

⁴ "Burg.," 66 (partition by thirds if the wife has neither father nor brothers); 86, 2; 62; 69; 42; 52; *F. Lindenbr.*, 75; "Rib.," 37; "Alam.," 55; "Bai.," 14, 7; "Cnut.," II, 74; "Ælfred.," 12; "Roth.," 178 and on "Liut.," 89, 114, 126 *et seq.* Under Rotharis the wife has a right to the "meta" as an exception; under Liutprand, as a general rule, and then her parents only receive a symbolical price (4 deniers: *Fumagalli*, "Cod. dipl.," 69, in 853); *Rive*, "De dote," 1852; *Brandileone* "Arch. Giur.," 67, 2.

⁵ "Rib.," 37, 2; 50 sol (cf. "Wergeld" of 200 sol, and "Rib.," 36, 11: 25

laws¹ established a legal marriage portion if there were no marriage portion given by agreement. The custom of the marriage portion "ex marito" is to be accounted for² outside of the Roman

head of cattle or 4 horses, etc.); "Alam.," 55, 3: 40 sol; "Bai.," 14, 6 *et seq.*; 7, 14. On the "justicia" of the Bavarian law *cf. Adler op. cit.*, and account given by *Brunner*. *Brunner*, "Z. S. S., G. A.," 1895, 231; "Forsch.," 482; "Fr. r. Dos.," 569 *et seq.*; "Festg. f. D.," 41 *et seq.*, maintains that among the Salians in the absence of a special agreement the marriage portion is equal to one-third of the possessions (movables or immovables) of the husband, and that the word "tertia" is even the technical term designating this customary marriage portion: *Pardessus*, "Dipl.," no. 179 (sixth century); *Marculfe*, II, 17; *Thévenin*, nos. 53, 175, 179 (in 833, etc.); "Cart. Langob.," "M. G. H., L. L.," IV, 595 ("tertia," marriage portion of the Salians, and "quarta," marriage portion of the Lombards). In the "Cap. extr." of "L. Sal.," 7 and 8, the marriage portion of 62 "sols" or one-half, is perhaps the customary "tertia," for it seems that it is equal to one-third of the "Wergeld," and the "Wergeld" itself corresponds to the value of a free man's share of land ("Hufe"). According to *Ficker*, III, 376 *et seq.*, the normal marriage portion is one-half. *Heusler*, II, 310. It is curious that this quantity of a third should be exactly equal to the right which the widow has over acquets. *Cf. post*, "Dower of One-third," and *ante*, "Share of the Dead": "Anc. Us. d'Anjou," ed. *Marnier*, § 75.

¹ If there is no marriage portion, then there is no marriage, and the children are illegitimate: *Majorien*, "Nov.," 6, 9 (in 458) (Oriental precedents, *Mitteis*, "Reichsr.," 225). Although abrogated by Severus in 463, the rule was applied in Gaul. Letter from Leo the Great to Rusticus of Narbonne in 458 or 459 (*Mansi*, VI, 405), received in "Capit.," VII, 105 (VI, 133; VII, 179, 389, 463; 4, 2), in *Gratian*, 2d p., C. 30, q. 5, c. 6 (pretended Council of Arles, *ante*, Chap. II, § 101): "Nullum sine dote fiat conjugium." *Majorien* had in mind the Roman marriage portion; Pope Leo, the antenuptial gift "in dotem redacta," the later ecclesiastical sources, and the Germanic marriage portion (up to the twelfth century): "Wis.," 3, 1, 9 (*Eswig*); 12, 3, 8; *Papien*, 37; "Cod. Théod.," 3, 7, 3. The "Libelli dotis," *Rozière*, nos. 219 *et seq.*, include every sort of conferring of marriage portion by the husband upon the wife. According to the Germanic conception of marriage, if there were no betrothals there could be no regular union, or, at any rate, no honorable union: *Dareste*, "Études," 309, 324.

² The antenuptial gift of the Lower Empire is derived from the very common usage of the giving of presents by the husband to the wife before the marriage; this usage itself originated in the marriage by purchase. Why did it become generally accepted, and why did it grow into a regular institution? *Cf. Esmein*, "Mél.," p. 58; *Mitteis*, "Reichsr.," p. 256; *Larocque*, "Le Don du Fiancé," "Thèse," 1898; *Lefebvre*, II, 223; *Meynial*, "N. R. H.," 1897, 134 (scarcity of paraphernalia); *Dareste*, "Études," 41. The Roman practice was readily blended with the Barbarian law, which, like many of the old legislations, transformed the purchase price into a marriage portion for the benefit of the wife. The preambles to the formulæ conferring marriage portions invoked the "Lex Romana" and the "consuetudo pagi," which were in accord with one another in spite of the divergence between their sources. *Cf. Bachmann*, "Corpus juris Abessinorum," 1890. *Dareste*, "Études," 4, etc.: the marriage portion given by the husband is met with in Egypt (with the supremacy of the wife in the household which greatly scandalized the Greeks), among the Jews under the name of "Khetouba" (a minimum of 200 "zouzes" or deniers for the daughter, and 100 for the widow, Talmud), among the Arabs, among the Hindus, and in the Caucasus, where since 1866 the father gives the daughter one-third of the price that he has received for her: *Hanoteau and Letourneux*, "Kabylie," II, 155.

and barbarian precedents in two ways:¹ (a) having become a widow, the wife would have found herself without resources at the mercy of the husband's heirs, and almost in the same situation as a slave; the marriage portion from the husband assured her better treatment and, if need be, provided for her maintenance; (b) under a system where all the possessions of the wife passed to the husband, where they were all merged by the marriage relation, and where the woman had no paraphernalia, the Germanic marriage portion seems like an equitable compensation for the benefit of the wife;² the husband appropriates for her a portion of his estate in return for what he gains over her possessions or with the assistance of her possessions; this motive became more pressing in proportion as the rights of inheritance of the wife assumed importance and a portion of the acquets had to be conferred on her. Originally, undoubtedly, the marriage portion "ex marito" only consisted in movable objects;³ but deeds and formulæ contain long lists in which there figure, together with gold and silver, horses and clothing, pieces of land, and even domains with the slaves who cultivate them.⁴ Among the Lombards and the Visi-

¹ These reasons seem to us to result from an analysis of the institution. Formulæ and deeds simply consider the marriage portion as the necessary consequence of marriage, a requisite condition for its regularity (I marry you, and that is why I give to you). Cf. *Rozière*, no. 240; no. 238. The expression, "pro amore duleitudinis" (*Rozière*, no. 229, 232), etc., alludes to the "affectus maritalis," — that is to say, to the lawful marriage excluding concubinage. Cf. *Lefebvre*, II, 426; *Heusler*, II, 294: the husband shows by these means that his wife shall be "loco filiae, socio vitae." In Norway the increase of the marriage portion or the "tilgiöf" conferred by the husband generally consists of one-half of the marriage portion. The Jewish "Khetouba" seems intended to prevent the husband's abusing his right of repudiating his wife.

² This is the idea which could very well be expressed by the word "tanodo" of the Frankish formulæ if one were to accept the reading of "tanto dono" in certain documents in the sense of a gift that is the equivalent of the marriage portion. It is too bad that neither this reading nor this meaning seems to be correct. But, leaving aside all question of terminology, it is nevertheless true that the Germanic marriage portion has become the "quid pro quo" for the Roman marriage portion; it is quite certain that the prospect of having a large marriage portion must have determined the betrothed man to show his generosity. However, they did not go so far as to say that the two marriage portions must be equal, and the Germanic marriage portion still continued to be given before the marriage, in the same way as the Roman antenuptial gift, to which it was similar. Cf. "Wis.," 3, 1, 5; *Cæsar*, "Bell. Gal.," VI, 20.

³ Cf. the exclusion of the wife from succession to the land. Originally, the wife only has a marriage portion consisting of movables and a right to the "Beisitz," that is to say, a right not to be expelled from the conjugal hearth. *Post*, "Dwelling-house."

⁴ *Rozière*, nos. 219 et seq.; *Thévenin*, nos. 177 (11 "villæ"), 174. Galswinthe receives five towns in Aquitaine, among others, Limoges, Cahors and Bordeaux ("Capit.," ed. *Bor.*, I, 13). The Jewish "Khetouba" was only actually paid at the time of the dissolution of the marriage.

goths a maximum which the marriage portion could not exceed was fixed in imitation of the testamentary "disposable quantity."¹

§ 521. **The Gift of the Morning or "Morgengabe"**² consisted originally in merely a few simple gifts³ which it was customary for the husband to give to the wife the day after the marriage.⁴ It consisted, on the part of the husband, in a ratification of the conjugal union, a renunciation of the right to repudiate his wife in cases where according to the biblical expression she did not find favor before him; these cases were those in which she had undisclosed defects,⁵ and one of the latter among many of the primitive peoples is the loss of virginity; thus, they sometimes called the "Morgengabe," "pretium præmium virginitatis."⁶ In the Christian reaction against the facility of divorce, the gift of the morning, losing its early reason for existing, was changed into something which corresponded to the Germanic marriage portion;⁷ like the latter, it included movables and immovables, and

¹ "Liut.," 7 (in 717) ("morgincap" of one-fourth or more), 88 ("meta" of 400 or 300 "sols" at the most), according to the position of the interested parties: *Pertile*, III, 316; "Wis.," 3, 1, 5 ("Chindaswind") in 645: one-tenth of the husband's possessions. Cf. "Ulp., Reg.," 15; *Zeumer*, "N. Arch.," loc. cit.; *Brandileone*, "Arch. Giur.," 67, 2.

² *Greg. Tours*, IX, 20: "tam in dote quam in morganegiba, hoc est matutinali dono"; "Rib.," 37; "Æthelbert," 80; "Roth.," 199, etc.; see *Du Cange*, *Haltas*. "Morgengabe" is feminine, but the barbarian laws say "ipsum morgincap"; *Thévenin*, no. 178; *Gengler*, "De Morg.," 1843; *Zedekauer*, "Il Dono di Mattino" (Florence), 1886 ("Miscell."); *Heusler*, II, 297; *Schroeder*, "Güt.," I, 106; *Huber*, IV, 380.

³ "Alam.," 52, 6: the amount of 12 "sols," and the wife establishes the existence of it by swearing with her hand upon her breast: *Huber*, IV, 355; "Sal.," 102, *Hessels*.

⁴ Passing from hand to hand: "Rib.," 37.

⁵ The engaged man did not even know his betrothed as a general thing. Cf. *Mahometan customs*.

⁶ Cf. *Juvenal*, VI, 199: "quod prima pro nocte datur." — As to the importance connected with virginity, cf. "Deut.," xxii, 14 *et seq.* Queer provision of the Capitulary of 757, 10; "L. Wallia.," II, 20; *Michelet*, "Orig.," p. 58; "Tristan et Iseult"; "Æthelbirth," 77; *Westermarck*, p. 341; *Post*, II, 94; *Pertile*, III, 317; *Heusler*, II, 298 (bibl.); "Alam.," 53. Widows were entitled to the "Morgengabe"; however, some of the more recent Customs ("Augsbourg," "Bâle") would not give it to them because of a hatred for second marriages; when allowed to widows it is sometimes given the name of "Abendgabe," or gift of the evening: *Osenbrüggen*, "Stud.," 76 (Switzerland); *Amira*, "Recht.," 162. "Morgengabe" given by the widow to the man whom she marries if he is not a widower: *Huber*, IV, 380. — Perhaps we must look upon it as a sort of composition to be paid by the husband as a consequence of the abduction. *Heusler* sees in it rather an honor that is done the wife, a sign that she will not be treated as a slave, but as the mistress of the house (the treasure of the "Niebelungen" was the "Morgengabe" of Kriemhilt). *Daresté*, "Etudes," 108 (Persians); 288 (Sweden: a giving before 12 witnesses and a price varying according to the station of the spouses); 324 ("linfé" in Norway); "Nouv. Et.," 239, 370 (Wales).

⁷ The "Morgengabe" is met with in the case of irregular unions, thus

not mere objects for the use of women;¹ it ended by becoming merged with the marriage portion (together with which it was made use of) in order to become dower.²

§ 522. **Roman Marriage Portion** ("Dos"), "**Faderfium**,"³ "**Maritagium**."⁴ — (A) The share brought by the wife consisted first of all in clothing and ornaments exclusively used by women ("rhedo"),⁵ the only inheritance of which she could not be deprived. — (B) When she was recognized as having more extensive rights over the paternal inheritance the share which she brought was increased; over and above her trousseau she had a marriage portion in the Roman sense.⁶ This is the "faderfium" of the Lombards, the "maritagium" of the Anglo-Saxons. Sometimes her parents gave her her share of the inheritance⁷ in advance, at the time she was married, and sometimes she had already received the inheritance to which she had a right as a consequence of the previous death of her father and

differing from the "pretium": "Roth.," 223. Cf. morganatic marriages, *ante*. The "Schwabensp.," I, 20, makes it a privilege of the nobility.

¹ For real delivery is substituted a writing. Among the Lombards the "morgincap" should not be more than one-fourth (*Adelg.*, 3; one-eighth) of the present and future possessions of the husband; "Liut.," 7 (in 717), 103; prohibition against the husband's giving the wife more than she has received "in diem votorum in mepfio et morgincap": "Burg.," 24; 42, 2.

² Lombard law: deeds of 833, "pro meta," i.e. "quarta"; 874, 875, etc. "Form. Wisigot.," no. 20: conferring of marriage portion in hexameter verses. "Tr. d'Andelot," 587: Galswinthe received towns "tam in dote quam in morganegyba." *Huber*, IV, 380: a deed of 1282 ("dote seu dotalicio quod vulgariter dicitur morgangaba"); however, there are survivals of it even to our time, *ib.*, 381; "Schwabensp.," 18.

³ "Roth.," 182: "fader," meaning father; "fio," meaning "pecus," 199, 201.

⁴ "L. Henrici," I, 1, 3, 4, 70, 22; "T. A. C., Norm.," 3; *Glanville*, VII, 1; see *Du Cange*.

⁵ "Rhedo" (trousseau, cf. *post*, the German "Gerade"; Italy, "corredum"), derived from "rât," meaning "supellex": "Thur.," 2, 4; 1, 7; "L. Fr. Cham.," 42; "Burg.," 51, 3 and 4; 86, 1; 14, 6 and 14, 4. Cf. "Sal.," 59; "Cap. extr.," 7; "Alam.," 55; *Lupo*, "Cod. Berg.," I, 529; *Pertile*, III, 312; *Dümmier*, "Formelbuch," p. 96. In the fifteenth century the Dithmarses (Friesland) still marry their daughters without giving them any marriage portion: *Hano-teau and Letourneux*, "Kabylië," II, 162, 294; *Du Cange*, see "trosellus"; Dig. "de leg.," 32, 32, 6.

⁶ Was there a delivery to the husband of the things comprising the marriage portion?

⁷ "Roth.," 181, 182, 184 (*Pappenheim*, "Launegild," p. 9), 186, 199, 201, 228; "Liut.," 1 *et seq.*, 14, 64, 101, 113; "Aist.," 1, 4, 5; Deeds, for example c. 855; *Pertile*, III, 312; *Schroeder*, 305; *Greg. Tours*, IV, 27 (large marriage portion of Galswinthe); VI, 45 (the marriage portion of Rigonthe, daughter of Frédégonde, carried in fifty carts); "Sal. Cap. extr.," 14; *Marculfe*, II, 10.—Disinheriting in case of the daughter's marriage without the consent of her parents: "Liut.," 119 (imperative provision); "Burg.," 12, 5; "Alam.," 57 (misalliance). — Cf. Girls made heirs in default of male heirs in the Greek law, *Beauchet op. cit.*; "Erbtöchter" of the German law.

mother.¹ The progress made in the rights of inheritance of women is one of the most important factors in the evolution of the system of possessions between spouses. By making a sister the equal of her brothers the wife was made more like her husband.

§ 523. **Rights of the Husband during the Marriage.** — In the family communities such as those which existed under the Burgundian law, the community of inheritance did not allow the wife to have anything of her own (excepting, no doubt, the "ornamenta muliebria"); her possessions were mingled with those of her husband; products and lands served to increase the common assets.² Under systems which were less strictly those of the community the husband's "mundium" carried with it consequences which were similar in certain aspects and different in others.³ In appearance, at least, there was but one inheritance; the possessions which composed it, whether they came originally from the wife or the husband, were subjected to the administration and the enjoyment of the latter.⁴ He had the power to alienate movables (ex-

¹ Ireland: the authority in the household belongs to that one of the spouses who contributes the largest share: *Dareste*, "Etudes," 324.

² *Huber*, "Hist. Grundlage d. ehel. Güterrechts d. Berner Handfeste," 1884; "Gesch. d. Schweiz. Privatr.," IV, 349; *Heusler*, II, 301. The "communis facultas" of the father and the children includes the share contributed by the wife, which she can no longer withdraw; 14, 4 (cf. *Huber*, IV, 351, 3; *Schroeder*, "Güt.," 299; *Brunner*, "Z. S. S., G. A.," 1895, 104); she has a right to a portion, a child's share of the common property, cf. 24, 62, 74. Cf. "Alam.," 91, 95, 53, 55; "Pactus," 3; *Huber*, IV, 352 (bibl.); *Post*, II, 150.

³ Among the Arabs before the time of Mahometanism the wife was purchased and formed a part of the inheritance; according to the Koran she should give her consent to the marriage, she becomes the owner of the nuptial gift, keeps the enjoyment of her personal belongings during the marriage, and does not even contribute to the expenses of the household; she is not subject to any authority on the part of her husband. When she becomes a widow she takes by right of inheritance a portion of the husband's property. The Arabian wife has thus passed from extreme subjection to extreme liberty. *Dareste*, "Etudes," 61. But we must not suppose that these rules were applied in all the Mahometan countries. Cf., for example, *Hanoteau and Let.*, "Kabylie," II.

⁴ "Burg.," 100: "Maritas facultatem ipsius mulieris" (Roman or Burgundian) "sicut in eam habet potestatem, ita et de rebus suis habeat" (in the absence of previous betrothals). Cf. XII, 61. This "Novella" ("N. Arch.," 25, 285) is made for a period of transition (Roman marriage portion, barbarian "mundium"). For *M. Lefebvre*, II, 442, this cannot be an overthrowing of the old Burgundian law and the establishment of the husband's power by virtue of the Christian ideas: *Glasson*, III, 211; "Burg.," 1, 42, 45, etc.; "Cod. Euric," 223; "Mélanges Couture," p. 25; "Wis.," 2, 3, 6; 4, 2, 15; *Zeumer*, "N. Arch.," 24, 96; *Schroeder*, "Güterr.," I, 126; "Rib.," 74; this "bit of text," as it is called by *Lefebvre*, II, 445, is very significant; it states, in passing and as a foregone conclusion, that one can no more contract with the wife of another person than one can with a slave or a child, obviously referring to the customary organization of the family in order to

cepting the "ornamenta muliebria").¹ Every acquisition realized during the marriage belonged to him,² — fruits, harvests, or the

justify this statement. It is especially among the Salian Franks that *Lefebvre*, II, 432, contests the existence of the husband's "mundium." The example of Frédégonde is of little value as proof (see *ante*, § 144, note 2, Chap. II); her case was such an abnormal one that it needs to be justified in the eyes of the Franks. But we admit that the "libelli dotis" (*Rozière*, 219 *et seq.*) furnishes him with a better argument by conferring upon the wife the ownership, the enjoyment and the possession (either immediate or from the time of the marriage) of the property established as a marriage portion by the husband. No allusion is made to the "mundium" or to the intervention of the husband in the administration or the disposal of these possessions. So that the Frankish wife appears to be independent of the husband, having separate property, with a distinct inheritance and interests, like the Roman wife. Let us observe, however, that all the formulæ are not identical; sometimes the spouses must have possession together, or the wife must have her marriage portion if she survives; sometimes she has it at once, but only for her life with a reversion to her husband or his heirs; sometimes she can do as she wishes with it. Thus the wife's rights vary; but apparently her position is always the same, and it is for this reason that we must not allow formulæ based upon Roman models to make too great an impression upon our minds; they only express to a certain extent the law as practised by the barbarians; this is clearly seen from the gaps in them and the absence of the right to acquests, for example. Perhaps we should conclude from this that it was legal to give the wife a "peculium" of her own, just as she had her paraphernalia at Rome; but it would be a mistake to consider as common law something which was only a rare exception and a copying of the civilized man by the barbarian of the better class (for instance, gift of "villæ" and of considerable domains). Behind this deceitful veneer there exists, at least for the masses, and no doubt also to a great extent in exceptional cases, the old custom which submits the wife to the husband and does not allow her to do anything without him. Furthermore, the conferring of the possessions given to the wife does not necessarily imply a loss of their enjoyment by the husband who gives them. The essential object of the "libellus dotis" was to make the wife's right irrevocable; it was given the same name as the right of a purchaser by making use of typical clauses (*Rozière*, 267 *et seq.*; cf. 159 *et seq.*); this does not mean that the wife had to act in the same way as a purchaser; she would have had to lose her status of a married woman in order to make that possible. Also, in "interdonatio" charters there is no mention made of the marriage portion "ex marito": *Rozière*, 245 *et seq.*; to read them one could not doubt its existence.

¹ "Burg," 51, 4. Here we have the germ of the "peculium," of separate and personal belongings for the wife (English and German law). We have just seen that perhaps as early as the Frankish period the wife also had, as an exception, we believe, possessions of which she had the administration, and the products of which she kept. Such was the case of Frédégonde (a very exaggerated case because of the character of this queen): *Greg. Tours*, VI, 45; 10, 79. Cf. Lombards, *Pertile*, III, 313; *Daresté*, "Études," 325: In Norway the husband has the administration of his wife's possessions, but the inheritance of each of them remains separate, and the wife's inheritance consists of the marriage portion, the increase, the gift of the morning, and everything that the wife acquires by inheritance or otherwise. If the wife dies first the husband keeps the increase. Cf. *ibid.*, 348 (Iceland).

² Cf. "Roth.," 184; "Liut.," 57. Cf. *post*, "Partition of Acquests." However, Frédégonde kept for herself the acquests due to her own labors, to the income from her possessions, and to the gifts of her husband or third parties. In mutual gifts between spouses the husband and wife each give the other the acquests made during the marriage "quod pariter conlaboraverimus"; *Rozière*, 245 *et seq.*

products of work ("quod simul laboraverunt").¹ When the share brought by the wife was an immovable, a conflict took place between the rights of the husband and the rights of the wife's family;² as a general thing, the husband did not have the free disposal of them, any more than he did of his own immovables.³ Nor was he authorized to deprive his wife of the rights which had been conferred upon her under the form of the "pretium" or of the "Morgengabe."⁴

§ 524. **Dissolution of Marriage.**⁵—The various possessions which were united in the hands of the husband so as to form a single estate, at least in appearance, were not always separated on dissolution. The tendency of the Barbarian law is rather to allow the community of possessions resulting from the marriage

¹ Cf. "Rib.," 37, 3; "Alam.," 55, 2; "Wis.," 3, 6, 1; *Greg. Tours*, X, 29. The wife's possessions, as well as those of the husband, must answer for the debts of the latter: "Bai.," 1, 10; "Burg.," 65. *Contra*, "Ina," 57; "Æthelstan," 6; "Cnut," II, 76. The wife's "Wergeld" belongs to the husband: "Alam.," 51; "Roth.," 200.

² Cf. in the Roman law the husband as owner of the land included in the marriage portion: "Burg.," 100. Among the Jews the marriage portion and the "Khetouba" are administered by the husband during the marriage. Cf. as to the Caucasus, the wife's administration: *Dareste*, "Nouvelles Etudes," 239, 268 (Mongols: the wife freely disposes of her dower), 323 (Cambodia).

³ "Liut.," 22: with regard to her relatives or the judge, the wife who alienates her property with the consent of her husband, "violentiam se pati non reclamat"; 29; *Thévenin*, nos. 58, 148; "Roisin," "Formvorschr. f. die Veräußerungsgeschäfte der Frauen" (Lombard law), 1880 ("Unters." by *Gierke*); *Dareste*, "Et.," p. 310.

⁴ The wife's rights account for her frequent intervention in deeds made by her husband (cf. children). Deeds (*Schroeder*, "Güt.," p. 130 *et seq.*); 773, the husband having made a delivery to his wife, both together deliver to a third party the property that she has received; 775, the husband gives what he has excepting the marriage portion conferred upon his wife; 774: "O. et conjux mea H. donamus, hoc est quod donat conjux mea suam dotem quam tradidi illi ante diebus nuptiis"; "Rib.," 37, 3; during the marriage, "conscripta" or "tradita" possessions have been used up ("simul consumpserint"), the widow has no right to reclaim them, and undoubtedly no right to demand an equivalent for them: *Heusler*, II, 314, 349; *Thévenin*, no. 134; *Huber*, IV, 358: "ego" (wife) "et L." (husband) "conquisivimus"; *Heusler*, II 314; *Lefebvre*, II, 433. Cf. "Acts of the Apostles," v, 1: Ananias sells his property jointly with Saphira.

⁵ According to *Brunner op. cit.*, the national Frankish law gave the widow the ownership of the Germanic marriage portion, but an ownership which was limited by the rights of the children if there were any, and if there were none by the right of reversion that belonged to the relatives of the husband who had made the gift; in case the wife predeceased the husband her heirs had no rights to this property and the husband kept it; the "Morgengabe" reverted to the donor after the death of the wife; as to acquests, they must have belonged to both spouses together, excepting that they were partitioned in the proportion of two-thirds to the husband or his heirs and one-third to the wife. Moreover, the marriage portion established by contract must have excluded the right to a portion of the acquests. Cf., however, "Festg. f. Dernb." (right to dispose).

to continue to exist.¹ When the marriage is broken, the disposal of the possessions varies, not only in different systems, but according to the causes of the dissolution of the marriage, — according to whether there are (or have been) children,² or whether that one of the spouses who survives shall remarry.³ We can only give a brief summary of this complex subject.⁴ We point

¹ The German "Beisitz." Thus is to be accounted for the law of the Thuringians which declared that the mother leaves the land to her sons, and to her daughters the "Gerade." She is excluded from the succession to the land; but, because of her right of "Beisitz" she takes the place, in fact, of her husband at the head of the family patrimony. In Poland the widow keeps the enjoyment of the possession so long as she does not remarry; if she does remarry she has no share in the inheritance, but she takes away her bed with its bedding and any product of her own labor: *Dareste*, "Et.," 186; "N. Et.," 324; *Glasson*, "Inst. Anglet.," I, 125; Joly, "Thèse," p. 132 (system of the "Hadana" in Mahometan law).

² *Brunner*, "Z. S. S., G. A.," 1895, 63, has shown the influence of the birth of a child on the matrimonial system ("Kinderzeugen bricht Ehestiftung"). In the very old law people are married "liberorum quaerendorum causa," and barrenness of the wife is a just cause for repudiation: "Bai.," 8, 14. Charlemagne repudiates the daughter of Didier: "Mon. S. Gall.," III, 17; Hincmar, in *Migne*, "Patr. Lat.," 125, 734. So long as there are no children the marriage is only provisional, and it is not hard to see that a provisional system of possessions must also correspond to this trial of a life in common. Once the marriage has been sealed through the birth of a child the pecuniary rights of the spouses are modified, even though the child should die before the dissolution of the marriage. Thus, taking up the various periods of the old law: (a) under the system of separate possessions the rights of the husband accrue; he obtains the marriage portion in case he survives (courtesy of England); (b) the separation of possessions becomes changed into a community; the limited community into an absolute community; the survivor takes all the property (at least if there are no children at the time of the death). Applications of this among the Frisians: 1st. Barbarian law, "Pactus Alam.," 3, 1; "L. Alam.," 89 (the child has opened its eyes, seen the roof and the four walls); "Bai.," 15, 8; "Sax.," 47; *Æthelbert*, 78, 81; "Burg.," 14, 3, 4 (*Brunner*, p. 104); "Gulathingslög," § 54. — 2d. Feudal France, Normandy, England: a child screaming and crying, — *post*, "Rights of the Survivor." — 3d. Sicily (Norman origin?). Absolute community participated in by the children: *V. la Mantia*, "Consuet.," p. 6; *Brünneck*, I, 81; II, 6; "Ass. d'Antioche," p. 47. — 4th. Artois, Flanders, Hainaut, Vermandois: blood gift between husband and wife: "Cout. de Flandre," ed. *Linburg-Stürum*, III, 509; *Faider*, "Cout. de Hainaut," III, 353. — 5th. Frisia, Westphalia, various parts of Germany, cf. *Brunner*, *op. cit.* — 6th. Switzerland: *Huber*, IV, 356, 437; "Placit. gén. de Lausanne," ed. *Salis*, p. 58; "Zfischw. R.," 1903, 226. — *Brunner*, p. 92, also sees in the period of a year and a day a time of trial; *Mittels*, "Reichsr.," p. 224 (Egypt): if the wife has not become pregnant at the end of this time the husband has a right to repudiate her. *Post*, "Basis of the Community."

³ The majority of the barbarian laws contemplated subsequent marriages, and their pecuniary consequences: *Brunner*, "Sitzb. Ak. Berlin," 1894, 2, 1289 (Tit. 44 of the Salic Law on the "reipus" is only an imitation of the Gallo-Roman practice, "Cod. Théod.," 3, 7, 1; it is to be accounted for by the idea of facilitating the marriages of widows, which the relatives of the first husband might have an interest in opposing: "Roth.," 182; "Bai.," 14, 6 *et seq.*; "Jydske Lov.," 1, 8; "Gragas," II, 155, 162. Cf. "Sal.," 72; "Cap. extr.," 7, 8). Moreover, the title dealing with the "reipus" was never applied in practice: Capitulary of 819; *Heusler*, II, 308; *Post*, I, 185.

⁴ Cf. *Heusler*, II, 306 (a study of the various barbarian laws in succession).

out as a striking characteristic the appropriation of the possessions of the spouses for their children; this will be found later on embodied in the rule, "The dower of the mother is the principal inheritance of the children."¹

§ 525. **The Same.** — (A) *The "Morgengabe"* returned to the husband who had given it, because of its personal character,² in case the wife died or was repudiated for just cause. If the husband died or the wife was repudiated without cause, she acquired this gift absolutely.³

§ 526. **The Same.** — (B) *The "Pretium"* belonged to the husband⁴ when the wife died before him or was repudiated for some just cause,⁵ excepting that the rights of their children were not affected, the result of which was that he was not allowed to make an alienation of it. Sometimes, even, a duty is imposed upon him to restore back the "pretium" during his life, when the children have attained their majority.⁶ In case the husband dies, his widow

¹ Brunner, "Fr. r. Dos.," p. 568, only sees in the Merovingian capitularies which deal with the marriage portion and second marriages a stamp of the Roman law in its last stages (contrary to those who considered them as an expression of the Frankish law: *Heusler*, II, 311): (A) *Marriage with children*. The Roman legislation had ended by making family possessions of the antenuptial gift and the marriage portion; the surviving spouse had the enjoyment of them, but was not able to dispose of them: "Cod. Théod.," 3, 8, 2, 3; "Nov. Théod.," II, 14, 1, 3 ("second marriages"); "Nov. Majorien.," 6, 6, and "Severus," 1; cf. "Int. de Nov. Th.," II (even if there were no second marriages). A "Nov." of Valentinian III, 34, 10, even compels the widower to restore half of the wife's marriage portion to the children, unless they attain the age of twenty years: "Ed. Théod.," 54; *Papien*, 26, 2; "Wis.," 4, 2, 3; "Cod. Euric.," 321; "L. Sal.," "Cap. extrav.," 7, 8. — (B) *Marriage without children*. The system of partition by halves ("Nov. Valent.," III, 34, 8, cf. *Mitteis*, "Reichsr.," pp. 248, 252) is found once more in "Burg.," 24, 2, and "Wis.," 4, 2, 13. With this may be connected "Sal. Cap. extrav.," 7, 8 (the widow has two-thirds, but upon condition of giving up that which the German law later on calls the "Federwat" (bed and bedding), and the value of this seems to make up the difference between two-thirds and one-third. Cf. "F. Andec.," 1; *Troya*, "C. Dipl. Lang.," no. 520. The Edict of Chilperic, c. 4, comes back to partition by halves between the surviving spouse and the relatives of the other. Cf. "Bai.," 14, 9; "Alam.," 55; Brunner, *op. cit.*, p. 568. These capitularies are only applied in cases where no agreements have been entered into. Cf. *Rozière*, nos. 245 *et seq.*; *Brandileone*, *op. cit.*

² Cf. *Huber*, IV, 355.

³ "Alam.," 56. As to repudiation, *Joly*, "Thèse," p. 148.

⁴ However, the marriage portion is partitioned between the surviving spouse and the relatives of the predeceased spouse according to the "Cap. extr.," 7 and 8 of the "L. Sal.," and the Edict of Chilperic, 4.

⁵ "Burg.," 34, 3; "Bai.," 7, 14; "Wis.," 3, 4, 3, 12. According to the law of India, a gift made to the wife passes at her death to her daughter if she has children, and to her husband or her father if she has not, while at the same time taking into account the various forms of marriage: *Daresté*, "Études," 74.

⁶ This is what the "Cap. extr.," 7 and 8 of the "L. Sal.," held in the case of second marriages: the widower or the widow who remarries keeps the

gets the "pretium,"¹ sometimes the absolute ownership of it,² but more often with rights which are limited in the interests of their children or of the relatives of the husband, to whom it returns when there are no children.³ These restrictions are especially prominent when the wife leaves the house of the husband to return to her relatives or in order to enter into a second marriage. The wife who has been repudiated without cause⁴ is in about the same situation as the widow.

§ 527. **The Same.** — (C) *The disposal of the share brought by the wife* would seem as though it should be easy to regulate; it ought to belong to the wife or her heirs under all circumstances.⁵

Germanic marriage portion without being able to give it or sell it, the former until the children have attained the "perfecta ætas," the latter until her death. If there is no second marriage the widower or the widow will ordinarily live with their children and the possessions will be mingled.

¹ "Burg," 69, 42 (right of the widow who has not remarried to one-third of the husband's possessions, but only for her life, assuming that there are no children; loss of this right in case of a second marriage); 52; "Roth," 182, 184; "Aist," 5; "L. fam. S. Petri Worm," 1 (reversion to the husband's relatives if there are no children); *Beyer*, "Mittelrh. Urk.," I, 83.

² Various systems in the formulæ (and later on in the Customs dealing with dower): 1st. Absolute ownership of the wife in every case (you will do what you wish, will leave to whom you wish); 2d. Ownership if there are no children; and enjoyment if there are; 3d. Enjoyment in all cases. One does not see any very striking differences between the barbarian formulæ and the Roman formulæ: *Rozière*, nos. 219 *et seq.* *Heusler*, II, 307, maintains, taking as his basis the Frankish formulæ, "Lindenbr.," 7, and "Bignon," 6, that the marriage portion of the widow was reserved for the children ("verfangen"). *Idem.*, *Ficker*, III, 378. *Brunner*, "Fest. f. Dernberg" (Berlin), thinks, on the contrary, that she had a right to dispose of her "tertia" or marriage portion, and that this "tertia" in ownership was then converted into a dower of one-half in enjoyment: "L. Sal.," "Cap. extr.," 7, 8 (Roman influence according to *Brunner*; second marriages only); *Marculte*, 2, 9, 17; "Andec.," 34, 40, 54; *Thévenin*, nos. 53, 113, 176; "Cart. de Saint Père de Chartres," p. 88; "Wis.," 4, 5, 2 (right of the wife to dispose of only one-fourth, formerly of the whole); "Alam.," 55, 56; "Burg.," 24, 62 (partitioning). The Treaty of Andelot, 587, has not very great probative force because its character is that of a transaction following a crime. *Cf.*, however, *Lefebvre*, II, 428; *Pertile*, III, 318; *Brandileone op. cit.*

³ *Cf. post*, "Dower"; *Tacitus*, 18, second marriages, birth of children; "L. Sal.," "Cap. extr.," 7 (the widow who remarries cannot alienate the marriage portion); "Cod. Théod.," 3, 8, 2, 3; "Nov. Théod.," II, 14, 1, 3 (Int.); *Majorien*, 6, 6; *Severus*, 1. *Cf.* "Nov. Just.," 98, 1 and 2; 127, 3; "Alam.," 55, 57 (argument *contra*: "nunquam revertatur"); "Bai.," 14, 6 (15, 7); besides her marriage portion and the share contributed by her, the widow has the child's share of the husband's possessions, "usufructuario jure," but she loses it if she remarries; if there are no children the widow takes half of these possessions, the near relatives of the husband the other half; but should she remarry or die, her heirs will have only her marriage portion and the share she contributed; one-half of the husband's possessions revert to his own near relatives; the widow who remains chaste keeps the gifts of her husband if there are no descendants or near relatives: "Cod. Eur.," 322; "Wis.," 4, 2, 14.

⁴ "Bai.," 7, 14; "Alam.," 53; *Grimm*, 6; "Wis.," 3, 6; "Burg.," 34, 4 ("Int. Cod. Théod.," 3, 16, 1). *Cf. Greg. Tours*, 10, 8; 9, 33.

⁵ This is what happens according to the "Rib.," 48, 49, if there is no "ad-

But the husband often acquires it, especially when there are children and he does not remarry; it is deemed sufficient to limit his right of disposing of it.¹ In the community system of the Burgundians this share remains mingled with the possessions of the husband; neither the widow nor her heirs have any right to it. Among the Lombards the husband's "mundium" is sufficiently strong to cause this share to be kept by the husband who survives, even if there are children. Among the Alamans the husband acquires this share, provided that there shall have been born a child of the marriage who shall have lived sufficiently long after the death of his mother to open his eyes and see the roof of the house and the four walls.² If the wife survives or is repudiated without cause, she gets back the share she has contributed³ whether she return to her relatives or whether she remarry. In the case of divorce by mutual consent the rights of the spouses over their possessions are fixed by their agreement; but ordinarily the wife only recovers the share which she has contributed.⁴

§ 528. **Rights of the Wife over Property acquired jointly.** — Besides her rights as survivor, in the foregoing properties, *i. e.* the "pretium" and the "Morgengabe," the widow takes a portion of the acquests which have been made during the marriage,⁵ — one-fatimus": "L. Sal.," "Cap. extr.," 8; "Bai.," 14, 9; "Burg.," 24, 4; "Roth.," 201.

¹ This was no doubt so among the Franks. *Cf.*, however, *Glasson*, III, 217.

² At least in the Lombard law: *Thévenin*, no. 61. *Cf.* "Roth.," 187, 188, 201, 130.

³ "Roth.," 182: the widow who remarries has the "Morgengabe" and the "Faderfium"; 184, if she prefers to live in her father's house after he is dead, she must previously deduct the "Morgengabe" and the "meta," but she must partition the "Faderfium" with her sisters, just as she must the rest of the succession. "Alam.," 55: she has "quidquid de sede paterna adtularit," besides the legal marriage portion, to the extent that "parentes ejus legitime plagitaverint"; proof by oath with fellow swearers or by the judicial duel: "Pactus," 3, 2; "Sal.," "Cap. extr.," 7, 8; "L. fam. S. Pierre Worm.," 1; "L. Henrici," I, 70, 22; "T. A. C., Norm.," 3. — "Burg.," 14, 4 (an interpretation which refuses to give the widow without children the right to the share contributed by her).

⁴ "Wis.," 3, 6; "Pact. Alam.," 3, 2; "Roth.," 182; *Thévenin*, no. 82.

⁵ There is no mention of them in either the "libelli dotis" or the "Cap. extrav." of the Salic Law. Must we assume with *Brunner* that the marriage portion conferred by agreement excluded both the legal marriage portion and the right to acquests? — Was this portion of the acquests reserved for the children in the same way as the marriage portion? *Cf.* as holding the contrary opinion *Heusler*, II, 310. — In the Burgundian family community the wife seems to have been counted as one more member, and she was given, for example, one-third of the husband's inheritance when she survived him (Tit. 74). The right to acquests quite naturally arises from this system of community. There has been a desire to find for it a more distant origin; the saying of *Tacitus*, "Germ.," 18, in speaking of the Germanic woman,

third among the Franks, according to the law of the Ripuarians¹ and a Capitulary of 821, chapter 9,² and one-half among the Westphalians, according to the law of the Saxons;³ the law of the Visigoths divides the acquests between the two spouses in proportion to their respective fortunes.⁴ In this right to the acquests some only see a right by survivorship, others find in it the proof

"laborum periculorumque socia," already seems to presage the community of possessions. But life in common cannot of itself result in community of possessions, for, were this not so, it is hardly likely that any but this matrimonial system would have been known. In Norway the spouses can form a community of acquests in which the wife's share is only one-third: *Dureste*, "Etudes," 325, 348 (Iceland); "Nouv. Et.," 325 (Cambodia), 341 (Malgaches).

¹ "Gesta Dagoberti," 46 (in 639); "Rib.," 37. *Schroeder*, I, 94, wrongly concludes from this that the widow has a choice between the "Morgengabe" and the acquests. Cf. *Heusler*, II, 313. If we admit with *Brunner* that there is a legal marriage portion of one-third, the word "tertia" may mean this marriage portion; and this learned man believes that this is its technical acceptance. Cf. "Polypt." of *Irminon*, 12, 3; *Marculte*, II, 17; "App. Marc.," 40; "Andec.," 45, 58; "Lindenbr.," 50; *Greg. Tours*, 8, 39; 7, 40; *Thévenin*, no. 53 (*Pardessus*, "Dipl.," no. 179, in 572; cf. *Brunner*, "Festg. f. Dernb.," p. 45), 175 (in 833? the engaged man gives his future spouse a manse with slaves; and besides this one-third of his present and future possessions), 176 and 179 (one-third of all the present and future possessions), 174, n. 1 (marriage portion of one-half instead of one-third about 904); *Schroeder*, "Güt.," I, 92; *Kraut*, "Vormundsch.," II, 379. Cf. in the later Customs partition of the community in the proportion of two-thirds to the husband and one-third to the wife (portion of the sword and portion of the distaff): *Merlin*, see "Cout. de Ferrette."

² Capitulary of 821, 9 (I, 301). In giving the widow one-third "collaborationis quam simul in beneficio conlaboraverunt," the Capitulary means to say that this advantage shall not itself be treated as an acquest, no doubt because of its personal character. As to other acquests, "res quas (maritus) aliunde adduxit vel comparavit vel ei ab amicis conlatum est," the Capitulary confers them without saying "tam ad orphanos quam ad uxores," and referring to the previous law: *Flodoard*, "Hist. Rem.," 85; "Cap. Kiersy," 877, c. 5, 6. On the question, cf. *Sandhaas*, 121; *Schroeder*, "Güt.," I, 91; *Heusler*, II, 310.

³ "Sax.," 47; 48; *Heusler*, II, 346; *Brunner*, "Z. S. S., G. A.," 1895, 100; *Haenel*, "R. Z. G.," I, 290; *Stemann*, "Güterr.," (Jutland), 1857.

⁴ "Wis.," 4, 2, 15, 16; 5, 2, 3 and 4; *Zeumer*, "N. Arch.," 26, 123; *Brissaud*, "Mélanges Couture," 1901 ("La Société d'Acquêts entre Epoux dans les Lois Wisigothiques"). — The Code of Euric, 325, perhaps already contemplated in express terms the community of acquests among spouses; this was assumed in its c. 323, where it sets forth that certain acquests belong to the husband, — a thing which would have been useless unless there were a partnership and in the "Antiqua," 5, 2, 3, reserving for the spouse who receives the gift alone the possessions given by the king. The Law of Reccesvind, 4, 2, 16, thus did not introduce the community between spouses into the Visigothic law; this community already existed in the time of Euric. With regard to this law, let us notice: (a) that it gave the heirs of the spouses the same rights as the latter over their share of the acquests; thus there is no question here of a right of the survivor; (b) that the conjugal community is to be accounted for by reasons of a pecuniary nature rather than of a moral nature, because the share of each spouse is in proportion to his or her fortune, and because the acquests to the production of which one of the spouses does not contribute belong exclusively to the other. Cf. "M. G. H., L. L., Leges Visig.," pp. 183, 211.

of the existence of a true community of possessions between spouses¹ since the barbarian period. Except among the Visigoths, there is rather a *progress* towards community than community properly so called, for the right to acquests does not pass to the heirs of a predeceased wife.²

¹ To this effect, *Brunner, op. cit.*; *Heusler*, II, 310. *Cf. Post*, II, 156. *Contra, Glasson*, III, 213.

² In fact, the majority of the texts assume that the wife who takes the acquests survives the husband: "Rib.," 37. At the same time, the contrary has been argued from the formulæ of *Marculte*, 2, 7, 17, according to which the wife gives the surviving husband her portion of the acquests, — a thing which is quite useless if, simply owing to the fact of her surviving, it belongs to her. But it is difficult to draw any argument from this clause, for it has as its counterpart another clause that is certainly incorrect, — the clause by which the husband gives his surviving wife, not his share in the acquests, which might be understood, but all the acquests; a thing which he cannot do when the wife has one-third of them. *Cf. Edict of Chilperic*, 4; *Thévenin*, no. 57; "Andec.," 54; "Lindenbr.," 13; *Pithou*, 38; "Cart. de Cluny," I, 9, etc.; *Glasson*, III, 215.

TOPIC 2. DOWER AND OTHER RIGHTS BY SURVIVORSHIP

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§ 529. **Dower. General Ideas.** — By this is understood that portion of the personal belongings of the husband¹ over which the widow has the right of enjoyment during her life, and also this right of enjoyment itself. We have already seen that dower was the result of the fusion of the Germanic marriage portion and the "Morgengabe."² Originally it formed a set-off or equivalent given to the wife in return for the share brought by her,³ and,

¹ "Dos," "dotalicium," "dotarium," "doarium," "vitalitium," "vidualicium," "viarium"; see *Du Cange*, "Vivelotte," *Ragueau* (dower of commoners in *Boularic*, I, 97). Germany, Italy: "dotalicium" has as its synonyms terms which sometimes serve also to designate institutions similar to dower: "Leibgeding," contract for life; "Leibzucht," "liftocht," allowance for life; "Witthum," dower; "Widerlage," "Contrados," *post*, "Increase of Marriage Portion"; *Pertile*, II, 336; "meta," "quartisium," "sponsalicium," "donatio propter nuptias," "antefactum," "morgengabe."

² The conferring of dower precedes the marriage, and yet "Au coucher gagne la femme son douaire"; it is a very widespread opinion that dower is "the reward and recompense of chastity": *Pasquier*, "Lettres," IX, 1; *Pertile*, III, 337. — In the German countries the "Morgengabe" has often been maintained alongside of the increase of marriage portion or "Widerlegung" and the dower: *Stobbe*, IV, 108, 183; *Huber*, IV, 379; *Heusler*, II, 374; "Sachsensp.", 1, 20; 3, 38. Legal "Morgengabe" for the Saxon nobility. Sometimes it consists in simple gifts, sometimes it constitutes a dower (Austria), and sometimes, finally (Southern Germany, Switzerland), it forms a "Sondergut" for the wife: "Schwabensp.", 1, 18 (20); "estreine." Sometimes the "Witthum" has also this last character: *Heusler*, II, 373.

³ If it were exclusively a recompense for the marriage portion, women who did not furnish a marriage portion would have no right to it: *Loysel*, 152. In Germany dower properly so called, "Witthum" or "Widem," is contrasted with the counter marriage portion, "Widerlage" (or increase of marriage portion), the amount of which is in proportion to that of the marriage portion, and which the surviving wife obtains, just as the surviving husband obtains all or part of the marriage portion: *Chaisemartin*, "Prov.," p. 341: "Rich wives make poor children," *F. v. Wyss*, p. 49; *Stobbe*, IV, 114 (distinctions); *Heusler*, II, 370; *Huber*, II, 375. The increase in the amount of the

when this share was nothing, then it was a means of preventing her from being absolutely destitute.¹ The Church showed itself favorable to dower, and the Custom made it obligatory, following the example of the canon law.² It seemed all the more necessary as the wife was strictly dependent upon her husband; her rights of inheritance in her own family were often very much curtailed, and the few possessions which she had were in danger of being spent during the marriage in the interest of the husband, for at one time there was nothing to prevent the husband from alienating them or pledging them for himself; the income which they produced or the acquests which they served to obtain did not benefit the wife, or only benefited her to a small extent, under the old matrimonial system, which was exclusively one of community. Thus we see in what an embarrassing situation an elderly widow might find herself at the death of her husband. Dower was often her only resource.

It made the possessions of the husband inalienable, in countries of Customs, just as the marriage portion system made the

marriage portion was thus of very great importance in this matter. In Italy at the beginning of the fourteenth century marriage portions were almost reduced to a mere trousseau. They soon increased, and Dante was able to say that the birth of a daughter was a source of ruin. In 1434, in Florence, there was created a marriage portion insurance ("monte dei doti"): *Pertile*, III, 321.

¹ There is a close connection between dower and the system of property between spouses on the one hand and inheritance or gifts between spouses on the other. — (A) *Lardy*, "Législ. Civiles des Cantons Suisses," see the charts at the end of the volume. The idea of a right of succession between spouses was opposed to the principle: "Who has my blood has my property." However, in time they came to recognize this idea as a consequence of the resemblance shown between dower or community right, which was common to the surviving spouse, and the right of succession. In Germany the distinction is not very clear, and one can say that, generally speaking, the right of succession there takes the place of the legal dower: *Stobbe*, IV, 499; *Huber*, IV, 470; *Heusler*, II, 421. Very often the spouse who inherits appears rather as a member of the community giving up joint possession than as an heir properly so called. In France, perhaps as a consequence of the Roman influence, the idea of succession is brought out better (*cf.*, however, Normandy). *Rimasson*, however, connects the legal right with the right of succession of the barbarian period. *Cf.* as to the case where the survivor takes the succession of the predeceased in the quality of heir of their children: "Justice," p. 212; "Sachsensp.," I, 33; "L. Alam.," 95; *Pollock and Maitland*, II, 422 (copyholds); *Lehr*, "Dr. Angl.," p. 107; *post*, "Community"; *Van Weter*, "Dr. Rom. et Dr. Celtique," 1898, p. 48; "M. G. H., L. L.," II, 37 (general law in the year 1019 giving the survivor, if there are no children, all the possessions of the predeceased; this law was not applied). *Cf.* Dower of Children, "Verfangenschaft." — (B) Gifts between spouses; *Loysel*, 149, 150: "Mutual gift does not prevent dower"; *Pertile*, III, 344; *Chaisemartin*, 382: "Hat with the veil and veil with the hat" (placed upon the altar), a symbolical form of mutual gift.

² Dig. X, 420; "Justice," p. 216; *Glanville*, VI, 1. Competence of the ecclesiastical judges, *post*. Part played by the Holy See in the quarrel between John Lackland and Queen Béragère on the subject of the dower which she claimed: *Rymer*, "Acta," I, 152.

possessions of the wife inalienable in countries of written law. The husband could not dispose of property without the consent of the wife, and, moreover, the personal belongings or family possessions, which it affected if there were no agreement to the contrary, consisted in those things of which people scarcely deprived themselves, even where the Custom permitted it. So great was its importance still in the thirteenth century, that Beaumanoir devotes an entire chapter of his work to it, whereas he passes rapidly over community. The institution met with some resistance on the part of feudalism; the woman was, in fact, scarcely capable of fulfilling the feudal duties; it was necessary that the heritability of fiefs should be fully accepted, for dower to be applied to this category of property.¹ In the last stage of the old law the juriconsults have some difficulty in justifying its existence.² The system of property had changed; the community between spouses had become common, and more often than not it was sufficient if the wife had her share of the community. But the community might be a bad thing; the husband might abuse his powers in order to dissipate it or might administer the personal

¹ Originally fiefs could not be encumbered with dower. "L. Feud," 1, 9, 1; "Sachsensp.," 3, 75. Later on it was allowed, but with restrictions which recall the primitive law, such as consent of the lord: *Viollet*, p. 779. "Dower of the finest," in England, that is to say, dower affecting the finest of the common tenures, whereas tenures by knight-service during the minority of the children return to the lord; the suppression of tenures by knight-service involved the disappearance of this form of dower: *Littleton*, 49; *Blackstone*, II, 8. Kingdoms, the great manors, castles, which the vassal promises to give back and which the lord can demand, were not subject to dower: *Beaumanoir*, 13, 8, 19; *Loysel*, 136; "Bourges," 59; "L. d. Dr.," 115; "Amiens," 121; "Schwabenspiegel," "Lehn.," 36, 104, 188; "Const. Neapol.," III, 13; *Pertile*, III, 339. — The right of the family and the right of primogeniture were also found to be in conflict with dower: "Poitou," 162. — As to the dower of queens, cf. *Isambert*, Table, see "Douaire"; *Ducoudray*, "Orig. du Parl.," p. 795; *Maffert*, "Apanages," "Thèse," 1900; *Monteil*, "Domanialité publique," "Thèse," 1902.

² "Justice," p. 219: She [the wife] is of little service during her life [this is not so in the case of the young widow in good health who has personal belongings; moreover, one might say the same of the husband who is old or infirm]; she is the slave of the lord [St. Paul to the *Ephesians*, V, 22: 'viris subditæ']; she has more pain in childbirth than the lord has [a motive which it is hard to take seriously, even by saying that dower is a recompense for maternity]. The saying of *Beaumanoir*, 13, 1, is often cited, "At the death of the husband the widows are left stunned and despairing"; but the juriconsult does not seek to modify the dower on this account; he means to say that one should not take advantage of their mourning to deprive them of their rights. If the dower only served to insure the maintenance of the widow, the one who had resources could make no claim to it. Cf. *Viollet*, "Et. de St. Louis," III, 267. If he had to pay for the care and the services of his wife, reciprocity would be due the husband. Cf., however, the German proverb: "Dower is the fief of women"; *Chaisemartin*, p. 335; "Norm.," 376; *Lefebvre*, "La Cout. Franç. du Mariage au Temps de Saint Louis," 1901.

belongings of his wife badly. Dower seems to have overcome these dangers, which became less, moreover, as guaranties in the interest of the wife came to be developed. It was intended to allow the widow to live honorably according to the station of her husband, and to keep her rank in society; the nobleman's widow, excluded from the paternal inheritance, had rights which were quite special. Finally, several of the Customs saw in dower a means of keeping for the children the personal belongings of their father.

If dower had only been, as said sometimes, a witness of affection, it would have been natural for the husband to receive a corresponding benefit; but the Customs for the main part refused to grant him any such benefit, which, indeed, proves that dower has sprung rather from a thought of interest than from one of affection. It is true that, following the example of the Barbarian law, the usages of certain provinces, such as Normandy, Anjou, and Maine, made an exception to the common law and allowed the widower the marriage portion of the wife; this same Custom existed across the Channel under the name of **curtesy of England**,¹ which reminds one of the "Counter-Increase" of the countries of written law.

Having become less useful,² being restricted by court decisions,

¹ In Paris and in various of the central provinces, — Orléans, Anjou, Touraine, Maine and Poitou, — the husband who was a widower obtained for his life the marriage portion of his wife, provided he had had a male heir by her and had married "eum virgine." This was a sort of counter-dower: "Et. de St. Louis," I, 13 (provided that the child had screamed and cried); *Boutaric*, I, 45; "L. d. Droiz," § 415; *Beautemps-Beaupré*, "Cout. d'Anjou," I, 189; "A. C., Picardie," 15. In these texts only the gentleman widower is dealt with. Cf. "Confer. de Guénois," 602; "Paris," 238 (reference legacy of the noble spouse). South: "Charroux," 13; "Limoges," 76; "A. C., Bayonne," 63, 81; *post*, "Counter-Increase"; "Ass. d'Antioche," 1; *Viollet*, p. 808. The Norman law extended this right of the widower over all the immovables of his wife, but it was made subject to the condition that he should not remarry: "Summa Norm.," 119; *cf.* "C. de 1583," 382; *Delisle*, no. 72 (in 1210): "quand diu erit absque muliere"; *Colin*, "N. R. H.," 1892, 465. The Custom of England, which was more liberal, more "courteous" than the Norman Custom, did not deprive the widower of this right in case he married again; nor, moreover, did the other French Customs: *Glanville*, VII, 18, 3; *Bracton*, fo. 438; "Reg. Maj.," II, 57; "L. Burg.," 44; *Pollock and Maitland*, II, 412; *Littleton*, 35 (*Blackstone*, II, 8, 3: On the free bench of the County of Kent, or right of the survivor to half of the lands of the predeceased spouse, *cf.* the German "Beisitz"). — As to the origin of this right *cf.* *Brunner*, "Forsch.," 708; "Z. S. S., G. A.," 1895, 96. The fact that it persisted is to be accounted for outside of the force of tradition by the desire not to treat the husband who was a widower any differently from the way in which the wife who was a widow was treated. *Cf.*, moreover, the right of custody in case the children live, *ante*, §§ 163 and 197.

² *Lamoignon* suggested the abolishing of all legal rights of the survivor:

and left in use mainly among the class of the nobility, dower appeared under the Revolution like a fragment of feudalism, a hindrance to the freedom of transactions, a complication in the regulating of inheritances.¹ The Law of the 17th Nivôse, year II, Art. 61, seems to have abolished it "as well as the increase of the marriage portion" and the other rights of a survivor;² though it has been possible for dispute to arise on this subject,³ it is quite certain that the Civil Code no longer recognizes the legal dower.⁴

§ 530. **Conditions requisite for the Existence of Dower.** — (A) *Kinds of dower.* Two sorts of dower are to be distinguished: *dower by agreement* (or *prearranged*) and *Customary dower* (or, as we would say to-day, legal dower). Beaumanoir in a passage which has given rise to a great deal of discussion, 13, 12, attributes the institution of the **Customary dower** to an ordinance of Philip-Augustus, of the year 1214, which has never been found: "The general custom of dower . . . the wife takes half of that which the man has the day he marries her, which began with the ordinance of the good King Philippe, king of France, who reigned there in the year MCC and XIV. And this ordinance commanded this to be done throughout the whole kingdom of France, excepting the domain of the crown and several baronies held from the crown, which were not to be divided in half for dower, and which bring no dower to the ladies excepting that dower which is promised them when they are married. And before this ordinance of the king Philippe no woman had dower excepting such dower as should be promised at the marriage. And it is very evident that the custom was such formerly, from a word which the priests caused the man to say when he was married, for he then said, 'With the dower which is arranged between my friends and thine I endow thee.'" It is beyond a doubt, however, that before

"Arr.," pp. 269 and 464. Regulation of 1773 doing away with the legal dower in Aosta.

¹ "Code Civil interm.," II, 171; cf. III, 155; *Sagnac*, p. 300; *Aron*, "N. R. H.," 1901, 601; *Merlin*, see "Gains nupt.," and "Quest. de Dr.," 7, § 3.

² There is no doubt that the dower of children was abolished: Decree of 22d Vent., year II, Art. 49, and of 9th Fruct., year II, Art. 24. Controversy as to the dower of the wife: *Schmitz*, "Thèse," 1900, p. 81.

³ Under the Civil Code gifts by marriage contract, etc.

⁴ A Law of March 9, 1891, reopening an evolution which seemed to be closed, has conferred rights of succession upon the survivor of the spouses, whether rich or poor, and even when there are children, when it would have been sufficient to have given an allowance for support to the spouse who was in want.

the year 1214 Customary dower was not unknown;¹ the "dos legitima" of the barbarian laws is nothing else, and there is nothing to show that it fell into disuse.² Perhaps this ordinance was enacted with respect to fiefs, which dower could not affect without injuring the rights of the lords.³ At any rate, the Church and the Custom made it a duty of the husband to give his wife dower.⁴

¹ In the English Customs one will observe a remarkable evolution from the dower by agreement to the legal dower. Thus, according to *Glanville*, VI, 1, the husband is held bound to endow his wife "ad ostium ecclesiæ"; when endowing her sometimes he chooses property which is a part of the marriage portion ("dos nominate"), sometimes he does not specify in what the dower shall consist, and then the dower is "rationabilis"; it includes one-third of the free tenement of which the husband is seised at the time of the marriage. About the time of the reign of Edward III the wife has a right to a reasonable marriage portion, even if the husband has remained silent; the dower being compulsory, it is implied: *Bracton*, fo. 12; *Britton*, 101. — In France it was even deemed sufficient to promise a dower, or the formula reported by *Beaumanoir* was made use of, without any specific piece of property being made subject to dower. In the eighteenth century certain of the French Customs only admitted of dower by agreement ("Marche," 288; "La Rochelle," "Yssoudun," "Cambrai," "Amiens," etc.). Perhaps the legal dower had never been admitted in these Customs, perhaps it had ceased to be recognized by them. Other Customs distinguish between the noble women and the plebeian women. Thus the "Cout. de Saintonge," 76, only confers the customary dower upon noble women; the Customs of "Anjou" and "Maine" refuse to give it to them when they are the principal heirs of their relatives. According to *Rimasson*, p. 493, Customary dower is but a transformation of the right of succession that was formerly recognized as belonging to the spouse and that was added to the marriage portion conferred by agreement.

² To the contrary, *Rimasson*, p. 496.

³ *Beaumanoir* makes three assertions, all of which are open to dispute: (a) Philip Augustus was responsible for the creation of Customary dower. But it is quite certain that even before his time a legal dower existed. One may assume, it is true, that this legal dower had fallen into disuse in the Ile-de-France and the neighboring regions. Cf. *Rimasson*, 496. (b) The Ordinance of 1214 was meant to apply to the entire kingdom. This is very unlikely, and, in fact, it was not applied in Normandy and in the other countries where the English law was applied. (c) This ordinance must have assumed that the amount of dower was one-half. But charters establish the fact of the previous existence of this quantity. Then, if that is so, did the Ordinance of 1214 never exist? It is hard to believe that, because *P. de Fontaines*, 21, 45, himself also speaks of the enactment of King Philip which conferred the seisin of dower upon ladies who were widows. Laboulaye makes the conjecture that the ordinance was enacted to apply to fiefs, which were not affected by dower, according to the "L. Feud.," 1, 9, 1. The word "ladies," the exception which concerned the kingdom and the great manors, all support this conjecture: *Blackstone*, II, 8. *Brunner*, "Festg. f. Dernb.," Berlin, p. 41 *et seq.*, rounding out this explanation, believes that Philip Augustus at one and the same time converted the dower of one-third of the ownership into the dower of one-half of the usufruct, the usufruct alone being admissible in the case of fiefs. "Bret.," 199: "No one can give more than one-third by way of inheritance or one-half by way of usufruct." Cf. *Glasson*, VII, 396.

⁴ *Glanville*, VI. — Afterwards dower comes to be regarded so much as the acquitting of an obligation that there is no occasion for its registration, and it is not subject to reduction because of its affecting the legal share.

It was natural that a legal dower should be imposed upon those who had avoided this obligation (for example, in marriages which the priest had not blessed). Such was the favor with which dower was looked upon that the wife could not renounce her legal dower by marriage contract;¹ in the seventeenth century, dower having become less of a necessity, this was allowed.² **Prearranged dower**, moreover, excluded the legal dower;³ but it is to be noticed that it was forbidden to contract for this dower during the marriage for fear it should only serve to conceal gifts between spouses.⁴

§ 531. **The Same.** — (B) *The amount of legal dower* varied according to the Customs; it was generally one-half, in conformity with the Ordinance of 1214.⁵ But the dower of one-third, or English dower,⁶ — it would be more accurate to call it Norman dower, — was also very widespread, especially in the provinces of the West.⁷ The dower established by agreement might be less than the Customary dower, but could not exceed it, — excepting, however, in Paris, Orléans and some provinces where there was no

¹ *Boutaric*, I, 97. "A fortiori," a general renunciation during the marriage would be unlawful: *Boissonade*, p. 208; cf. *Loysel*, 151; "F. gén. de Navarre," 4, 1, 1.

² *Laurière*, on "Paris," 247, states that this amounted to a break with the practice of several centuries. The abolition of the Velleianum Decree of the Senate, the custom of creating the Customary dower when a prearranged dower was established, may have contributed towards this result: *Pothier*, no. 2; *Ricard*, on "Paris," 247; Order of Jan., 1606.

³ "Cout. Not.," 51; *Desmares*, 175. Excepting according to certain Customs in which the widow had her choice. *Jamont*, "Thèse," p. 80 (Brittany); *Pothier*, no. 3.

⁴ *Desmares*, 219; "Gr. Cout.," II, 32.

⁵ *Beaumanoir*, loc. cit.; *Viollet*, "Et. de St. Louis," I, 138; "Cout. Not.," 59; "Olim," IV, 346; "A. C., Artois," 32; "Paris," 248. The dower of one-half seems to be more frequent among plebeians, the dower of one-third among nobles (perhaps because of the right of primogeniture). *J. d'Ibelin*, 179: the nobleman's widow has half of the fiefs, the commoner's widow all the possessions; "Cout. des Bourg.," 186; *Varin*, "Arch. de Reims," I, 609. — "There cannot be dower upon dower," *post*, "Dower of Children."

⁶ That is to say, which was in use in England; but the English themselves had borrowed this from the Normans, and we have already seen that this amount is met with as early as the barbarian period. Cf. right of primogeniture, which is of two-thirds.

⁷ "T. A. C., Norm.," 3 (excepting the chief manor); 5, 2; 79; *Du Cange*, see "Manerium," "Mesnagium," "Mesuagium"; "Summa," 101: one-third of fiefs; one-half of burgage tenures; "Bret.," 336; "Anjou," "Maine," "Touraine," etc.; "Et. de St. Louis," I, 17: one-third for nobles, one-half for others; I, 137; *Glanville*, XII, 20; "Magna Charta" of 1215, c. 8. Cf. "Magna Charta" of 1217, c. 7; *Bémont*, "Chartres," p. 50. We also find in England, alongside of the common-law dower, which is of one-third, dower of one-half (socage, gavelkind) and even of all the husband's lands. One-third at Naples and in Sicily (*Pertile*, III, 334, 337; *Brünneck*, p. 37) in Castille ("F. Viejo," V, 1); "Ass. de Jér.," *J. d'Ibelin*, 71, 91; *Geoff. le Tort*, 16; *Ficker*, III, 244.

maximum.¹ Whether equal or less, it excluded² Customary dower, and, as the Customs did not fix any minimum,³ the dower of the widow ran the risk of being very greatly reduced as a result of special agreements; there was nothing anomalous in this, after she was allowed to renounce her dower by marriage contract.

§ 532. **The Same.** — (C) *The seat of the Customary dower* is exclusively the husband's own inheritance;⁴ movables and acquests are not subject thereto. One would rather expect the opposite result, for the family possessions ought, it seems, not to have been affected by the rights of the wife. But over the movables and jointly acquired property of the marriage this right was converted into a right of community, which had the advantage of leaving to the husband the free disposal of this category of possessions.⁵ According to the Ordinance of 1214, dower only affected those personal belongings of which the husband was possessed at the time of the marriage;⁶ by this it would have been too much restricted, because in most cases the husband is too young at that time to have any personal belongings; so the dower was by contract extended to present and future personal belongings, according to a practice which is found from the time of the barbarian period.⁷ Frequently, the father in consenting to the marriage, also consented to subject the family possessions to the dower;⁸ this consent was implied where the son merely pro-

¹ "T. A. C., Norm.," 79, 2; "Magna Charta," 1215, 8; "Olim," IV, 346; "Jostice," p. 217, 219; "Const. Chât.," 78; *Loysel*, 139; *Desmares*, 137, 218, makes a distinction: commoners can give more than one-half, noblemen cannot; "Cout. Not.," 59; "Norm.," 371; "Poitou," 259. Divided dower in Burgundy: *Robin*, "Thèse," p. 165. — This restrictive tendency comes to light as early as the barbarian period and is in accord with the rights of the family. — Cf. Italy, *Brandileone*, "Arch. Giur.," 67, 2. Laurière and Lamoignon complain of the conferring of enormous dowers.

² "T. A. C., Norm.," 79; "Jostice," p. 219; "Cout. Not.," 51; *Desmares*, 175; "Paris," 261; *Loysel*, 147, 151; Troyes, Meaux, etc., option between the two kinds of dower.

³ The English law admitted that the wife could always claim her legal dower of one-third: *Littleton*, 39, 41. This was not so in the thirteenth century: "Magna Charta," c. 8.

⁴ Fiefs or plebeian tenures. Cf. *Boutaric*, I, 98. A subsidiary dower upon jointly acquired property and movables according to certain Customs: *Pothier*, nos. 17, 98; "T. A. C., Norm.," 5, 4; 79, 2; "T. A. C., Bret.," 30, 40; "Orléans," 221; "Paris," 257.

⁵ Survivals of the old law: *J. d'Idelin*, 177 (dower upon the acquests).

⁶ *Glanville*, VI, 1; "Magna Charta" of 1215, c. 8; cf. "Magna Charta" of 1217 and 1224; *Pollock and Mailland*, II, 419. This is normally the object of the prearranged dower, of the "libelli dotis."

⁷ *Thévenin*, nos. 175, 176; *D. Vaissette*, "Preuves," no. 502. — To the same effect, *Beaumanoir*, 13, 13 et seq.

⁸ Anglo-Norman dower, "ex assensu patris": "T. A. C., Norm.," p. 81; *Viollet*, "Et. de St. Louis," III, p. 276 (*id.* in Touraine, Anjou, etc.); *Loysel*,

ceeded by making a gift of present and future possessions. What agreements accomplished, the Custom accomplished also, and with all the more ease because the Customary dower was an aliquot part.¹ The personal belongings coming from collaterals or descendants were alone ordinarily excepted from the appropriation made for dower.² Even taking this restriction into account, one can see that a large number of immovables were found to be incapable of being disposed of.³ The feeling of practical necessity, combined with a desire not to take away the personal belongings from the administration of the relatives to whom they belonged, often led to the substitution of a dower consisting of a sum of money, especially under the form of a rent-charge for dower in kind.⁴

§ 533. **The Same.** — (D) *The wife obtains her dower, upon going to bed*, it was formerly said;⁵ the majority of the Customs by the sixteenth century have abandoned this archaic rule, and no longer demand that the marriage shall have been consummated. The dower accrues merely by virtue of the nuptial benediction.⁶

138; *L'Hommeau*, III, § 6. This was especially useful in a case where the son died too young to have taken the succession of his parents; his widow would none the less have a dower over the hereditary share which would have come to him: "Poitou," 260 ("Semi-dower").

¹ "T. A. C., Norm.," 79; cf. "Summa," 101; *Beaumanoir*, 13, 14; "Gr. Cout.," II, 32, *Desmares*, 175, 215; "Cout. not.," 51. *Loysel*, 137, attributes the extending of dower to include future personal belongings to an advocate of the fourteenth century, Eudes de Sens; but as early as 1268 the "Olim" mentioned it: "Paris," 248. — Entailed possessions were subject to dower if there were no others: "Ord." of 1747, 45 *et seq.*; *Pothier*, no. 61.

² *Boutaric*, I, 97; *Beaumanoir*, 13, 13.

³ According to the "Ass. de Jér.," *J. d'Ibelin*, 220, in the Customs of "Berry" and "Bourbonnais" (*Pothier*, no. 13) and at Lincoln in England, etc., dower is only taken out of possessions of which the husband is seised at the time of his death. Thus any alienation executed by the husband cannot be attacked. Cf. *Rimasson*, p. 495; "A. C., Anjou," ed. B.-B., I, p. 517.

⁴ In English law from the time of Henry VIII the system of jointures or rents in money upon some immovable of the husband's came to be substituted almost entirely in practice for dower in kind, which had the disadvantage of making the husband's possessions incapable of being disposed of: *Blackstone*, II, 8; *Lehr*, p. 105; *Chaisemartin*, p. 340; in Saxony a frequent changing of the dower into a life rent; *Stobbe*, IV, 114.

⁵ *Loysel*, 140; *Beaumanoir*, 13, 25; "Summa Norm.," 101; "Jostice," p. 219. Survival in the "N. C., Bret.," 450, where it is merely required that the wife shall have put her foot into the bed: *Buche*, "N. R. H.," 1885, 653; *Pothier*, no. 147; "Toulouse," 113 (*id.* for the increase); *Littleton*, 36 (the wife only has a right to the dower if she is more than nine years old at the time of her husband's death); cf. *post*, the basis of the community. The old rule is to be accounted for by remains of the "Morgengabe," the "Beilager," and marriage perfected by consummation. "Oseulum," "Ass. de Jérus.," "C. des B.," 145 (re-enacting "Cod. Just.," 5, 3, 16).

⁶ *Loysel*, 140; "Bret.," 450; *Laurière*, on "Paris," 248 (II, 295).

§ 534. **The Same.** — (E) *The forfeiture of dower* arises from the adultery of the wife, from the fact that she has abandoned her husband, or, as a general thing, that the separation of domicile has been adjudged against her; or, again, owing to misconduct of the wife during the year of mourning.¹ A second marriage compels the woman who has dower to furnish surety, but the dower is not lost unless there is an agreement to that effect.²

§ 535. **Rights of the Wife over the Dower.** — (A) *During the marriage.* Prearranged dower affecting specific possessions was at first considered as the property of the wife.³ But, according to the classical theory, the husband kept the ownership, administration and enjoyment of it during the marriage. All the more was this so with respect to the Customary dower, which affects a certain quantity — a half or a third — of the possessions of the husband.⁴ If the latter no longer loses the ownership of dower, he only has a limited right of disposal; he cannot by means of any deed,⁵ whether for a consideration or gratuitous, deprive the wife of her dower.⁶ When he alienates possessions which are encumbered with dower, the alienation, though it cannot be attacked

¹ "Gr. Cout.," II, 32; *Loysel*, 174; "Norm.," 361; "Bret.," 450; *Glanville*, VI, 17; *Blackstone*, II, 8; *Pothier*, no. 257; *Dumoulin*, on "Paris," 30; *Loysel*, 175; *Pothier*, no. 258 (Order of 1571); "F. de Nav.," 4; *Stobbe*, III, 116. — "Anjou," 311: Misappropriation of dower, — that is to say, abuse of its enjoyment. — Some of the Customs, "Touraine," 337; "Maine," 313; "Anjou," 310; and "Bret.," 208, consider as being inconsistent the quality of dower and of legatee or donee; in Paris the wife can have at one and the same time her dower out of the personal belongings and a gift out of the portion of the jointly acquired property of the community which was contributed by her husband. — "Bourg.," 38: renunciation of the community causes loss of dower. *Contra*, "A. C.," (in Giraud), Art. 3.

² *Fleury*, I, 385; *Pothier*, no. 263; "Bret.," 254; "Ass. de Jér.," "C. des B.," 167; "Olim.," III, 1193, 3.

³ The husband makes a delivery to the wife. *Cf.* a charter of 1069 in *Beugnot*, "Ass. de Jér.," II, 116: "I give you one-half of that which I shall receive from the inheritance of my mother"; then comes a specification of the property: "hec autem trado tibi sub attestacione carte hujus" (Verdun). *Cf.* *Laurière*, on *Loysel*, 155; *P. de la Janès*, nos. 405, 409: the ordinary clause of disseisin-seisin is sufficient. Germany: formalities of the "Auflassung" in general, but in families of princes a mere agreement is sufficient; *Stobbe*, IV, 115.

⁴ The wife could at the most be considered as a joint owner of one-half or one-third of the husband's possessions.

⁵ "T. A. C., Norm.," 4; 79, 12: confiscation of the husband's possessions carries with it loss of dower. *Contra*, *Loysel*, 142 *et seq.*; *L'Hommeau*, III, 55.

⁶ "Justice," p. 169: "Dower cannot be encumbered"; *Chaisemartin*, p. 339; *Rimasson*, p. 158. The inalienability or quasi-inalienability of dower was one of the causes of its being done away with. *Cf.* the English law of 1833 (*Lehr*, p. 104): the husband is authorized to deprive the wife of her dower unless he shall have stipulated not to do so in the marriage contract; purchasers or creditors of the husband are consequently preferred to the widow.

during the marriage, is void as against the wife upon its dissolution.¹ From this it follows that: (a) if the husband survives, as there is no longer any dower, this deed cannot be attacked; (b) if the dower is prearranged, the wife who survives has the right to reclaim² the personal belonging which has been alienated,³ though the grantee who has been ousted may bring an action of warranty against the heirs of the husband; (c) if the dower is Customary, the wife who survives may reclaim possessions alienated by the husband only if there are no personal belongings in the inheritance; the heir is thus compelled to provide her with her dower first of all out of the hereditary possessions. It of course follows that these solutions are applied to agreements creating rights in land as well as to alienations properly so called. The husband whose credit was found to be very much affected by the rights of his wife, and third parties with whom he dealt, could not fail to attempt to provide for themselves against the danger of an eviction. There were cases in which eviction could not take place, for example, the case of sworn poverty; for if the rights of the family were blotted out under this hypothesis, all the more should it be the same with the rights of the wife.⁴ In all periods it seems that alienations made by the husband with the consent of the wife have been made valid; numerous examples of this are to be found during the barbarian period.⁵ During the feudal period renunciation of her rights by the wife is authorized⁶ on condition that it shall take place under oath,⁷ and when the dower has been prearranged

¹ This general principle has not been everywhere applied in the same way. Our outline is therefore only general.

² For how long a time? Certain Customs only give her a period of a year and a day. Generally she has the ordinary periods of prescription reckoned from the time of the husband's death: *Dumoulin*, s. 119; "Gr. Perche"; "Paris," 117; *L'Hommeau*, p. 482. The Decree does not extinguish the dower.

³ *Beaumanoir*, 13, 5 (cf. 21, 3): after her death the inheritance reverts to the purchaser. *Contra*, if the dower belongs to the children: "T. A. C., Norm.," 79; "Summa," 101; *Blackstone*, II, 8; *Glanville*, VI, 3: same solution, but with this exception, that if the wife offers opposition to the alienation she loses her dower; this is because she is bound not to gainsay her husband.

⁴ "Gr. Cout.," II, 32; *Boutaric*; "Actes du Parl.," no. 7823. Other cases of necessary alienation: *Pothier*, no. 84.

⁵ *Rimasson*, p. 397.

⁶ *Beaumanoir*, 13, 5; "Olim," I, 735 (in 1268): expressed renunciation; "Justice," p. 169 (grant to the wife); *Boutaric*, I, 97; "L. d. Droiz," 849; "T. A. C., Norm.," 4 (the wife's renunciation is not binding). The wife in Scotland renounces her dower without any formalities; in English law the same result is arrived at indirectly by means of the proceeding of the fine and recovery.

⁷ "Et. de St. Louis," I, 173; "Artois," 33. The other texts do not mention it: "T. A. C., Norm.," 4; "T. A. C., Bret.," 30, 40; "F. de Béarn," 272.

the amount renounced must be reinvested.¹ This, however, only came about very gradually, for it was to be feared that the consent of the wife was not free; if during the marriage she could not give up her dower in mass and all at once, she ran the risk of being led to lose it bit by bit by means of successive renunciations in proportion to the alienations made by the husband. In the sixteenth century the oath is no longer made use of. Reinvestment, properly so called, has given way to the recompense or legal reinvestment;² and, finally, the security of the wife consisted in an implied mortgage.³

§ 536. **The Same.** — (B) *At the death of the husband.* Only then did this right vest for the benefit of the wife, for the rule is that "a husband never paid dower."⁴ Loysel, 146, says that "Customary dower gives seisin;⁵ prearranged dower had to be asked for at law, which is something that is beginning to be changed almost everywhere."⁶ In prearranged dower the possessions subject to the dower were known beforehand. On the other hand, it was necessary to partition the personal belongings of the husband in order to know which of them were affected by

¹ "Et. de St. Louis," I, 173; *Boutaric*, I, 97; "Artois," 33.

² *Loysel*, 151. *Laurière* states that the renunciation is valid even if the wife does not take any other property from the husband's succession in order to indemnify herself. Cf. renunciation of the Velleianum Decree of the Senate; *Meynial*, "N. R. H.," 1900.

³ *Loysel*, 155. Rank, *Pothier*, no. 193 (Order of 1661: after the marriage portion and before the reinvestment of the personal belongings), 343; *Boissonade*, p. 178. The mortgage affects the hereditary possessions held by the heirs and possessions which have been alienated and are held by third party purchasers. The implied mortgage was brought about in two ways: (a) system of rents assigned over a piece of land; (b) notarial deeds: see "System of Mortgages"; "Toulouse," 118: "assignamenta pro necessariis dotibus et dotaliciis." A similar mortgage for the increase of the marriage portion; the wife could not renounce it (*cf. post*, "Marriage portion system"), whereas she was allowed to renounce the dower mortgage.

⁴ Dower even went so far as this: *Loysel*, 141, 172. However, in case of a judicial separation or separate maintenance the wife had a right to reclaim her dower "during the lifetime of her baron." "Ass. de Jérus.," "C. des B.," 171; *Viollet*, p. 790; *Pothier*, no. 153; *Fleury*, "Inst.," I, 386. In the seventeenth century the wife who had obtained a separate maintenance only obtained an allowance, the "Semi-dower": see *Ferrière*.

⁵ *Loysel*, 141; *Desmares*, 216; "Gr. Cout.," II, 33; "Paris, A. C.," 140, 143; "N. C.," 236. The issues, arrears, complaints: *Pothier*, 159; *Stobbe*, IV, 115.

⁶ Competence of the ecclesiastical courts; in the thirteenth century the lay courts have jurisdiction in the action for possession, and in the sixteenth century there is no longer any question of ecclesiastical jurisdiction: *P. de Fontaines*, 21, 52; "Olim," in 1269, in *Boutaric* c., 1364; "T. A. C., Norm.," 5, 7: delays in the ecclesiastical courts as a result of a series of appeals carried as far as the pope: *Glanville*, VI, 11, 14; *Boutaric*, II, 1; *Loysel*, 146; *Beaumanoir*, 11, 9; "L. d. Dr.," 421.

the Customary dower;¹ according to certain Customs, the "woman who has dower appoitions and the heir chooses";² others give the wife the choice of possessions. — The estate of the wife, especially in dower by agreement, consisted at first in a true ownership, which was sometimes perpetual and sometimes for life;³ the latter prevailed, and was transformed under the influence of the Roman theories into a mere enjoyment or usufruct, which was extended, it is true, by reason of its origin, in a very broad manner.⁴ Dower is free, it is said;⁵ thus, the widow does not have to pay any relief;⁶ she does not contribute to the debts on movables of the inheritance of her husband;⁷ and, finally, in many of the Customs she furnished no surety.⁸

§ 537. **The Dower of Children**⁹ is nothing else than the dower of the mother¹⁰ which has become a Customary, "legal share"¹¹

¹ "Dwelling-house," *post*; *Beaumanoir*, 13, 19.

² *Beaumanoir*, 13, 8, 24; "Bret.," 31, 33; *Loysel*, 156 *et seq.*

³ *Viollot*, p. 777; "Et. de St. Louis," I, 132, 137. Ownership according to certain Customs, — for example, "Sens," 169; or by means of an agreement: *P. de la Janès*, no. 400. Dower without any reversion, see *Ferrière*; *Loysel*, 148; "T. A. C., Norm.," 6. The "Cout. d'Aoste," 5, 7, 15, allowed the wife to dispose of her dower without leaving any part of it to the children, "which custom seemed to be rather harsh": *Pertile*, III, 337; *Stobbe*, IV, 115. — The general tendency, which was in conformity with the general conception of the gift, must have been to confer upon the wife only an ownership limited by the right of reversion to the donee and his heirs; this right became stronger when the dowager had only a usufruct, whereas in the case of ordinary gifts it disappeared or was reduced to the condition of a right of succession: *Brunner*, "Forsch.," 733. Cf. *Rimasson*, pp. 403, 159 (Roman influence).

⁴ The idea of ownership enables us to understand why the widow originally had the honorary rights connected with the fief (hunting, presentation of benefices, etc.), gave homage, paid the relief ("Gr. Cout.," II, 27. Cf. lease, appanage, pledge), paid not only the ordinary charge, such as the quit-rent, but the extraordinary charges, such as the Church tallage. — When she became a mere usufructuary she no longer had anything excepting rights of user, did not pay any relief ("Paris," 40), and very often had to give surety. Cf. *Pothier*, nos. 53 and 230.

⁵ The dowager must have taken the issues free and clear: *Beaumanoir*, 12, 2; 13, 7, 22 *et seq.*; *Bracton*, II, 40, 4; *Britton*, 103; *Stobbe*, III, 116.

⁶ *Loysel*, 154; "Olim," I, 419; "Paris," 40; *P. de la Janès*, no. 402.

⁷ *Beaumanoir*, 13, 9; "Olim," I, 467, 1; "Const. du Chât.," § 78 (ed. *Mortet*), note; *post*, "Community"; *Renusson*, c. 8.

⁸ *Loysel*, 153 (she keeps up the land, and pays the charges and ordinary rents of the land, but not those which have been constituted during the marriage); *Beaumanoir*, 30, 40; *Desmares*, 187, 196; "Cout. Not.," 104; "Paris," 252, 264; *Pothier*, nos. 53, 210.

⁹ *Pothier*, no. 228 *et seq.*; *Marchant*, "Thèse," 1899 (bibl.); *R. Caillemer*, "Mélanges Appleton," 1903 ("Douaire des Enfants").

¹⁰ Save a few exceptions: *Lebrun*, "Succ.," II, 5.

¹¹ An expression of *Loysel*, 158. — Cf. the "Verfangenschaft" of the German law: *Stobbe*, IV, 105 (bibl.), in the hands of the surviving spouse the immovable possessions of the predeceased spouse constitute with those of the former a mass which is inalienable unless the consent of the children be given; these

for the children.¹ If the mother dies before the father, the children are given dower in her stead and place;² but their right only vests at the death of the father. Up to that time the dower cannot be disposed of by him; it is even more inalienable than that of the wife, because she could renounce it and the children cannot. When the father dies³ the children are given a choice between the paternal inheritance and the dower, because "No one can be heir and have dower at the same time." If they accepted the inheritance the dower was not separated from the latter; they had to pay the debts of the father and abide by alienations made by him. If they renounced, they were authorized to take dower free from the paternal debts and no transferee could set up against them any alienation or agreement conferring real rights. However, they were held bound to deduct from the dower gifts which they had received, because no one can have dower and be a donee or legatee at the same time. Thus the dower of children appears to be a more powerful form of reservation;⁴ the latter, in fact, was

possessions are "Verfangen," that is to say, chained up for the benefit of the children; in case the surviving spouse marries again they are kept for the children of the first marriage to the exclusion of those of subsequent marriages. Cf. devolution and mutual gift, *ante*. The theory of "Verfangenschaft" gives rise to controversy (summed up in *Stobbe*, IV, 128). From the historic point of view one should notice its variations: the surviving spouse found himself originally at the head of the community, then his possessions were distinguished from those of the predeceased, and over the latter he was given merely an ownership for life or a usufruct. Cf. as to this evolution, *Heusler*, II, 457.

¹ *P. de Fontaines*, 34, 8; *Boutaric*, "Arr. du Parl.," March 15, 1326; "Jos-tice," 10, 21; 12, 24; 12, 6; 8, 3; *Beaumanoir*, 13, 2-18 (villages alone); "A. C., Artois," 35; "A. C., Picardie," pp. 151, 154; "Gr. Cout.," II, 32; *Desmares*, 175, 217, 283; "Cout. Not.," 82; *Boutaric*, I, 97 (note by *Charondas*); "Conf. des Cout. de Guénois," *loc. cit.*; "Paris," 248 *et seq.*; *Ferrière* on this Art.; *Marchant*, pp. 54, 61.

² Which means that "there is no dower upon dower": *Loysel*, 168; "Jos-tice," p. 256; *Beaumanoir*, 13, 2, 18; "Const. Chât.," 26; "Gr. Cout.," II, 27. Thenceforth in the case of a second marriage the dower of the second wife is one-fourth, that of the third one-eighth, etc.; in fact, the only thing that is left at the disposal of the father who remarries is one-half of his personal belongings; and, the dower being of one-half, this will amount to one-fourth (or the half of one-half) of the inheritance properly speaking, etc.: "Paris," 253; "Artois," 135.

³ Cf. in the Roman law the rule, "Dotis causa perpetua est." The inalienability of the land constituting the marriage portion, which is inspired by the thought of allowing the widow to marry again, was diverted from this object and served to keep the marriage portion in the family.

⁴ The legal share in the reservation must be paid by the father and the mother; the dower, by the father alone. Dower affects present personal belongings at the time of the marriage, or those which are acquired later on, even though they be alienated for a consideration, and not merely when they are given or bequeathed. Dower is only charged with debts contracted previous to the marriage; on the contrary, debts contracted during the marriage are paid out of the legal share and the reservation. In order to have

only an obstacle to gifts by will.¹ Dower is connected with the very old institutions, inspired by the old spirit of community interests.² It is therefore not very difficult to account for the fact that they succeeded in maintaining this ground until the end of the Old Régime in certain Customs, such as that of Paris, but that at the same time they did not have sufficient strength to become generalized or to become common law.

§ 538. **The Increase of the Marriage Portion** is the dower of countries of written law.³ It has the same object and the same characteristics,⁴ but not the same origin. The amount of the increase varies according to localities; as a general thing, it is proportional to the marriage portion to which it is added,⁵ and the amount of which it *increases*.⁶ Sometimes it is equal to the mar-

dower one must renounce the position of heir. The children can be deprived of dower (and not of the legal share or of the reservation) by a clause in the marriage contract, dower not being subject to the rules relative to primogeniture: *Loysel*, 163. These peculiarities are to be accounted for by the fact that from the day of the marriage the children acquire the dower just as though a delivery of it had been made; they get it "jure contractus," and not "jure successionis": *P. de la Janès*, 409.

¹ The customary third in Normandy, introduced for the first time in the "Custom" of 1583, Art. 399 *et seq.* (see Basnage, etc.), is a sort of legal share, — the only one, moreover, which was recognized in this province, and one which the Custom gave to the children in the form of the ownership of certain of their father's and mother's possessions in case they gave up their succession, and of which they could only be deprived by being disinherited: see *Ragueau*, *Guyot*.

² During the barbarian period it is not a rare thing for the widow to be unable to dispose of the marriage portion given by her husband to the prejudice of her children; in case of a second marriage the surviving husband is forbidden to dispose of it. *Contra*, "N. R. H.," 1884, 654. Can one also say that the dower consisting of ownership naturally passed to the children?

³ Terminology: "Donatio propter nuptias," "sponsalicium," "augmentum," "agenciamentum," "osculum": "Bord., A. C.," 111; "Cahors," 22; "Ass. de Jéru.s.," "C. des B.," 167; "Toulouse," 113 *et seq.*; "Angoumois," 47; *Viолlet*, p. 810. "Arras," in Spain; "Sereix" (increase) in Roussillon and Catalonia. *B. d'Argis*, p. 98 (advantage by contract). Italy: "contrados," *cf.* "ἀντιθέρεση," "incontro," "contrafatto," "antefatto" ("maximum"). German law, see "Widerlage."

⁴ *Boucher d'Argis*, p. 25 (comparison with dower). Effects during the life of the husband: "Toulouse," 118, 153; "Tonneins," 84. — There are Customs according to which the widow has the increase and the dower both at the same time. In Navarre the widow of a noble has the usufruct of all her husband's possessions, besides the "arras" and one-half of the acquests.

⁵ Before the time of Justinian the antenuptial gift was already in proportion to the marriage portion. The correlation was very much closer after the time of Justinian: (a) it could be established during the marriage; (b) the amount of it had to be equal to that of the dower ("Nov.," 97); (c) the immovables were inalienable ("Nov.," 61); (d) mortgage upon the husband's possessions; (e) anticipated restitution if the husband became insolvent: *Girard*, p. 957.

⁶ No increase without marriage portion: "Petrus," I, 30. — In the will (unpublished) of a simple workman, Jean de Latour, Aug. 28, 1348, the fact is admitted that his wife brought him a marriage portion of 8 "livres" and

riage portion (double marriage portion),¹ sometimes to one-half or one-third of the latter.² Although the parties may be free to fix the amount of the increase,³ it is not usual for the increase which is agreed upon to be greater than the Customary increase. It ordinarily consists in a right of ownership if there are no children, and in a usufruct if there are.⁴ The mother who does not remarry acquires, as a general thing, the "man's share" of ownership in the increase, — that is to say, a man's share with respect to the number of children who inherit.⁵ The origin of the increase, which was formerly much disputed,⁶ seems to have been in the "ante nuptias" gift of the Theodosian law, which had not ceased to be in use in the South of France.⁷ Upon two points they are similar; like the antenuptial gift, it cannot be appointed during the marriage; and, like that also, it is necessary that it should be equal to the marriage portion. This equality, which was forbidden by the law of Justinian, was only accepted by a few exceptional Customs.⁸ The Southern Custom introduced an increase

10 "sols," and this sum was assigned out of a certain piece of land; J. de Latour gives his wife as an increase of her marriage portion, and by reason of her pleasing services with her body and her property, a sum of 70 "sols." — *Lézat*, 49; "Tonneins," 83. — Italy, *Lattes*, 240, 247.

¹ "Bord. N. C.," 47, 49; "Agen," 27, etc.; *Stobbe*, IV, 185.

² "Toulouse," "Foix," "Montauban," "Albi," "Comminges"; *Lézat*, p. 97, etc.

³ *Roussilhe*, "Dot," II, 141; "Cahors," 22.

⁴ "Petrus," I, 33. As to the Justinian law cf. *Zacharie de Lingenthal*, p. 64 et seq.

⁵ *Boucher d'Argis*, p. 194; *Henrys*, IV, 9, 56 and 111.

⁶ *Boucher d'Argis* connects it with the Byzantine "hypobolon." Cf. *Zacharie de Lingenthal*, p. 64 et seq. The crusaders must have brought this institution with them from Constantinople. But the truth of the matter is that both the "hypobolon" and the increase have a common origin: *Brandileone*, "Don. propter nuptias," 1892; "Studii s. svolg. d. Rapporti patri-monial fra conjugi in Italia, Arch. Giur.," 67, 2 (1901); "Ult. fase d. Don. pr. nupt.," *Esmein*, "Le Test. du Mari et la Don. ante nuptias" ("Mél.," 1886); "N. R. H.," 1884, 1.

⁷ The marriage contracts in the South as early as the eleventh century contain antenuptial gifts which are frequently joined to marriage portion gifts. Examples in *D. Vaissette*, V, 738 (in 1095). Bertrand, the son of Raimond de Saint-Gilles, gives his fiancée "in sponsalicio" the towns of Rodez, Cahors, Viviers, Avignon and Digne, each one "cum comitatu et episcopio"; after the death of the spouses they will pass to their children; if there are no children the wife, should she survive, shall have the right to dispose of them at her will. Generally in other deeds, if there are no children, the property reverts to the husband's relatives: V, 795, 888, 954, 1109, 1202; VIII, 278 (in 1171: inequality between the marriage portion and the gift "propter nuptias"), 317, 394, 498. *Pasquier*, "Doc. rel. a Boussagues," pp. 26, 28; "Liber Inst. memor." ("Cartul. des Guillems de Montpellier," 1884-6), pp. 92, 263, 270, 349, etc.

⁸ "Petrus," I, 30, 43, 51, also requires that the gift "Propter nuptias" and the marriage portion should be of equal value; "Bord. N. C.," IV, 47, 49. *Contra*: "Montpellier," 75, 95; "Alais," 17; "Liber Instr. memor.," loc. cit.

established by agreement into certain localities.¹ Both the increase and the antenuptial gift were for the benefit of the children, provided the mother should have survived, whereas the dower only benefited them as an exception and when the mother had not survived.²

§ 539. **Rings and Jewels**³ were another right based on survivorship, granted to the widow in countries of written law, and consisted originally in objects specifically given by the husband to his wife,⁴ and later in a fraction of his possessions, — one-twentieth or one-tenth of the marriage portion, so as to form a sort of balance for the increase.⁵

§ 540. **Counter-Increase.**⁶ — In case the wife died before the husband the latter received all or a part of the marriage portion, sometimes in ownership, when there were no children, ordinarily in usufruct, especially where there were children.⁷ This is what is called the "Counter-increase," an equitable set-off for the acquisition of the increase of the marriage portion by the widow, and perhaps a survival of the acquiring of the marriage portion by the husband in the Roman legislation.

§ 541. **Mourning and Residence.**⁸ — The Customary law, which is in accord with the customs of the barbarian period, allowed the widow to reside in the house of the husband,⁹ and also allowed her mourning, — that is to say, mourning garments.¹⁰ The widow

¹ "Bord. N. C.," 47, 49; *Boucher d'Argis*, p. 29; *Fons*, loc. cit.

² *Bretonnier*, "Quest.," II, 1, 4, 9, 1.

³ *Boucher d'Argis*, p. 63; see *Guyot*; *Argou*, III, 11.

⁴ Cf. the old custom of betrothal presents. — See "Morgengabe," ante. Aragon, "bentages forales" (clothing, jewelry, the best bed in the house, a hackney, two beasts of burden with their harness). Catalonia, "regalos de boda." — Cf. paraphernalia of the English wife: *Lehr*, p. 103 (jewels given to the wife in order that she may wear them with a view of maintaining her rank in society; frequently she does not acquire their ownership; they are the family jewels). — In Rome, Labeon bequeaths to his wife Neratia the "mundus muliebris" and the "ornamenta muliebria": Dig., "de leg.," 32, 32, 6.

⁵ Sometimes the rings and jewels are the wife's of absolute right (Lyonnais), sometimes they must be stipulated for in the marriage contract (Provence, Grenoble, Bordeaux, Toulouse). They are to be found once more at Metz.

⁶ See as to this deeds of the South in *D. Vaissette*, V, 895, etc.; "Toulouse," 88, 92, 114, 115; "Tornadotz," "Fors et Cost. de Béarn," "r. de marit.," "Bord., A. C.," 104; *Ducros*, "Refl. s. la Cout. d'Agen," 246.

⁷ The Customs of the South vary greatly: "Nov.," 53, 6; 117, 5; "Cod. Just.," 6, 18; "Petrus," I, 33; *B. d'Argis*, *Roussilhe*, etc.

⁸ *Pothier*, "Tr. du Dr. d'Habitation," 1771; *Boucher d'Argis*, 63, 101; *Argou*, III, 11; Civil Code, 1465, 1481, 1492, 1570.

⁹ "Et. de St. Louis," I, 16. Cf. in the Mahometan law the period of legal repurchase ("aidda"), *Joly*, "Thèse," p. 176.

¹⁰ *Loyse*, 135. Roman custom: "mulier non debet suis sumptibus lugere maritum." The English widow has not a right to mourning: *Lehr*, p. 107 (*contra* in Scotland): Civil Code, 1481.

originally could not be banished from the conjugal hearth as long as she did not remarry. But later this right became restricted; the Custom of Paris only grants it during the period required to make an inventory and decide on what is to be done; the widow then took her maintenance and that of the servants out of the stores belonging to the community.¹ It was also customary in countries of Customs for her to withdraw from the movables of the community a few minor objects for her personal use ("linen and wearing apparel").² — In countries of written law she had no right to residence unless there were a special agreement to that effect.³ But mourning she was entitled to, as well as maintenance ("necessaria, vestitus et victus") during the year which was granted to the heirs of the husband within which to make restitution of the marriage portion (excepting that she was not allowed to demand interest on the marriage portion); if she had not brought with her any marriage portion, she received an allowance during this year, which was called "the widow's."⁴

¹ "Quarantine" of the widow in England ("Magna Charta," 1215, c. 7; *Bracton*, fo. 96). "Free Bench of the County of Kent," *ante*. "Trentaine" of the German law, and often during this period the widow has the "Musstheil," that is to say one-half of the provisions for eating which happen to be in the house at the time of the death of the husband: *Schroeder*, 309; *Heusler*, II, 298, 326, 342; *Pertile*, III, 341.

² *Beaumanoir*, 13, 21, only allows the widow to carry away her every-day dress and a bed such as she was accustomed to use for her rest; *Boucher d'Argis*, 81. — "Roisin," p. 154; *Lagrèze*, "Dr. dans Pyr.," p. 127; "Tours," 293.

³ "Insistance," "Toulouse," 119 *et seq.*; "Tenute" in "Roussillon"; *B. d'Argis*, 93; "Des Dev. du Déz.," p. 822; "F. de Béarn," 2, "De Marit." 3.

⁴ "Toulouse," 119 *et seq.*; "Decis. Cap. Tol.," IX, 337; *R. de Lacombe*, see "Augment," no. 24 (dwelling-house until the payment of the increase); *Roussilhe*, no. 625.

TOPIC 3. SYSTEMS WITHOUT COMMUNITY

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§ 542. **In General.** — The systems of property between spouses during the feudal and monarchic periods are very diverse, but can be reduced to two principal types. 1st. *Systems without community*, which are in use in England and Normandy and in rather a large portion of Germany and Switzerland and a few localities in the east of France. We may group with this the Roman system of marriage portions which was in effect in countries of written law, Italy and Spain. — 2d. *Systems with community*. Such are the partnership in acquests found in Spain and the southwest of France, the community of movables and acquests found in Customary France and Germany, and the absolute community found in a part of Germany.

§ 543. **English System.**¹ — (A) *The Common Law* under its classical form, such as it appears in Blackstone, with that extreme logic which does not hesitate at the absurd, seems to organize the entire system of property between spouses as a function of the incapacity of the married woman. During the marriage the wife is nothing and has nothing. Her personality is absorbed in that of the husband: "Vir et uxor sunt quasi unica persona," Bracton was already saying, referring to the text of scripture, "erunt duo in carne una."² Marriage is for the woman a sort of civil death; she cannot contract with her husband because they only form one person; gifts between spouses are radically impossible;³ agreements entered into between them before the marriage are

¹ Blackstone, I, 7, and II, 29; Pollock and Maitland, II, 397; Glasson, "Inst. d'Anglet.," II, 284; IV, 308; VI, 187; Lehr, p. 70; Bertheau, "Thèse," 1902.

² Bracton, fo. 429 b. Cf. fo. 414; Littleton, no. 168; Glanville, VI, 3; "Quoniam Attach," 22; "L. Burg.," 131.

³ Cf. "Reg. Maj.," II, 15; Bracton, fo. 29. But the husband may make a will leaving his property to his wife, as the gift is made to take effect at a time when the marriage will no longer be in existence.

annulled by the fact of its celebration; the wife cannot, moreover, have any dealings with third parties, nor act at law, nor make her will.¹ There is no need for the husband to give her authority, because she does not exist, considered as a person;² it is he who acts, who contracts, and who pleads; he would undoubtedly have been charged with making his wife's will if there had not been seen in this a religious act based upon conscience alone.

There is some exaggeration in these formulæ, even if we only consider the final state of the Common Law, and especially if one goes back to the period of its formation. In the thirteenth century the husband and the wife act jointly in court and extrajudicially, where the lands of the wife are concerned. If their alienation is proceeded with, the wife is interrogated by herself in order to find out if her consent has been free. Thus one sees that her personality is not entirely obliterated. She owes obedience to her husband, "*non potest contradicere viro, quia vir caput mulieris*"; the husband has a right over her which can be compared to the custody of a minor. By virtue of this right he acquires the movables (personal property) of the wife, subject to paying her debts, and has the administration and the enjoyment of her lands (real property). It is in this sense that the passage from Bracton must be understood: "*Omnia quæ sunt uxoris sunt ipsius mariti*."³ From this unity of patrimony, and from the respective rights of the spouses at the death of one of them, there might have arisen the system of the conjugal community.⁴ But the germs of this

¹ *Glanville*, VII, 5, 3: the wife cannot make a will without the authority of her husband, but it is his duty to allow her to dispose of one-third of the movables, and the majority of husbands do this. This is all the more readily understood as in case the husband dies first, the mass of the movables is divided into three portions: one for the deceased, one for his wife and one for his heirs. Private documents support this assertion. Cf. also *Bracton*, fo. 60b. If the wife dies intestate one portion of the movables is used in pious works for the salvation of her soul through the care of the Church. Thus it is the Church which claims the wife's portion and not the heirs, as would have been the case under the community system.

² The wife may contract in the capacity of an agent of her husband, in order to obtain household necessities: *Pollock and Maitland*, II, 432.

³ *Bracton*, fo. 32.

⁴ *Pollock and Maitland*, II, 432, cite an old deed which concludes as follows: "*Sic utriusque conjugis bona confunduntur, ut quivis eorum totius patrimonii in solidum dominus sit*." The two spouses are tenants by entireties. Cf. *Blackstone*, II, 12. One conveys to the husband and the wife and their heirs, the price of the wife's lands is paid to the husband and wife, following the fine they both appear in court on behalf of the wife's lands: *Littleton*, 667 *et seq.* Moreover, the community is not always easy to distinguish. It is generally admitted that it existed very long ago in Scotland, and yet Fraser has maintained, "*Husband and Wife*," 1876, p. 648, that it

institution came to nothing in England as well as in Normandy. The law set its face towards the separate property system. A special fact accentuated the tendencies of the old legislation in this direction. What I mean is the double jurisdiction of the Courts of the Church and the secular tribunals. The former, not finding the community either in the Roman or the Canon law, emphasized the fact that the wife had no movable property during the marriage; the secular courts maintained a decided separation between the immovable inheritance of the spouses, so as to preserve it for their family.

As a last item, the corporeal movables of the wife belong to the husband; he has the right to take possession of them, and, providing that he has done so, to dispose of them as of his own possessions "inter vivos" or by will; they are included within the intestate succession.¹ The products of the wife's labor are not excepted from this rule. The taking of possession has a particular importance with regard to chattels real or choses in action, whose disposal, consequently, is found to be a little different from that of corporeal movables.² As to the wife's immovables,³ the husband acquires an estate over them as long as the marriage lasts, or even for his whole life, in case a child is born (curtesy of England). He is free to dispose of this estate, but he cannot confer on third parties rights more extensive than those which he has himself. "A wife's property cannot be lost," as is demanded by the interests of the family; the only means of alienating it is the fine with the participation and consent of both the spouses.⁴

had been but recently imported from France. Cf. *post*, Germany: *D'Olivecrona*, p. 68.

¹ Cf., however, above, the right of the wife to one-third of the movables or to one-half if there are no children. But this old rule disappeared from the common law: *Pollock and Maitland*, II, 346. Cf. "Anc. Us. d'Anjou," ed. *Marnier*, § 75.

² (A) Chattels Real; the husband can dispose of them but only "inter vivos"; if he dies without having done so, they belong to the wife; if the husband survives they belong to him. (B) Choses in action; the husband collects the claims and can pursue the debtors; by this means he acquires this species of property. If he does not do this, as the wife has never been disseised, she keeps them. The husband who survives cannot pursue the wife's debtors in his quality of husband, but he can do so as administrator of the estate of his wife.

³ As to the "Maritagium" cf. *Glanville*, VII, 18; "Reg. Maj.," II, 18; II, 28 *et seq.*; II, 48 *et seq.*; II, 57; III, 17; "Quoniam Attach.," 20, 91 *et seq.*; "Stat. Alex.," II, 22; "Fleta," I, 13; III, 11; *Britton*, 67; *Bracton*, fo. 22, 28; *Littleton*, 265 *et seq.*; *Glasson*, "Inst. Anglet.," VI, 185; "The daughters scarcely ever receive any marriage portion from their parents, and, as their rights of inheritance are very limited it follows that all the wealth is kept for the men."

⁴ *Glanville*, VIII. — *Gide*, p. 253.

If one wishes to have a complete idea of the English system, one must remember that the wife has a dower of one-third, which makes it impossible for the husband to dispose of his lands during the marriage excepting by way of fine and with the consent of his wife. She still has a right to her "pin money," an annual allowance which it is customary for her husband to promise her, and to "paraphernalia," jewels and articles of the toilet (without counting the wardrobe which is necessary for her).¹

§ 544. **The Same.** — (B) *Courts of Equity.* The decisions of the **courts of equity** authorized the wife to keep as her personal belongings certain properties (separate estate) by confiding them to trustees or fiduciaries.² With respect to these possessions she has the same capacity as the unmarried woman ("feme sole"), the assured power ("ligia potestas") of the widow. *At law* the wife is "covert de baron"³ and has no possessions of her own; in equity she becomes independent of her husband through the intervention of trustees and to the extent of her separate estate.⁴ This is the wife with a marriage portion and the wife with paraphernalia, of the Roman law, but quite differentiated as a result of the presence of the fiduciaries who are strangers to the husband. This is a solution of rather doubtful propriety, this three-cornered establishment, but no other expedient was found to take the woman whose personal fortune was considerable out of the power of her husband. The motives which justified this even caused in time the recognition of the fact that the wife had a right to demand a separate estate independent of any agreement (equity to a settlement).⁵

§ 545. **The Same.** — (C) *Act of the 10th of August, 1882.* This body of rules was completed and generalized by a Law of 1882 enacting the civil emancipation of the married woman. This statute was exactly opposite to the common law. All the possessions

¹ The husband has a right to dispose "inter vivos" (but not by will) of the rings and jewels of his wife and these form a pledge for his creditors. Cf. "Quoniam Attach," 21, 38; "Fleta," V, 17.

² *Pollock and Maitland*, II, 430 (origin of this sort of trust). Cf. "Sondergut" of the German wife.

³ *Du Cange*, see "Cooperire"; *Pollock and Maitland*, II, 404.

⁴ Cf. *ante*, "Uses." The Courts of Chancery recognized married women as having the status of a "cestui que use."

⁵ A settlement is usually a deed by means of which the disposal of a piece of property is determined. The Court of Chancery at first only intervened on behalf of the wife when the husband applied to it, for example in order to obtain possession of a piece of the wife's property; it applied the rule: "He who seeks Equity must do Equity"; the Court would only give its help to the husband if he made a settlement on his wife, as Equity required.

of the wife are looked upon as paraphernalia, except there be an agreement to the contrary. The wife is fully capable of acting alone at law or extrajudicially. She has only to contribute to the expenses of the keeping up of the marriage if the husband or the children are indigent. The life in common of the spouses is not accompanied by a single community of interests outside of that which they may wish to establish and which they can put to an end when they please. Separate property and equality of the spouses, such is the liberal formula at which the English law has arrived, after having begun with the strictest subjection of the wife to the husband.¹

§ 546. **Norman System.** — (A) *Incapacity of the Married Woman.* The Norman law took the same point of departure as the English law. "As soon as the wife is under the authority of her husband," says the "Grand Coutumier de Normandie," ch. 100, "he can do as he wishes with her² and with her property and her inheritance; she cannot be heard as long as she lives under him."³ The absolute incapacity of the married woman such as results from this formula⁴ suffers exceptions at a very early time and decreases especially during the sixteenth century; there are cases in which the woman can act at law even in spite of her husband, for example, when she has received an injury.⁵ When the alienation of her marriage portion became lawful she had to be a party, and if she had her husband's authority she was free to obligate herself in the exceptional cases in which, even in the old times, she was allowed to alienate her marriage portion (to get the husband out of prison, etc.).⁶ If the early incapacity was not kept up, it at least paved the way for the Velleianum Senate Decree, which forbade married women, and even unmarried women and widows, to bind themselves for another. It was introduced into Normandy, as in the rest of Customary France, about the fourteenth century,⁷

¹ *Barclay*, "Bull. Soc. lég. comp.," XII, 443; *Esmein* on *Gide*, p. 259; *Bertheau*, p. 312.

² "Summa," 85, 8; 100, 3, 77. The following saying of Dumoulin is often cited: "In Neustria mulieres sunt ut ancillæ, multum subditæ viris suis qui sunt avari."

³ Incapacity of making a will lessened in Art. 417 of the "N. C."

⁴ Cf. "Hainaut," 1534: *Glasson*, VII, 389; *Dumées*, "Dr. Fr. Flandre," 1753.

⁵ "Summa," 76; 96; 100, 3; "N. C.," 543 *et seq.*; "Anc. Us. d'Anjou," ed. *Marnier*, § 95.

⁶ Separate maintenance of Roman origin (which has not been adopted by the English law).

⁷ Before this date no trace of it is to be found, a thing which is readily conceived of, for the Theodosian law either disappeared or else became blended

but it was applied there with a special strictness; intercessions for the benefit of the husband or a third party were looked upon as void at law unless there were letters of rescission; women were forbidden to renounce the benefit of the senate decree, which was contrary to the general usage in countries of Customary law, and the Parliament of Rouen refused to register the Edict of August, 1606, which abolished the Roman institution.¹

The property brought by the wife, or "**marriage**," was very small originally, for "the father owes his daughter a husband and nothing more."² Daughters were excluded by the law, even in the absence of agreement, from the inheritance of their ascendants, if they had brothers;³ at the same time, they might be recalled to the succession by a "reservation to partition," or even receive a marriage portion; and in this case *all of them together* ought only to have a third part of the inheritance at the most, and *each one* only the share of one of her brothers (or the one who took the least). If there were no reservation, the sons took the entire succession; but the daughters, who could claim nothing from their father,⁴ had the right to demand from their brothers ⁵ a **fitting marriage**,⁶ that is to say, a sufficient marriage portion to enable them to contract a marriage which corresponded to their station. The brothers were freed as far as their sisters were concerned, even if they did not give them any marriage portion, if they succeeded in procuring for them an honorable husband;

with the Germanic law, and the Justinian law only penetrated the Norman practice very slowly. The "Coutume" of 1583 makes no mention of it.

¹ *Froland*, "Mém. concern. l'observ. du Ste. Velléien en Norm.," 1722; *Colin*, p. 437.

² *Howard*, "Dict. de Dr. Norm.," see "Filles," II, p. 503. This dictionary is consistent with "T. A. C.," 10, 1; 80, 2; "Summa," 26, 100; "N. C.," 248 *et seq.*, 250: if nothing were promised him at the time of his marriage, he should have nothing. *Le Poittevin*, p. 267 (details as to the rights of succession of daughters).

³ "T. A. C.," 8-13, 80. Cf. "Anjou," "Maine."

⁴ "T. A. C.," 80, 2 (one-third at the most); "Summa," 100, 13. Cf. the maxim of the Customs: "No marriage portion for him who does not wish one." The discretionary power of the parents was tempered by the affection which they felt for their children, and it was more to be feared that they would make excessive gifts. As to contractual appointments (the benefits of which were extended to include the brothers of the appointee, because the Custom was one which equalized, and which made it impossible for the father appointing one of his children to alienate or to mortgage all the immovables), cf. § 519.

⁵ "T. A. C.," 80, 4: the brother is allowed a delay of a year and a day within which to provide his sister with a husband, when she is twenty years old; "Summa," 100, 15.

⁶ "T. A. C.," 80, 4: "De matrimonio competenti providere," "to provide a suitable marriage." Cf. 3, 1 and 2; *Ragueau*, see "advenant," "appargée"; "A. C., Anjou," ed., *B-B*, I, 70.

when the sisters refused to accept the husbands procured for them, they were (formerly) deprived of the marriage portion; conversely, if the brothers refused to establish their sisters, the latter were allowed to apply to the law in order to obtain a third of the paternal inheritance; and in cases of this sort they married whomsoever they wished. In the last stage of the law daughters asked for an arbitration of a fitting marriage for them before an assembly of the family. This marriage portion, which was also called a "legal share," or the equivalent of their hereditary share, constituted a preferred claim. It was paid regularly in money, but consisted just as often in a conveyance of possessions of an equal amount, as the sons preferred to free themselves in this way so that the daughter, compelled to have recourse to means of compulsion, should not be able to claim from third parties¹ the immovables coming from the family.² The settlement of the fitting marriage was a complicated operation; the right of the daughter or daughters was to one-third of the inheritance, but the share of any one of them could not exceed the share of the son who took the least; besides, in order to allot these shares, they had to take into account the nature of the possessions (fiefs, burgage, etc.).

The husband acquired the **movables** of the wife subject to paying her debts.³ But, although this rule of the old law never ceased to apply on principle, it underwent in fact considerable restriction as a consequence of the custom of inserting in the marriage contracts the "taking-back clause" (or conversion into money of a part of the movables), and because of the obligation which the Custom imposed on the husband to invest a portion of these movables, as though by virtue of an implied contract. By way of set-off, moreover, the wife who survived received, not only her dower, but one-third or one-half of the ownership of the movables left by the husband at his death,⁴ — one-third if he had children born during the marriage, one-half if there were no children alive; when she renounced this in order to avoid paying a

¹ Even before the marriage a marriage portion is already owing by the brother which cannot be compromised, either by him or by the sister to whom it is owing, for she can only draw on the income; unmarried daughters have nothing of their own: "N. C.," 261-268. The "T. A. C.," 80, 5 and 6, gives them the ownership of their land and the right to dispose of it, "as though they were males." Cf. "Summa," 24.

² That is to say, only when they are included within successions in the direct line: "N. C.," 262.

³ Cf. "N. C.," 390; *Houard*, "Dictionn.," see "Mari."

⁴ "T. A. C., Norm.," 5, 4 and 5: "De communi catallo," etc. But not the heirs.

corresponding portion of the debts, she was still given her paraphernalia, that is to say, movables which were for her personal use (bed, clothes, linen).¹

§ 547. **The Same.** — (B) *The Administration of the Immovables* belonging to the wife was confided to the husband; he administered them as though they had been his own, drew the revenues, and appeared in court with respect to them.² Acquests realized during the marriage belonged to him exclusively.³ Thus there was no community of property between spouses in Normandy, not even of acquests. Not only did the Custom not admit of any community, but it forbade community to be stipulated for.⁴ As a matter of fact, the position of the wife who survived her husband did not differ very much from that of the wife who had a community of property; she had the right to one-third of the usufruct of the ordinary property which was acquired jointly⁵ and to half of the ownership of property acquired jointly in burgage. As to ordinary jointly acquired property, she had rather a right to succession,⁶ that is to say, a right which was dependent upon her survival and the death of her husband. Over property acquired jointly in burgage, that is to say, over immovables which were in towns, she was recognized as having rather a community right, for it was exercised upon the separation of estates (*post*, § 565) without waiting for the death of the husband, and the heirs of the wife had the same right to it as she had.⁷ The former of these rights seems to be very recent; it only appears in the Custom of 1583;⁸ the other goes back to the "Grand Coutumier,"

¹ "Norm.," 392-95. Or at least one portion.

² "Summa," 14, 5: "nihil divisum habent." Cf. German law.

³ "Summa," 100, 9. Cf. "Ord." of July, 1219, I, 38.

⁴ "N. C.," 330, 389. The old texts are silent. This rule, which the Parliament of Rouen looked upon as a real Statute, is all the more remarkable because Normandy, just as the other provinces, has had its partnerships of participants or implied communities: *Colin*, p. 440; *Pothier*, "Comm.," no. 11. *Ficker*, 1237, finds a community of thirds even in the old Norman law. Cf. Sicily.

⁵ A Custom peculiar to Gisors and Caux.

⁶ "Summa," 100; "N. C.," 329, 392-95; "Placités," 80, 130. The wife who is the husband's heir, loses the right of ousting third parties who have purchased immovables included within her marriage portion, a thing which would not be permitted, were she a member of a community. Cf. *Tessier*, "Soc. d'Acquêts," no. 122. Moreover the Norman statute had not been repealed by the Law of the 17th Niv., year II.

⁷ Holdings in burgage (immovables situated in towns or boroughs) may be alienated without being subject to the control of the lord: "Summa," 29; Custom of 1583, 270; *Genesthal*, "Thèse," 1900, pp. 76, 126; *Lagouelle*, p. 249; *Viollet*, p. 136.

⁸ "Summa," 100, 9; 101, 5. Afterwards it seemed unjust for the husband

100, 9, — that is to say, to about the same period in which the community system had come to be introduced into the towns of the North of France.¹

§ 548. **The Same.** — (C) *Inalienability of the Marriage Portion.*² The Norman law, drawing its inspiration from the desire to preserve the wife's immovable possessions in the family, at a very early time provided for guaranties against the abuses of power by the husband; and, if these guaranties were more energetic in Normandy than elsewhere, it is because in no other locality did the family run a risk of being stripped because of the absolute incapacity of the married woman. The inalienability of the marriage portion consisting of immovables³ was already found in the "Très Ancien Coutumier," 80, 5; "Durante matrimonio non valet aliquis contractus factus de terra mulieris." Even as late as our day, people would say: "The possessions of the wife should never be lost." But the bearing of this maxim has not always been the same. In the old times the wife was authorized to reclaim her personal belongings from third parties, whether they had been alienated by her husband,⁴ by herself, or by both of them acting together; she had to act within a year and a day after the death of her husband by using an action which will always keep the

alone to profit by the advantages arising partly, and sometimes entirely, out of the wife's property. Cf. the community system. Neither the law of Upland, 1275, nor the law of the Ripuarians can serve to account for an institution of the sixteenth century.

¹ *Grigas*, II; differences between this and the Norman law: *Colin*, p. 464.

² The Norman system of marriage portions was not borrowed from the Roman law. — (A) It can neither be derived from the Theodosian law (why should the Roman marriage portion alone have survived out of so many other institutions, and in Normandy alone?), nor from the Justinian law (how could its revival have reacted so promptly, and only upon this special point?) — (B) Difference between this and the Roman marriage portion system: (a) The share contributed by the wife is called *marriage* and not *marriage portion*, excepting after the sixteenth century. — (b) At Rome the father is held bound to give his daughter a marriage portion, and not in Normandy. — (c) In Normandy all the property is included within the marriage portion, the husband acquires the wife's movables charged with the payment of her debts. — (d) And finally the inalienability of the marriage portion is not arranged in Normandy in the same manner as it is in Rome. Cf. *Viollet*, p. 797; *Glasson*, VII, 383.

³ "T. A. C.," 4; 80, 5; "Summa," 100; "N. C.," 537-531; "Placités," 128; *Regulating Order*, 1511; *Terrien*, "Comm.," ed. 1575, p. 267; *Colin*, p. 433. Cf. "T. A. C.," 80, 7; 79, 12. Cf. *Viollet*, p. 797. Alienation in court is possible, but only as a great exception; cf. the *fine* in England. Did the property which had come to the wife during the marriage through collateral succession, whether gifts or legacies, have to be included within the marriage portion? No, according to the general opinion: "N. C.," 390, 542. Cf. *Glasson*, VII, 387.

⁴ Guarantee due the husband by the heirs: "T. A. C.," 4, 3; 80, 5; "Summa," 14, 5 and 5 bis; *Tardif*, p. 72.

archaic name of **writ of encumbered marriage**.¹ The inalienability was absolute.

Such a hampering of transactions resulted therefrom that practice invented a system less strict in one sense and more sure in another. The writ of encumbered marriage was looked upon as being the equivalent of recovering the possession; there was seen in it a sort of possessory action; this was not very accurate,² but it allowed the woman who did not bring the action within a year and a day to petition after this period by means of an action of ownership ("action of apparent law") within forty years after the dissolution of the marriage. By way of set-off, the alienation of the marriage portion was legalized when executed by both spouses acting together.³ This reform, which was finally sanctioned by an Order of 1529, was passed in the Convention of 1583.⁴ At the same time, while authorizing alienation, the Courts protected the interests of the wife: 1st, by means of the reinvestment; 2d, by an implied mortgage over the possessions of the husband;⁵ 3d, by a subsidiary recourse against third parties who were grantees, enabling her to obtain the value of the property alienated, or, in default of this, the property itself. One can sum up this system by saying that the marriage portion had ceased to be inalienable, but that the wife was assured of recovering its value. If separation of estates (*post*, § 565) took place, the wife could only dispose of her immov-

¹ The wife who failed on the writ of encumbered marriage, could not afterwards sue by means of the action for real property: an obvious proof that this writ was not a mere possessory action.

² On these writs see *Brunner*. Cf. "Schwurger," "Impedire," to encumber, that is to alienate or to burden with real rights; "Summa," 100, 2; see *Du Cange*. This writ was no longer made use of excepting when the husband alienated the marriage portion by himself.

³ "Gr. Cout. Norm.," 100. Cf. "Summa." The right which the "T. A. C.," 80, 5, recognized the unmarried woman as having, that is, the right of disposing of her lands as though she were a man, was perhaps the foundation upon which the new doctrine was built up. In order to validate alienations made with the consent of the wife, recourse was had to the general practice of the oath. Judgments of the Exchequer of 1391; *Marnier*, p. 66. In the sixteenth century the old ideas as to the absolute incapacity of the married woman had become out of date. Order of 1511, and especially Order of Cerisy of 1539, which settled jurisprudence upon this point; *Terrien*, "Comm.," p. 267; "N. C.," 527, 538; "Placités," 124. Owing to the application of the *Vellieanum* the wife had no right to mortgage her immovables, even with the consent of her husband.

⁴ The Roman law starts with relative inalienability and ends with absolute inalienability (cf. the "Lex Julia," the object of which is to allow second marriages, and the Justinian law). The Norman law progresses in exactly the opposite direction.

⁵ As to this mortgage and its position, cf. *Basnage*, "Tr. des Hyp.," c. 6.

ables with the authorization of the law and with the advice of her relatives.¹

One last characteristic of the Norman system was the strictness with which the prohibition of **gifts between spouses**² was applied. It is true that the husband had his right to curtesy and the wife her dower, with its rights over movables and jointly acquired property. — (A) *During the marriage*, every gift, even mutual gifts, and every contract for a consideration, was forbidden between spouses; the wife could not make a will in favor of the husband and the husband only had a right to bequeath to her the share fixed by Article 429 of the Custom of 1583; neither spouse could give anything to the relatives of the other. — (B) *Before the marriage* neither betrothed could give to the other any part of their immovables; of their movables they were only authorized to dispose of a fraction calculated on the sum of their fortune in immovables, so that, if they had no immovables, they could give nothing. The woman betrothed, on the other hand, had the power to dispose of one-third of her immovables present and future for the benefit of her future husband (who already received all her movables); this is what they called the **gift of movables**, an expression which seems to allude to the fact that these possessions which were the object of the gift could be disposed of by the husband in the same way as movables, whereas the other immovables of the wife were inalienable.³ The gift of movables is the counterpart of the right of the wife to acquests ("N. C.," 390).

§ 549. **German System of Unity of Possessions** ("Gütereinheit," "Güterverbindung") or of the **Community of Administration** ("Verwaltungsgemeinschaft"). — The matrimonial systems in use in Germany and Switzerland from the barbarian period until the nineteenth century were scarcely less numerous than the systems of succession.⁴ They can be reduced to three types, about equally widespread: unity of possessions, partial community (movables, acquests) and absolute community. It is no doubt

¹ But she could alienate her movables and her immovables acquired after the separation: "Placités," 126 *et seq.* Cf. "Règl. sur Tutelles," 1673, Art. 51.

² "N. C.," 411, 422, 429.

³ If made by a widow who had children the gift of movables could not be of more than a child's portion. Cf. Edict of 1560; see *Guyot, Howard*.

⁴ Wächter counted more than sixteen principal systems in Würtemberg alone, upon one single point, that of the rights of succession of the spouses: *Stobbe*, IV, 75; *Lardy*, "Législ. des Cantons Suisses en Mat. de Tutelle, de Régime matrim.," 1876 (charts); *Schroeder*, "Gesch. d. ehel. Gü.", II; *Masse*, "Thèse," p. 163 *et seq.*

under cover of the first that there was introduced here and there, following the acceptance of the Roman law, the Southern system of marriage portion. The unity of possessions is not unknown in France; it is found in some of the Customs of the East,¹ such as the Custom of Reims, Art. 239 of which lays it down that the spouses do not have a community of possessions;² and the authors of the Civil Code thought it their duty to establish it in Articles 1530 *et seq.* The "**mainplévie**" of the Custom of Liège is also only a variation of this.³ In Germany it has thrown out such deep roots that the new Civil Code has made of it the system of the common law.

Unity of possessions is very closely connected with the system of the barbarian period. As in the latter system, there is a unity of inheritance; the possessions of the two spouses are mingled in a single mass. Under its very oldest form the wife owns nothing, or almost nothing; the husband becomes "*dominus dotis*" as in Rome.⁴ In a second stage the wife keeps the ownership of at least a share of the immovables contributed by her; the husband only has their administration; the unity of inheritance has become an entirely external thing; there is rather a juxtaposition of possessions ("*Güterverbindung*") than a unity of possessions ("*Gütereinheit*"). If the powers of the husband should be still more

¹ These French Customs did not forbid the spouses to stipulate for the community of possessions: *Pothier*, "Comm.," no. 461.

² "Reims," 239 *et seq.*: the husband can dispose of the movables and the jointly acquired property; the widow has an option, she can either take one-half of the movables and jointly acquired property or else keep her dower and the share contributed by her; the heirs of the wife who dies before her husband have a right to the jointly acquired property. There are many who maintain that there is a community (*Varin*, "Arch. lég. de Reims," I, 618-697), but that the rule "*Uxor non est proprie socia, sed speratur fore*," is followed literally: *Chauny*, I, 1; *Chimay*, II, 1; *Constantin*, "Le Dr. des gens mariés à Reims," 1903 (Thesis).

³ All the present and future possessions of the wife form a part of the inheritance of the husband, who can dispose of them as though he were their owner, even by will: *Pawillart*, 14s., Art. 110. About the sixteenth century it was admitted that the husband could not restrict the rights of his surviving wife by will. The only advantage derived from this system by the wife was that in case she survived she was given all the property left by the husband (excepting fiefs). *Britz*, p. 859, mistakenly concludes from this that we have here an absolute community; there can be no question of a community where one of the parties has the power to deprive the other of all rights by will: *Van Welter*, "Le Droit Romain et le Droit Celtique," 1898, with still less reason on his side, has gone back to the abandoned theory of the Roman origin of "*Mainplévie*" (*cf.* "*manus*"). *Cf.* *Chimay*, II, 1; *Ardenbourg*, "Bouc van tale," 46; *Ragueau*, see "*Plévie*"; see *Guyot*.

⁴ See *ante*, "*Mainplévie*" at Liège. The law of Béarn merely obliges the husband to refund the value of what he has received; he thus becomes the owner of the marriage portion.

lessened,¹ then they would arrive at a third phase, that of the separation of estates (*post*, § 565); each spouse would have the management and enjoyment of his inheritance. There is no need to say that there are countless transitions between these various phases, and that the first two cannot always be distinguished from community as clearly as one might think. Under the community system, as under that of unity of possessions, the husband's power means that the husband has the administration and the enjoyment of the possessions of the wife and the right to dispose of her movables, and that the woman has no capacity.

The causes of preference for unity of possessions rather than the community are all the more difficult to discern because these two systems which appear to be dissimilar have in this respect many points in common. During the marriage no external indication shows whether the spouses have community of possessions or not. The community is characterized by the mingling of the interests of the two spouses, by their participation in the profits and losses resulting from this life in common. It is a system which harmonizes with a system of individual ownership; it can be applied to movables and to acquests. The unity of possessions lends itself better to the preservation of the family property; it admits of more easily providing securities for the benefit of the wife and her relatives against abuses of the husband's power, — abuses of which the wife living in a community seems to have to take the risk. The Customs of the Pyrenees form an example in support of these ideas too curious not to be cited here, although it may appear to be out of place: they declare that there is a community of possessions ("meitades") between younger children ("soul" and "soulte") who intermarry and receive only a small marriage portion, whereas there is no community between the eldest son or the eldest daughter who are heirs, receiving in this capacity the family possessions and their "stranger" spouse.²

¹ We believe, contrary to the opinion held by Heusler, that the question of the matrimonial system is closely connected with that of the capacity of the married woman; thus separate maintenance is inconsistent with the rights of the husband over his wife in the very old legislation; it was necessary for the wife to be capable of becoming the owner of the immovables for the community of acquests to exist. But we admit that once the married woman was recognized as having capacity, it became possible to form different systems, on the one hand the community, on the other the possessions held in common, while at the same time placing her under the husband's power under practically the same conditions as existed before.

² "Soul" ("solutus") seems to mean: detached from the paternal house

To describe the unity of possessions¹ one should first of all recall the force of the husband's "mundium." The "Schwabenspiegel" says that the husband is the master and the guardian of his wife ("Vogt und Meister"). According to the "**Sachsenspiegel**" he takes her body and possessions under his guardianship ("nimt he in sine gewere al ir gut to rechter vormuntscap"). Husband and wife have no distinct possessions during their life; to the one to whom the wife gives her body she also gives her possessions; she has nothing during the marriage excepting "the blue sky and her distaff." Like the "tutor" of former times, the husband acquires the absolute ownership of the movables of his wife, subject to paying the debts for which she is held before the marriage. He gains the product of the wife's labor, the income of the land which she possesses; every acquisition made during the marriage belongs to him exclusively, even if they arise from the possessions of the wife. He has the administration as well as the enjoyment of the immovables² which his wife owns; but he is not authorized to alienate them without the co-operation of his wife, and these possessions do not constitute a pledge for his creditors; "The possessions of the wife should neither increase nor decline." At the death of one of the spouses the disposal of the possessions which have been joined in the hands of the husband was regulated in various ways. Sometimes the surviving wife is only given a small portion of them, such as a third of the acquets; sometimes she takes back the share which she has brought, at least her family possessions; and her heirs have the same rights as she has; sometimes no partition

According to the "Cout. de Barèges," 1670, Art. 13, these younger children are called "sterles," "esterlos" (outside of the house); so long as they are within the house they are slaves. Cf. "Cout." of 1760, VII; *Soule*, 24; *Lagrèze*, "Dr. dans les Pyr.," p. 185; "La Navarre," II, 242. "Adventice" (acquired) means a stranger (to the family).

¹ Unity of possessions is to be found in the "Sachsenspiegel," I, 31, 20-24, 45; III, 74s., and in the law of Magdeburg. On the other hand in Westphalia if there are children, a community of acquets becomes established between the spouses. Franconia and Southern Germany are also countries where the community exists. But there is some question as to whether the "Schwabenspiegel" admits the "Gesammte Hand" or the "Güterverbindung." To the effect that it is the latter, cf. *Wyss*, p. 61; "Schwabenspiegel," I, 11, 20, 21, 35, 36, 63, 71, 166; II, 23, 100; III, 98, ed. *Matile*; *Stobbe*, IV, 93 (differing with the "Sachsenspiegel" as follows: the consent of the wife's relatives is not always required for the alienation of her lands, etc.); *Huber*, *op. cit.*, connects the law of Béarn with that of the Burgundians.

² "Usufructus maritalis," an incorrect name for the old law, but one which tends to become more applicable in proportion as the Roman law takes root in Germany. Influence of this law on the nature of, and the privileges attached to the marriage portion. Cf. the Italian Statutes: *Pertile*, III, 353.

takes place, but the surviving spouse takes the entire mass¹ (excepting that it cannot be disposed of to the prejudice of children, if there be any, "Verfangenschaft"). Outside of these cases the wife has ordinarily those rights of survivorship, whether legal or established by agreement, which survive as institutions from the law of the previous period; Dower ("Witthum" in Suabia; "Leibgeding," "Leibzucht" in Saxony), "increase of the marriage portion," — that is to say, dower in proportion to the marriage portion ("Widerlegung"), "Morgengabe" (which is sometimes preserved). She is also recognized as having the right to live in the conjugal house ("Beisitz") as long as she does not remarry, — at least, if there are no children. The movables belong to the husband or his heirs,² with the exception of the "Gerade" (clothing and ornaments)³ reserved to the widow or her nearest female relative ("Niftel"), and of the "Musstheil," that is to say, of one-half of the provisions which are found in the house upon the death of the husband, to which the widow alone has the right, to the exclusion of his heirs.⁴

In the course of time the Germanic system of the unity of possessions became more advantageous for the wife. The husband ceased to be looked upon as her guardian and lost the lucrative rights which were connected with this title; he only kept the administration of the entire patrimony in his quality of head of the family. He no longer obtained the possessions of the

¹ "Worms," 1184; *Stobbe*, 222, 242. Other Customs give the widower one-half and the widow one-third or the share of a child (share of the sword, share of the distaff): *Schroeder*, p. 313. The "Alleinerbrecht des überlebenden Ehegatten" must at first have existed only for the benefit of the husband, and this was not a right of succession, but the maintaining of a pre-existing right. As far as the wife is concerned it was an innovation; it is readily understood that it could exist in new towns where "areæ" were granted at one and the same time to the husband, wife and children, and where the inhabitants had no family possessions, but only acquists. Cf. "Mainplévie" at Liège. Switzerland: "portio statutaria" ("Eherecht"), a hereditary right. Perhaps it is by this means that the formula of the "Ass. de Jérus.," "C. des B.," 186: "No man is so much the right heir of the dead as his lawful wife," is to be accounted for. *Van Wetter*, *loc. cit.*, p. 46; *Glasson*, VII, 379.

² As to wedding presents, cf. *Stobbe*, IV, 163.

³ As to the "Gerade": "Sachsensp.," I, 24, 3; cf. I, 45, 2; *Ficker*, IV, 20.

⁴ Heusler sees in the "Gerade" and the "Musstheil" a proof of the existence of a sort of community of movables (with unequal shares), for what these possessions consist of varies with the fortune of the husband; they are mingled during the marriage with the other movables, and the creditors of the husband can distrain upon them. But as the law which came into existence after the "Sachsenspiegel" eliminates all idea of a community, the rights of the wife had to be termed rights of succession contrary to the spirit and the terms of the old legal system. Cf. *Stobbe*, IV, 82.

wife, in case he survived her, to the prejudice of the natural heirs of the latter. The restitution of the wife's immovables was guaranteed to her by forbidding the husband to alienate them without her acting with him. Securities are provided which have the effect of allowing her to recover the value of her land which has been alienated,¹ or, again, of the share of movables brought by her; she gets first of all a contractual lien on certain possessions of the husband, and afterwards an implied mortgage on the whole of his inheritance. The incapacity of the married woman became less, a change which took place of its own accord from the time when she had a distinct inheritance of her own, and when the formation of the family no longer absolutely demanded the complete subordination of its members to its head. She could bind herself if she had the authorization of her husband (or even of a court in modern law), have dealings with her husband (except that the intervention of a guardian or compliance with certain formalities to assure her freedom was necessary), carry out urgent affairs in the absence or illness of her husband. The contracts which she made alone, without any authorization, she or her heirs could be compelled to perform at the dissolution of the marriage.² She even had the right to bind her husband for household necessities ("Schlüsselgewalt")³ or when he had authorized her to carry on a separate business or trade. Towards the thirteenth century the separate estate by decree was introduced;⁴ the husband who was a prodigal and a spendthrift could be deprived of his rights, and then it was the wife who had the administration and enjoyment of them, sometimes alone and sometimes with the aid of a guardian in localities where the guardianship of women was in force.

The system of the separate property, "**Sondergut**," is nothing more than our separate estate (*post*, § 565) by agreement, or, if one prefer it, the Roman system of paraphernalia. With relation

¹ As to the reinvestment and the recompense, *cf.* *Stobbe*, IV, 164.

² In the Hanseatic towns the creditor who meets his debtor (when the debtor is a woman) is authorized to distrain upon her dress; the husband has to pay him off, at least if he wishes his wife to be able to recover her clothing and go out of the house.

³ In the old law the wife can only act as her husband's overseer and can only enter into binding obligations to the extent of very small sums of money, 3, 5, and 12 deniers. Modern law tends to recognize her as having a power of her own, subject to the control of her husband, assuming that there is no opposition on his part. The result of this is that she binds herself when she binds her husband.

⁴ "Schwabenspiegel," I, 73, ed. *Matile; Stobbe*, IV, 292.

to the "Sondergut," the woman has the same capacity as though she were not married. At first only those things which are exclusively for the use of women, such as clothing and jewels, "Nadelgeld," were left at their disposal. And later the Custom allowed them to reserve by contract of marriage every kind of property, movables or immovables; third parties who made them gifts were allowed the same rights. The "Sachsenspiegel" still clung to the principle of the inheritance, but a hundred years later these reservations are authorized by the "Magdeburg-Blume." In its development the practice of the "Sondergut" resulted in nothing less than the emancipation of the married woman carried out by agreement.

The "**Verfangenschaft**," which was especially in use in countries where the community existed (Franconia, Southern Germany), has the effect of forbidding the spouse who survives and who receives the entire estate of both spouses to make any disposal of it to the detriment of the children of the marriage; it is preserved for the latter in such a way that in case the surviving spouse enters into a second marriage the children of this second marriage have absolutely no share in it; conversely, the children of the first marriage can claim nothing out of that which constitutes the estate of the second marriage. This system often resulted in great inequalities between the children of the various marriages, — inequalities which were all the more regrettable as they were due to pure accident, such as the date of the acquiring of an inheritance by the spouse who married again; should the relatives of this spouse die during the first marriage, their inheritance went to the children of the first marriage; should these relatives die a little later, the children of the second marriage would profit thereby. Such results as these were repugnant, but the old law was better adapted to them than to the fusion of the two families into one, and so they had to be allowed in order to avoid such results. By virtue of the marriage, a community of interests, and often even a community of possessions, had been established; spouses and children were included therein; a new union created a distinct community, another "Hausgemeinderschaft."¹ The family spirit was opposed to one community be-

¹ *Schroeder*, p. 724 (bibl.) seeks to find the origin of this institution in the clauses employed in gifts between spouses; it is thus, he says, that the mutual gift in writing gave rise to the mutual gift of blood. But how account for these clauses themselves? Moreover see *Heusler*, II, 457, 473 (contrast between the Suabian law and the Franconian law); *Ficker*, "Unt.," II, 213; IV, 556. Cf. *Britz*, p. 670 (devolution); "Roisin," p. 88.

coming enriched at the expense of another; the surviving spouse was left the possessions of the first community, but with his hands tied in case he might wish to dispose of them. During the marriage these possessions were practically incapable of being disposed of by the husband, or, at least, he could not dispose of them without the intervention of his wife; after the dissolution of the marriage the inalienability persisted in practically the same way; the co-operation of the children of the first marriage was necessary in order to alienate. We have no difficulty in seeing how this practice of the "Verfangenschaft" (or devolution) furnished the children of the first marriage with guaranties against the risk which a second marriage caused their interests to be subjected to; like the dower of children, or the continued community (*post*, § 564), this practice served the same purpose as the application of the laws of the Lower Empire on the subject of second marriages did elsewhere.

The institution of the "Verfangenschaft" is rather often modified by the admission of the "**Theilrecht**," or right to partition, which is commonly considered as being of more recent date (middle of the thirteenth century). The surviving spouse who wished to remarry could be forced to partition with the children; with his share which was thus released, and the possessions which he acquired afterwards, he entered into a new community; as to his children, they were given their share once for all; they had no longer any claim over his inheritance; membership in the community in their case had killed heirship. The "Theilrecht" was thus inspired by the same thought as the "Verfangenschaft"; the community established by the first marriage remained entirely distinct from that which resulted from the second marriage. Difficulties were presented with regard to acquests made or debts contracted during the interval between the two marriages; the Customs varied a great deal upon this point, but at the same time, as a general thing, these acquests and debts were included in the partition. Towards the thirteenth century, and especially since the middle of the fourteenth, there begin to appear in marriage contracts agreements for "affratellation" between the children of different marriage "unio prolium," "Einkindschaft" ("To einen kindermadchen"), by virtue of which the children of both marriages should be treated as though they were brothers. In cases of this sort there are no longer two separate communities, but only one. The spouse who

marries again has the advantage of no longer being compelled to make a liquidation, which is perhaps untimely, and which is at any rate complicated and prejudicial to his interests. As to the children, their equality is also justified in many cases; and, if it is not equitable, for example, because the predeceased spouse had a fortune which was greater than that of the new spouse, or vice versa, there is nothing to prevent a stipulation being made for a reference-legacy for the benefit of the children of the first or second marriage.¹

§ 550. **The Roman System of Marriage Portion** remained in force in Italy,² in Spain³ and in the countries of written law in France; it even penetrated into Germany.⁴ In its essential characteristics it is a system of the separation of the interests of the spouses. The wife keeps her properties; she gives the husband only a part of them, — the marriage portion ("dot," "dos"), which is a reserve fund for her and for the family,⁵ thenceforth not subject to any alienation; the husband has no right to dispose of it, nor has the wife; and she cannot bind herself with respect to her marriage portion. These broad rules were not interfered with, and court decisions and practice, and sometimes even local custom, added to them and corrected them in ways some of which are of importance.

Contrary to the axiom of the Customs, "No marriage portion from him who does not wish it," the father of the family is held bound in the South to give his daughter who has come of age a marriage portion, even though she marry without his consent.⁶

¹ *Stobbe*, 244; *Heusler*, II, 476; "Z. S. S., G. A.," 1901, 440; "Tract. Uni. jur.," VI; *Groebe*n, "De orig. unionibus prolium," 1870; *Beseler*, "Erbvertr.," I, 7; *Viollet*, pp. 489, 789. Cf. Sicily: *Pertile*, III, 360.

² "Digesto Ital.," see "Beni"; *Salvioli*, 347; *Pertile*, III, 320; *Zdekauer*, "Patto dotale" ("R. Ital. p. le sc. giur.," 25, 99); *Ciccaglione*, "Patti nuziali" (Naples), 1881; "Storia d. Dir. Ital.," I, 444; *Lattes*, "Dir. consuet. Lomb.," p. 239.

³ "Siete Part.," IV, 11; "F. de Vizcaya," XX.

⁴ *Stobbe*, § 235.

⁵ "F. de Béarn," 269.

⁶ L. 19, Dig., "de ritu nupt.," L. "si pater," "Cod. Just.," "de dot.," "Nov.," 21 of Leo. This Custom makes its appearance in the deeds of the eleventh century: *D. Vaissette*, "Preuves," nos. 244, 385, 388, etc.; "Siete Part.," IV, 11, 8; "Bord., N. C.," 43; "Toulouse," 117 (the daughter who has been given a marriage portion is excluded from the succession of her father); *Tardif*, "Le Dr. privé au XIII^e s.," p. 30, 81; *Henrys*, I, 4, q. 52; *Roussilhe*, no. 4, 87. The conferring of the marriage portion is generally carried out by means of a notarial deed: "Toulouse," 109; *D. Vaissette*, V, 518, 1031. As to the trousseau, wedding chest, comb, cf. *Ragueau*; *Lagrèze*, "Navarre," II, 185; *Bretonnier*, see "Quest." Marriage portion of nuns: *Mallebay de la Mothe*, "Quest." D., 20; *Benedicti*, see "Dotem."

This obligation, which is not only moral, but legal, is incumbent, if there is no father, upon the paternal grandfather and the mother. The courts compel them to pay it, and if necessary determine its amount. The woman often appointed as her marriage portion all her possessions present and future.¹ If there were no appointment, it was usually assumed that her possessions were paraphernalia; however, the question was disputed, and in certain localities, — for example, at Toulouse and in Auvergne, — her properties were held as forming a part of the marriage portion, just as they did in countries of Customs.²

The power of the husband did not exist in countries of written law.³ The wife, who was the owner of her **paraphernalia**, had the enjoyment and the administration of them as though she had not been married.⁴ At the same time, in countries of written law, within the jurisdiction of the Parliament of Paris (Lyons, Beaujolais, Mâcon, and Forez) she was compelled to provide herself with the authorization of her husband in order to dispose of them (Civil Code, 1576).

According to the Roman law, the possessions forming a part of the marriage portion became the property of the husband, but he was bound to restore them.⁵ This was a very limited ownership, especially with regard to the land, which formed a part of the marriage portion, and which was made inalienable. Thus, the Glossators queried whether the marriage portion belonged

¹ "Toulouse," 87, and with regard to this, *Casevieille* and *Soulatges* (who mistakenly interpret this as an application of the L. "Quintus Mucius," Dig., 24, I, 51, according to which acquisitions made by the wife are presumed to belong to the husband and to have been paid for out of his money, unless she prove the contrary, a very reasonable presumption moreover, when all the wife's property is included within her marriage portion); "Auvergne," 14, 8 (the marriage portion is here called "Verchère," see *Ferrière, Du Cange*); "Toulouse," 84, 85 (the presents given to the spouses the day before the wedding or the day of the wedding itself belong to the husband); "Bord., N.C.," 48. On the Ordinance of 1563, 17, see *Ginoulhiac*, p. 139 (the marriage portion should not be more than 10,000 "tournois"). — Italy: *Pertile*, III, 352.

² The *acquired* property, or property accruing during the marriage, is included in the paraphernalia: *Ginoulhiac*, p. 138; *Haencl*, "Dissens. domin.," pp. 6, 105.

³ Excepting in certain localities: Auvergne, *Masuer*, XIV, 39; Bordeaux, "F. de Béarn," 261. Everywhere the wife owes "obsequium" to her husband (cf. L. "Assiduus"), for example she is bound to go where he goes: "Dec. cap. Tolos.," 86. We may observe the fact that as a general thing marriage does not emancipate, as it does in countries of Customs, which means that the woman may be subject to the paternal power: *Serres*, "Inst.," I, 12.

⁴ "Petrus," I, 32: "etiam sine consensu viri et liberorum." *Contra*: "Bordeaux."

⁵ "Cod. Théod.," III, 13; *Papien*, 22; "Petrus," I, 30 *et seq.*; IV, 54; "Toulouse," 87.

to the husband or to the wife ("Diss. domin.," p. 436); after them our old authors said that the husband was the master of the marriage portion, that he had the legal title to it; they were willing to add that the wife kept the true ownership of it; and the more recent of them treated the husband as a mere usufructuary. The Civil Code merely re-enacted their doctrine by denying to the husband the **ownership of the marriage portion**, and only left him its enjoyment.¹

The **immovables of the marriage portion** are **inalienable**; neither the husband alone nor the wife alone, nor the two spouses acting together, can make a disposal of them. The Custom of Toulouse, 103, agreeing with the Breviary of Alaric, authorized an alienation of them which was made by the two spouses acting together. "This was a disastrous Custom," said the Glossator Casevieille, "the most obvious result of which would be to deprive the wife of her marriage portion, and one which I have never seen enforced."² In his time the absolute inalienability of the Justinian Law had taken the place of the relative inalienability of the "Lex Julia."³ This was a consequence of the revival of

¹ The husband's ownership is again affirmed by *Argou*, III, 8: *R. de La Combe, Ferrière*, see "Dot"; "Siete Part.," IV, 11, 7. But *Roussilhe*, no. 216, denies its existence. *Masuer*, XIV, 25, also used to say, in speaking of the reclaiming of the land included within the marriage portion: "it is necessary that both should take part in it, the husband as far as the usufruct is concerned, and the wife with regard to the ownership." The other authors who are cited habitually in support of this proposition merely give a translation of equivocal expressions of the Roman law (for example D. "de j. dot.," 75: "quāvis in bonis mariti dos sit, mulieris tamen est"); *Wallon*, p. 133. Thus *Domat*, "Lois civ.," 1, 9, 1, 4, according to whom the husband alone acts, if it pleases him so to do, or else the wife acts with the authority of the husband or of the law. Cf. *Tessier*, "Quest. sur la Dot," 1852. — Upon this question of the bringing of the actions for real property with regard to immovables included within the marriage portion, the old case-law was not very well settled: *Tessier*, II, 137; *Roussilhe*, I, 255.

² "Petrus," I, 34 (cf. "Nov.," 61). The same rule is applied to the gift "propter nuptias." — Cf. "F. de Béarn," 264, 262; F. of 1552, "r. de mariti," 15; "Bord., A. C.," 114; "Montpellier," 1205, 14: consent of the father and mother or, if this is not obtained, of the wife's relatives: "Salon" in *Giraud*, II, 254 (oath). — The "Cout. de Toulouse," 110, also allows the wife to bind herself on behalf of her husband, excepting that it does not allow her a privileged recourse similar to that which she has in matters concerning her marriage portion. — *Gide*, 2d ed., p. 392.

³ In our time a formula has been suggested which was unknown to our old authors: it would be better for the wife with a marriage portion to be unable to alienate rather than for the land to be inalienable. But so long as the husband was looked upon as the owner of the marriage portion there could hardly be any question as to the incapacity of the wife. It is true that the Velleianum Decree of the Senate made the wife incapable of binding herself and especially on behalf of her husband, but this disability affected the wife who was given her paraphernalia, and not the wife who was given a marriage portion, who could not bind her marriage portion even on her own behalf.

the Roman law in the twelfth century, and no doubt practice willingly based itself on this theory with the object of procuring assured and indestructible resources for families. It was only permissible to alienate the marriage portion in exceptional cases: (a) With the permission of the court, for example, to have the husband released from prison, or to procure nourishment for the family. (b) By virtue of a clause in the contract of marriage, which either did or did not forbid reinvestment.¹ Outside of these two cases alienation was absolutely void at law unless there were "letters of rescission." During the marriage the wife could not avail herself of this nullity because of the rights of her husband over the marriage portion; but as soon as the marriage was dissolved she had thirty years within which to invoke it. As to the husband, although he is ordinarily refused the right of repudiating his own act by evicting the grantee, at the same time there is a tendency to grant him the action in avoidance, — a tendency which tallies with the recognition of the ownership of the wife.

The **obligations** contracted by the wife during the marriage could not be realized from the lands of the marriage portion,² even when the marriage had come to an end; had it not been for this, the spouses would have had a very simple means of evading the rule that the marriage portion was inalienable.³ Moreover, on this point it is necessary to take into account the Velleianum Senate Decree; we know that it forbade women, whether married or not, to become bound for a third party.⁴ In Justinian's time this prohibition was especially applied to the relations between spouses; for, according to the Authentic, "*Si qua mulier*," outside of cases in which they bound themselves for their husbands, wives were authorized to renounce the benefit of the Senate Decree; as a matter of fact, renunciations were frequent. The wife, who was incapable of binding herself even with respect to her parapher-

Again the Velleianum Decree of the Senate has always been distinguished from the inalienability of the marriage portion. The Velleianum is renounced, not the inalienability: *Louet*, 12, 3. The Edict of 1606 abrogated the Velleianum without affecting the inalienability: *Henrys*, 1, 4, q. 104. The Velleianum could not be invoked without letters of rescission, and one had to act within ten years, whereas the inalienability acted "*de plano*," and one had thirty years within which to plead it: *Despeisses*, 2, 2, 1, 7; *Roussilhe*, I, 399. One is a personal statute, the other a real statute: *Roussilhe*, I, 373; *Mongin*, "*R. crit.*," 1886, 92; "*N. R. H.*," 1888, 343; *Ginoulhiac*, p. 143.

¹ The wife may also make a gift of her possessions included within the marriage portion in order to establish her children.

² It was otherwise with regard to obligations "*ex delicto*."

³ *Du Périer*, "*Quest.*," I, 3; *Roussilhe*, nos. 379 *et seq.*

⁴ "*Toulouse*," 68, 69, 71, 74, 109, 110, 130 *et seq.* Italy: *cf. Lattes*, p. 245.

nalía in the interest of her husband, was all the more incapable with respect to her possessions which formed a part of the marriage portion. The Edict of 1606 repealed the Velleianum; but it did not succeed in preventing its being applied in countries of written law; and only had the force of law in those countries which were included within the jurisdiction of the Parliament of Paris, and even in them it was not of very much use in the numerous cases where all the possessions of the wife formed a part of the marriage portion. In order that the promises which she made for the benefit of her husband should be of some value, she had to be allowed to bind and to alienate her marriage portion; and this is what was done in the interests of commerce by a Declaration of April, 1664.¹

The **movables of the marriage portion** consisted of money or of certain specific things. In the first case it often gave rise to the "investment clause," which was inserted in the contract of marriage, and the effect of which was to substitute a marriage portion in real property for the one consisting of money.² The specific things (movables or immovables) which had been appraised became the property of the husband, for "appraisal is equivalent to sale." With regard to the specific things which had not been appraised, a question as to the **inalienability of the movables of the marriage portion**³ was raised, — a question to which the increase of wealth in movables in our day added considerable interest. As a general thing, the husband had the right to dispose of corporeal movables and choses in action⁴ (although the Parliament of Bordeaux refused to give him this right because it did not recognize his ownership of the marriage portion; it did not even allow alienation by both spouses acting together).⁵ But in all the countries of written law (excepting in those within the jurisdiction of the Parliament of Paris since the Statute of April, 1664), it was accepted that the wife could not compromise

¹ Bretonnier, "Quest.," see "Dot" (this Declaration was passed at the request of the General Receiver of Lyons who wished for more guarantees from his under farmers by having their wives bound); *Henrys*, 4, 3, 8.

² Dig., 23, 3, 54. Cf. 27th term of *D'Aguessseau*; *Roussilhe*, no. 184 et seq.; *Benech*, "Emploi et Remploi de la Dot," 1847.

³ An analysis of the old case-law: *Tessier*, "Quest. s. la Dot," 1852; *Lescœur*, "R. crit.," 1875, 380; *Wallon*, "Thèse," 1877.

⁴ *Roussilhe*, nos. 226, 233, 238, 257, 265, 266 (ed. *Sacase*); *Serres*, II, 8. Cf. "Petrus," I, 34. The question would not have been of very great practical interest, had the maxim "In matters of movables possession is equal to title" (at least with regard to corporeal movables) been applied.

⁵ *Lescœur*, p. 391; *Wallon*, p. 195. — Cf. "F. de Béarn," "r. de marit.," 15.

the restitution of the movables of her marriage portion by renouncing her claim against her husband, or the mortgage which guaranteed the latter.¹ In this sense the movables of the marriage portion were inalienable as far as the woman was concerned.² The practitioners of the Parliaments, being inspired by the spirit of the Roman laws, had extended to movables, in the measure that the nature of these possessions allowed, that which the Roman laws had enacted with regard to the lands of the marriage portion.³

The **mortgage**⁴ which guaranteed the restitution of the marriage portion⁵ affected all the husband's possessions.⁶ It dated back to the marriage contract, assuming the latter to have been notarial; and, if not, to the marriage itself.⁷ The result of this was that the wife was preferred to the creditors of the husband as far as the restitution of her marriage portion was concerned, but she was only preferred to creditors who became such after the marriage. Within the jurisdiction of the Parliament of Toulouse

¹ *Roussilhe*, nos. 238, 303, 314; *Julien*, "Elem.," I, 4, 28; *Despeisses*, III, 29; "Bord., A. C.," 113. Italy (*Lattes*, p. 244): as early as the eleventh century renunciation of her mortgage by the wife when the husband alienates one of his possessions; she declares that the other possessions of her husband are sufficient to assure her the restoration of her marriage portion, or else the husband assigns other possessions to her by way of guarantee.

² The Romanists were concerned with this question especially with regard to the L. 30, "Cod. Just.," "de j. dot.," 5, 12; Justinian declares therein that "naturali jure" the movables included in the marriage portion belong to the wife, but "secundum legum subtilitatem" they belong to the husband. Bartolus in his "Leet. s. l'Auth. 'Sive a me,'" which is taken from the "Nov.," 61, and inserted at the end of c. 21, "Cod. Just.," "ad Sen. Vell.," IV, 29, maintains that the "Nov.," 61, which modifies the law in the Code and the Digest, prohibits the alienation of "res dotales quæ servari possunt." Cf. also on the L. 1, Dig., "Sol. matr.," no. 18, and on the "Cod. Just.," 5, 13, 1. On these texts and on the L. 30, cf. *Cujas. Domat*, 1, 9, 1, 30. Details in *Wallon*, p. 133; "Dissens. dom.," p. 202.

³ *D'Olivecrona*, III, 28; *Mallebay de la Mothe*, "Quest.," B., no. 14.

⁴ Borrowed from the Roman law. In the "Cout. de Toulouse," 118, 153 (*Casaveteri*, fo. 48), it is presented under the form of assignment established over the husband's possessions by the consuls or the magistrate: "pro necessariis" (Art. 119), "dotibus et dotalitiis"; "F. de Béarn," ed. *Mazure*, 254, 271; F. of 1552, "r. de mariti," 6; "Siete Part.," 4, 11, 17; *Lattes*, p. 241. Cf. "The Community." As only the immovables were affected by the mortgage, the wife was granted a privilege over the husband's movables: *Bretonnier*, see "Meubles"; *Boucher D'Argis*, "Gains nupt.," XXIII. Finally the payment of the marriage portion was also guaranteed by means of a mortgage over the possessions of the pledgor: "Dissens. dom.," III, 103, 401, 582.

⁵ "Toulouse," 116, allowed of the appointment of "fidejussores"; *Casaveteri*, fo. 45, v.; *D. Vaissette*, V, 402 (in 1083). Same custom in Spain. *Contra*: "Cod. Théod.," III, 15; "Cod. Just.," V, 20; "Dissens. dom.," p. 443.

⁶ Even those held in trust (by virtue of a secondary title); "Ord." of 1747, 52-53.

⁷ A compulsory or a voluntary decree clears the mortgage on the marriage portion, if there be no opposition offered to the distraint, at least before the Edict of 1771. On the subject of this Edict, cf. *Roussilhe*, no. 312.

an enactment of Justinian's, the celebrated law "Assiduis," was followed, which preferred the woman to the mortgage creditors previous to the marriage,¹ but with one alteration: the latter were allowed to bar out the priority of the wife if they warned her of the existence of their rights before the marriage was celebrated ("giving of notice").²

Separate Estate. — The wife could ask (*post*, § 565) for an anticipated restoration of her marriage portion if her husband became insolvent ("vergit ad inopiam").³ By virtue of a judicial decree, she took back the administration and the enjoyment of her possessions which had gone into the marriage portion, but she was compelled to invest the movables,⁴ the preservation of which was no longer guaranteed by a mortgage over the husband's possessions. The marriage portion land remained inalienable, and the woman had no capacity to bind herself with respect to her marriage portion. As she recovered her right to bring actions, every prescription thenceforth began to run against her.⁵

The matrimonial system which we have just outlined was completed by the rights of survivorship,⁶ rights of inheritance, and gifts between spouses, which have been discussed above.

The **comparison** between the **system of marriage portion** of the South and the **community** of the Countries of Customs has long been a classic point.⁷ Pasquier already said, "Ask those who are

¹ L. 12, "Cod. Just.," "qui pot.," VIII, 18 (p. 531). *Contra*: "Toulouse," 109, 110, 111. Priority of those creditors to whom both of the spouses are under obligation, *ib.*, 71; *Lattes*, p. 242. Difficulties as early as the time of the commentators; cf. Azon, "Summa Cod.," ad l. "Qui pot.," *Bartolus*, on l. "Assid.," *Haenel*, "Dissens. Dom.," pp. 104, 438, 582.

² *Soultages*, "Cout. de Toul.," I, 250; *Ferrière*, see "Dot"; *Argou*, III, 8; *Serres*, IV, 4, 29; cf. "Bret., A. C.," 410 (D'Argentrés), and "N. C.," 439.

³ Dig., "sol. matr.," 24; "Petrus," IV, 54 (prohibition against alienating what she receives); "Decis. Cap. Tolos.," 339; *G. Durand*, p. 467; "Siete Part.," IV, 11, 29; *Lattes*, p. 244.

⁴ *Julien*, "Élém.," I, 4, 36 *et seq.*; *Laviguerie*, "Arrêts inédits," I, 254.

⁵ *Roussilhe*, nos. 433, 491 *et seq.* (she needs no authorization), 497; *Bretonnier*, see "Dot." Cf. *Viollet*, p. 804.

⁶ Right of the survivor or reciprocal gift which the future spouses make and which shall go to the survivor of them, especially in countries where there is neither increase nor counter-increase: *Roussilhe*, no. 597; "Siete Part.," IV, 11, 23 *et seq.*; "F. de Béarn, r. de marit.," 10; *Ginoulhiac*, p. 147: the husband who survives receives the marriage portion at Toulouse, Bordeaux, Agen and Montpellier. As to the increase see: *Ginoulhiac*, pp. 97, 129, 149; *Brandileone*, "Stud. prel. s. svolg. d. rapporti patrim. fra coniugi in Italia," 1901 ("Arch. Giur.").

⁷ There is a complete literature on this subject: *Dramard*, "Bibl. du Code Civil," p. 215; *Troplong*, "Contr. de mar.," Preface, 1851; *Sacase*, Preface to his edition of *Roussilhe*, "Dot.," 1856. As to the Revolutionary drafts of a Code, cf. *Sagnac*, pp. 295, 376; *Loché*, "Législ. civ.," 13, 27. The draft of the Civil Code, art. 138, prohibited even the stipulating of inalienability.

brought up in countries of written law, and they will tell you that separate estate is beyond comparison better than community, while those of countries of Customs will give their decision in favor of community of possessions, — so great is the tyranny which a long and ancient custom has over us.” Each one of these systems has its advantages and its disadvantages; they correspond to different situations. This accounts for their being preserved in our Code. P. Gide brings out in excellent terms the merits of the system of the marriage portion, “If it be true that for the good government of a household, as for that of the State, it is necessary to combine in a fair proportion the principle of conservation and the principle of progress, never was this combination in domestic order more happily realized than by the marriage portion system. This system forms into two parts the fortune of the household; one immovable, unchangeable, should constitute for the family a reserve fund; this is the marriage portion of the wife. The other, left to the free disposal of the head of the house, may be transformed, may increase, and may serve to sustain commerce and industry; this is the husband’s fortune.” It is not forbidden to do this under the community system, but everything then depends upon the prudence and the good will of the spouses. By adopting the marriage portion system they tie their hands beforehand; they take precautions against themselves, against their imprudence or their inexperience; and in many cases this is more sure. It is true that by exonerating the fortune of the wife from every risk of loss she is prevented from having any benefit from it, but this result can be avoided by a stipulation for a partnership in acquests.

One could also make the marriage portion system more flexible by always allowing the alienation of the marriage portion funds, subject to reinvestment in immovables, government securities or other good securities (this is what parties did formerly in the clauses of their marriage contracts), or even without reinvestment with the authorization of a court (this is something which was

The decline of the marriage portion system in France seems to be attested by recent statistics (1899, 1900): *Planiol*, “Tr. de Dr. civil,” III, 234; *J. Bressolles*, “Des rég. matrim. actuellement pratiqués dans le pays toulousain,” 1880. According to practitioners, its abandonment is especially due to the impediments which it places in the way of the most useful sort of acts and also to the injury which it thereby causes the spouses; it gives an opportunity for fraud; and finally by adopting the community, one saves the expenses of the drawing of a marriage contract: *Homborg*, “Abus du régime dotal,” 1849; *Gide*, p. 489.

only permitted as an exception). Thus, this would be like a community system under which the marriage portion is alienable, but under which its restitution is assured by a system of reinvestments and compensations. Or, again, it would be like the absolute system of community, which is only a marriage portion system with all the possessions in the marriage portion, but not including inalienability, just as separate estate is a marriage portion system with all the paraphernalia of the wife's property.

§ 551. **The Partnership of Acquests** is combined with the Roman marriage portion system in the Bordelais,¹ at Bayonne, in the Labourt, the Soule,² in Navarre³ and Spain.⁴ In the Spanish region it is connected with the Visigothic laws,⁵ and perhaps these laws have left traces of it in the Southwest of France.⁶ At all

¹ On the "Cout. de Bordeaux," cf. Commentaries: *Ferron*, 1540; *De Lurbe*, 1612, 1701; *Autonne*, 1621, 1737; *Dupin*, 1746; *La Mothe*, 1768 (see *Camus*' no. 1205); *Salvia*, "Jurispr. du Parl. de B.," 1787; *Tessier*, "Soc. d'acq.," ed. *Deloynes*, 1880; "Acad. lég. Toulouse," VII, 521; IX, 533. — *Glasson*, VII, 390.

² Sixteenth century: "Bayonne," 9, 24; "Labourt," 9, 1; "Sole," 24, 1 (acquests and shares contributed by the spouses); "F. de Béarn," 255 *et seq.* (ed. *Mazure*, p. 99): the wife has no right to acquests (a thing which would perhaps not have been established if the tribunal had not been opposed upon this point to the previously existing law).

³ *Desdevises du Désert*, "R. des Pyrénées, 1890, 804 ("conquistas, bienes de ganancia"); "F. de Navarre," r. 25 (the survivor of those who marry "solt à solte" takes all the possessions of the predeceased, unless there be children).

⁴ From the "Fueros Juzgo" the partnership of acquests must have passed into the local "fueros," for example it is to be found in the "Fueros de Cuenca" at the end of the twelfth century (*Antequara*, p. 157), having this peculiarity that partition of acquests takes place by halves, whatever may have been the share contributed by either spouse. It is the same in the "Fueros Real," III, 3 ("de las ganancias"). Omitted from the "S. Partidas," the partnership of acquests once more makes its appearance in the Laws of Toro and thence passes into the laws which follow: *Lehr*, "El. de Dr. Esp.," I, 120. — In Portugal, there has existed a universal community between the spouses since the twelfth century (at least among the lower classes): "R. h. Dr.," 1858, p. 132. Similarly in Biscaya there exists the "Hermandad" between spouses. — Sardinia: "Carta de Logu," 162.

⁵ Peculiarities in the "Fueros Real" which bear witness to the Visigothic origin of the partnership of acquests: profits gained in an expedition carried out at the king's expense, etc. It is true that the Code of *Reccesvind* divided the acquests in the proportion of the share contributed by each spouse. But the change which has taken place with respect to this point may be accounted for by means of the difficulty of proving what this contributed share consisted of and the need of simplification. Cf. *Walter*, I, 495, note o, on "L. Wisig.," 4, 2, 11 (partition by halves). The Zeumer edition makes no mention of this passage; cf. "N. Archiv.," XXVI, 107; *Dahn*, "Westgot. Stud.," 127.

⁶ One might also be led to believe that there has been a spontaneous formation of the partnership of acquests in the Southwest of France, beginning with the Frankish law. — At any rate it is not of Roman origin, as was thought formerly; for the Roman laws which would have been drawn from in order to form a typical clause (*Dig.*, "pro soc.," 17, 2, 7 *et seq.*) were not included within the Breviary of Alaric, and the Justinian law was not yet sufficiently

events, its existence is attested at Bordeaux from the twelfth century.¹ In 1206 a Privilege of John Lackland did away with the right of the widow to half of the acquests,² but it did not go so far as to forbid this half being granted to her by means of express stipulation. The partnership of acquests then became a system based upon agreement, but only in the town of Bordeaux, to which the Privilege was confined.³ Up to that time it was the system of the common law,⁴ and it did not cease to be so in the Bordelais. In the absence of agreement⁵ the spouses were married subject to the partnership of acquests. The woman had no paraphernalia and was subject without any reservation to the power of the husband, which formed a striking contrast to the Roman system in force in the rest of the South.⁶ Once the Custom had been impaired by the Privilege of 1206, practice widened the breach and tended to make the Roman law prevail, without succeeding, however, in abolishing the partnership of acquests. Little by little, the rule established for the town came to be applied in the sur-

well known in the Bordelais in the twelfth century for it to have been possible to have drawn an institution of such importance from a few texts scattered at random through the Digest. Furthermore, why should these texts have only resulted in the partnership of acquests at Bordeaux? Finally, let us observe that the Bordeaux system differs very greatly in other respects from the Roman system: the wife has no paraphernalia and she is under the husband's power. — Lastly, the "Cout. de Bordeaux" did not borrow the partnership of acquests from the neighboring countries of Customs, for only the community of movables and acquests was recognized in them.

¹ "Arg. Privil." of 1206: "sicut capere consuevit."

² "A. C., Bord.," 202. With what object was this privilege asked for? Must it be accounted for by the influence of the English law or of the Roman law? The text is silent. This privilege left in existence the right to the acquests for the benefit of the children in case the mother died first. Later on a formal stipulation was required from the wife's heirs as well as from the wife herself: "Bord., A. C.," 82 *et seq.*, 108 *et seq.*; "N. C.," 70 *et seq.*

³ The same restriction applied to the exclusion of the daughter who was given a marriage portion from the succession of her father: "A. C.," 76, 202.

⁴ This was also the system in use in Bayonne, Labourt, Soule, and Navarre.

⁵ Rights of the survivor, sum which the surviving spouse takes out of the possessions of the deceased spouse: "A. C.," 98, 104, 111, 113; "N. C.," 47, 49. Contractual reservation of the acquests or conferring the ownership of all the acquests upon the children to be born of the marriage, the surviving spouse having only the usufruct of them: *Tessier*, no. 302.

⁶ Other provisions of the "Cout. de Bordeaux" which are connected with the Customary law: (a) Communities between brothers or cousins who are not nobles: "A. C.," 13-18, 56-68, 74, 85-88, 96, 97, 111, 112, 143, 244, 245. — (b) Repurchase by person of the same lineage. — (c) The rule: "Paterna paternis." — (d) Reservation, two-thirds for commoners, one-third for nobles. — (e) Hereditary seisin. — (f) Right of primogeniture (for the benefit of the sons or the daughters). — Together with these rules are found others of Roman origin: the paternal power, the legal share, the making heirs of girls in default of male issue, disinheritance, etc. — The "A. C.," makes no mention, as the "N. C.," does, of the obligation which the father is under of giving his daughter a marriage portion.

rounding country; this change is perceived in the "Nouvelle Coutume" of 1520; the marriage portion system is the law and the partnership of acquests only exists by virtue of a special stipulation;¹ it has become an accessory of the marriage portion system. At the same time, the paraphernalia possessions,² which were unknown to the old Custom, became distinct from the possessions which formed the marriage portion;³ the husband had the administration of them,⁴ just as he had that of the partnership of acquests; but the wife, who was subject to the power of the husband with respect to these possessions, acquired the right to dispose of them without authorization. Thus the old system of Bordeaux came to be altered, and it is in this state that Article 1581 of the Civil Code and the practice of the Southwest of France preserved it.⁵

¹ "N. C.," 26; "Attest." of the 13th of July, 1715, and of the 12th of Feb., 1746.

² That is to say, those which the wife acquires after the marriage.

³ "A. C.," 61, 64, 66, 80, 85, 112.

⁴ "N. C.," 42. In the written law, the issues of the paraphernalia belong to the wife.

⁵ "A. C.," 114: the selling of the wife's inheritance is only valid when carried out with the husband's consent and if he has possessions out of which his wife will be able to recover the value of her inheritance; 56, 103, 174. Cf. "N. C.," 53 and (*Lamothe*) II, p. 128: the wife can alienate it by herself, "salvo jure mariti."

TOPIC 4. SYSTEMS OF COMMUNITY

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§ 552. **Origin of the Community of Possessions between Spouses. Distinctive Characteristics of this System.** — The system of common law at the beginning of the feudal period in countries of Customs placed the possessions of the wife under the administration and made them subject to the enjoyment of the husband; one can say that in this sense they were all part of the marriage portion. All the acquets belonged to the husband. The wife, who was strictly subject to the husband's guardianship, only had a right of survivorship (dower, etc.) and the restoration of the share brought by her in immovables, when the marriage came to be dissolved. Under this system, as under that of the community, the possessions of the spouses formed but one mass, which was in the hands of the husband. But it was lacking in the two essential characteristics by which the community system is marked: (a) the transmissibility of the wife's rights to her heirs; by which, if marriage were dissolved by her dying first, her heirs took the share to which she would have had a right if she had survived; (b) during their joint life the spouses are looked upon as joint owners, or as partners with respect to losses and gains.¹

¹ To-day there is much discussion as to the **juridical nature** of the community. Cf. especially *Stobbe*, IV, 215. The various opinions which have

Had legal relations been governed by pure logic, the husband would have fallen to the rank of a mere manager charged with the administration of the common possessions in the interest of the family. This was a modest position which the husbands of other times could not accept, even assuming that the wives would have thought of imposing it upon them, for this would have been to give up their domestic power. So, they preserved their authority almost in its entirety; all the possessions of the wife were included in the marriage portion, as in former times, and were placed in the hands of the husband. The result of this is that the transition from one system to the other was scarcely perceptible; the old texts are not very precise; what an embarrassing question it is to decide whether or not they have in view the community system! Until the very end of the old law one can say, however paradoxical the expression may seem, that the system which is the most like that of the community is the exclusive system of community; this is so true that, if there were no community, it was this latter system that the spouses were considered as having adopted. In the community, it is said, the wife gets an interest in the prosperity of the household; this is correct, but she gets not a very much larger interest in the community where she only had a right to a third than in the exclusive system of com-

been formed show the special tendencies of certain legal systems or certain phases of the evolution of this system. Our old authors did not, so to speak, concern themselves with the question; they were satisfied with defining and regulating the relations existing between the spouses without seeking to find the only principle upon which they could have based this regulation. For them the community is a civil partnership "*sui generis*," having special rules due to the special position of the spouses. — Here is an outline of the principal systems suggested: 1st. "The husband is the only owner" of the community possessions; the wife only has a right to arise in the future if there remain any of these possessions at the time of the dissolution of the marriage (community "*mortis causa*"). This is the tendency of the French Customs. Furthermore, the husband has not been authorized to dispose of the community by last will and testament. 2d. There exists "joint ownership or joint possession" between the spouses; but neither member of the community can claim their share or make any disposition of it; the husband's debts are an encumbrance upon the wife's share as well as his own, etc.; scarcely any of the rules of Roman joint possession are applied. 3d. The community constitutes a "legal person"; from this it would follow, for example, that after the dissolution of the community, the creditors of the community would have a right to the community possessions before the creditors of the spouses individually; in the old law there is not a trace of these ideas to be found. 4th. There would exist a Germanic joint ownership, "*zu gesammter Hand*"; this not very precise theory would assume that both spouses would have to act "*communi manu*"; but as this is only true in exceptional cases, the conception of unity of hands must be brought in ("*Einhand*"), a thing which overthrows the principle. Cf. the oft-cited passage from *Justus Veracius*, "*Libellus consuet. princip. Bamberg*" (1681), 1733, p. 59.

munity with its right of survivorship, also equal to one-third. The transmission to her heirs of her rights of joint ownership constituted the only practical difference between these two cases.

Thus, at its very origin the community is scarcely to be distinguished from the system of possessions between spouses of the barbarian period. But an evolution due entirely to decisions and practice¹ modified its early characteristics by increasing the number of guaranties and privileges in the interests of the wife, which served as a counter-weight to the very extensive powers

¹ The evolution of the community system is, as we see it, characterized by the affirmation and the more and more energetic protection of the rights of the wife. There are many who interpret it differently. There are those who maintain that the wife was at first almost the equal of her husband (in the thirteenth century she validly binds herself for the time following the dissolution of the marriage, she takes the place of her husband when he is under a disability or absent): *Chéron* "Thèse," p. 17; *Gautier*, "Chevalerie," p. 358; *Gide*, 470; *Lecoy de la Marche*, "La chaire Fr. au moyen âge," p. 400. Cf. *Viollet*, "Et. de St. Louis," I, p. 147; *Glasson*, VII, 267. In the sixteenth century under the sway of Roman ideas she must have been deprived of this rank, she must have been placed under a disability and under guardianship. The community must have lost its original character of a partnership between equals; the powers of the husband must have grown out of all proportion when the wife was placed under a disability; and yet at the same time nothing could be more inaccurate than this pretended weakness and inexperience of the sex, because both unmarried women and widows were under no disability. The community came to be, in the eighteenth century, a partnership in nothing but name, a thing which could be compared to a scale gone crazy, which, tipping now to the right, now to the left, never attains equilibrium; a limping institution of which it could rightly be said: "It is the wife which the community oppresses so long as it exists, and the husband when it is dissolved." *Fenet*, XIII, p. 707 (*Duvergier's* report); *Chéron*, "Thèse," p. 58. There would be an inconsistency, according to these ideas, between the disability of the wife and the partnership of possessions. The formula of Pothier (unformed law) is taken literally, and it is contrasted with the old law, according to which the wife who was not under a disability was a true partner, although she was subordinated to her husband. It has been reiterated "ad nauseam," that if the married woman is under a disability, it is not because she is inferior to her husband. Nor is it apparently because she is his superior. Had she been the man's equal, she, as often as he, would have been the head of the household. But custom made of her a perpetual minor. Chassaneus tells us that, in his day, when a married woman passed near a man custom required that she cover half of her face through modesty. How can we be astonished, being given this characteristic and others of a similar nature, that the juriconsults had to concern themselves with the "fragilitas sexus," with the lack of experience of women. Unmarried women and widows were not similarly situated; they ran the risk of causing injury to themselves, and that is all; married women ran the risk of causing injury to their families, therefore greater precautions had to be taken against them. Where many see nothing but an unfortunate retrogression, I see only the continuation of an older state of affairs. It was thought that it would be best to place the wife under a disability, to compel her to provide herself with the authority of her husband for every act, the day that the archaic system which made the family patrimony practically inalienable, disappeared. Granting this point of departure and the Customs of former times, the progress of our old law can far more readily be understood. "A. C., Bord.," 66.

of the husband.¹ Instead of establishing a mathematical equality between spouses, which would have resulted in the strong making use of the weak, they were placed in an equal position by an ingenious combination of rights which varied but which were equivalent. It is because originally the community did not differ very much from the system which preceded it that it retained the institutions of dower and mutual gift, which were much more in harmony with the system abandoned. Under the Civil Code² dower has disappeared; community, which was formerly restricted to countries of Customs, has become the common system of law in the whole of France. Its foundations have not been modified; the husband has not ceased to be the head; but he is no longer looked upon as anything but an administrator with extensive powers. It would no longer be correct to say that he is the master and the lord of the community; he can no longer give the possessions belonging to the community "inter vivos." This is an advance; it had, however, been half realized by the old law. It would be difficult to go very much further in this direction by increasing the rights of the wife, as some have asked, without running the risk of destroying the equilibrium which has been established between the spouses by a system consisting entirely of set-offs and balances.

§ 553. **Date of the Community.** — It is true that in its early stages the community was not a very important thing;³ one must wait until it passes unperceived into the early part of the Customary period. The examination of documents does not belie

¹ Separate maintenance, a right to attack alienations made in fraud of her rights, renunciation of the community, benefit of emolument, prerogatives in the exercise of the recaption, the implied mortgage: such are the weapons given the wife against her husband, and it is easy to see, even from this mere enumeration, that she is not sacrificed. The husband has absolute power, but he is held in check at every turn by the feeling of his responsibility.

² The first draft of the Civil Code of Cambacérès, 1793, Art. 11 (*Fenet*, I, 20), gave both spouses an equal right to the administration of their possessions; the wife could exercise it as well as the husband. This rule, which was founded upon the idea that the inequality of the sexes was nothing more than a prejudice, was abandoned by Cambacérès himself in his third draft, that of the month of Messidor, year IV, as being contrary to the natural order of things and only liable to give rise to disputes: *Sagnac*, p. 294. Cf. preparatory work on the Civil Code.

³ Cf. as to the German texts, *Schroeder*, II, 2, 2; II, 3, 390 *et seq.*; *Stobbe*, IV, 118 (uncertainty). A comparison with the German law is here, as in many other cases, of great utility, because we find therein, as though in an archaeological museum, forms which have disappeared elsewhere, rules which were used in periods of transition, anomalies and exceptions which permit of our following more closely the progress of our own institutions.

this conjecture.¹ It is rarely found mentioned in the twelfth century;² the charters of the communes of the North, like that of Laon, 1128, c. 13, speak of a community of acquests between the spouses.³ In the thirteenth century P. de Fontaines does not seem to make any allusion to it; "Jostice,"⁴ the "Et. de St. Louis,"⁵ the Assizes of Jerusalem,⁶ and the Registers of Parliament,⁷ are far from being explicit. Beaumanoir is very sparing of details; he, however, affirms in a categorical manner the existence of the conjugal community and presents it as an immemorial custom, 21, 2: "Everyone knows that a community is formed by marriage, for as soon as the marriage is performed the property of one and the other becomes common by virtue of the marriage. My views are that the man is a guardian. . . ." ⁸

¹ Among the Scandinavians, about the twelfth century: *D'Olivecrona*, p. 31; "Saga de Nial," *Dareste's* translation, p. 3.

² "Cart. de Cluny," in 937, no. 476: a wife gives her husband her half of the jointly acquired property. "Fribourg en B.," 1120, Art. 15; *Giraud*, "Essai," I, 123; *Huber*, IV, 426.

³ "Ord.," XI, 185 (no community of movables: return of the money to the donor); "Amiens," 1190, 35: one-half of the acquests to the survivor, the other half to the children. Cf. Charters of Cerny, Crespy, Bruyères, Sens, etc.; "Ord.," XI, 233, 235, 259. — See also the "Ord." of 1219 (I, 38) as to Normandy (*Laurière*): if the wife dies before her husband without having had any children; the husband gets all the movables and acquests; he excludes the wife's heirs.

⁴ P. 256. Cf. pp. 169, 170, 225, 231.

⁵ "Et. de St. Louis," I, 16, 17, 139, 140, 143; *Viолет*, "Et.," I, 132, cites *D'Espinay*, "Cartul. angevins," p. 183 *et seq.*; "R. h. Dr.," VIII, 45; *Chevalier*, "Cartul. de Noyers" (1085), p. 152; "L. de Droiz," I, p. 182.

⁶ In the Assizes of the High Court, the wife of a noble has only dower, but this dower includes half the movables and immovables which are left at the death of her husband (at least in the case of knights), after the debts on the movables have been paid (ed. *B.*, Table, see "Douaire"). Besides her dower the "Assises de la Cour des Bourgeois" give the widow (or her children) the absolute ownership of one-half the jointly acquired property, c. 183, 187; she is held responsible for the debts of her husband, without there being any mention of a possible renunciation by means of which she can escape this, c. 191; the husband should also pay his wife's debts contracted before the marriage, or even during the marriage if they were for the needs of the household, and he is allowed to sell his wife's personal belongings even to pay his own personal debts, assuming that his own personal belongings are not sufficient, c. 194. According to c. 186, "acquests made by the husband before the marriage" belong, if he dies "intestate," to his wife, for "no man is so rightly the heir of the dead as his wife" (and "Gen.," ii, 24, is cited).

⁷ "Olim," I, 5 (in 1255); 261 (in 1267); 565 (in 1265); 708: community of acquests; II, 422, 474; III, 862, 1179; *Boutaric*, "Actes du Parl.," II, no. 5049; *Ducoudray*, "Orig. du Parl.," p. 797.

⁸ *Beaumanoir*, 21, 2; 13, 9, 21; 30, 99; 57, 1 *et seq.* According to Beaumanoir, the community established by the Custom existing of absolute right between the spouses, includes all their movables and deprives them of their inheritances; all their debts on movables fall into this community. Are the immovables acquired during the marriage jointly owned? On this point Beaumanoir is not very precise. To read him without having any preconceived idea, it would seem as though in his opinion the acquests made by

We must come down to the fifteenth century in order to find in the texts a detailed regulation of this institution.¹

§ 554. **Causes which produced the Community and directed its Evolution.**²—The causes which made the wife the partner of the husband are of an economical nature rather than of a moral nature; we can hardly find them in the Christian sentiments of the Middle Ages.³ As we see it, the community is

each of the spouses individually belonged to them individually (*cf. Leroux de Lincy*, "Hôtel de Ville de Paris," 127); as to the immovables which they acquire together, they also are personal belongings, in this sense that the husband has no right to dispose by himself of the share which belongs to his wife, but only of the jointly possessed personal belongings which are divided into halves at the dissolution of the marriage (*cf.* 21, 2; 30, 99). The husband is necessarily the administrator of the association, the guardian of his wife, the "sires" of his wife's possessions as well as of his own personal belongings. He can dispose of the movables at his pleasure and he alone can bind the community. The community is dissolved at the death of one of the spouses, but not when there is a judicial separation; at the most the husband provides his wife with an allowance for her support. One-half of the debts are to be charged to the wife, but she can free herself of this obligation by renouncing the movables. There is no question of recompenses; the price received for personal belongings which were alienated went into the community just as the other movables did. It seems that the community comes into existence at the time of the celebration of the marriage (*cf.*, however, 21, 2, and 21, 25). As between people of rank, a three-sided association is formed if the surviving spouse enters into a second marriage, consisting of this surviving spouse, the new spouse and the children of the first marriage.

¹ *Desmares*, XX, 124, 152, 247; "B. Ch.," 2d. s., I, p. 400, Art. 8, 11; "Gr. Cout.," p. 321; *J. Lecocq*, 83; "Cout. Not.," 19, 161, 176; "A. C., Anjou," ed. *B-B.*, II, 227; IV, 261; "Cout. de Lorris," ed. *Tardif*, Art. 193; *Loysel*, III, 385, 657; "Paris, A. C.," 110; "N. C.," 220 *et seq.* (*cf. Ferrière*, bibl.); "Conf. des Cout. de Guénois," fo. 549; *Molière*, "Ec. des femmes," IV, 2. — In Burgundy the community was not generally adopted until 1489; *cf.* "T. A. C.," "de acq.," 8 and 11 (*Giraud*, "Essai," II, 286 *et seq.*) — "Cout. de Verm.," 10; "L. de Dr.," I, 184.

² *Cf. Ginoulhiac*, *Laboulaye*, *D'Olivecrona*, etc., also *Tardif*, "Origines de la Comm. de biens entre époux," "Thèse," 1850; *L. Passy*, "Thèse," 1857; *P. de Salvandy*, "Gains de survie," "Thèse," 1855.

³ *Christian Origin.* The Christian guidance given the family in the Middle Ages must have resulted in the power of the father and the conjugal community: *Lefebvre*, "Lec. d'introd." and "La Cout. franc. du mar.," 1901. *Cf. Typaldo-Bassia*, p. 16. — If Christian feelings had created the community how does it happen that this institution was unknown to the Christians of very early times? One has difficulty in finding among the writings of the theologians and the canonists a few scattered texts which either deal fully with, or touch lightly on the community. *Cf.* in *Lefebvre*, II, 488, the letter from St. Augustine to Ecdicia, "Ep.," 282 of the "Pati. lat." of *Migne*, and compare it with the "Laudatio Turiae," *Gratian*, c. 27, q. 2, c. 17; Dig. X., 4, 20, 2. The canonists know of scarcely anything beyond the Roman marriage portion system with dower. If it be unconsciously that the spirit of Christianity has given birth to the community, how is it that it did not produce this same effect in Southern Europe, in Normandy, in England and in certain portions of Germany? Why did not this spirit make the absolute community prevail everywhere, as must logically have followed? Why in the French Customary community do the acquests of the spouses obtained before the marriage remain their personal belongings? The maxim "Vir et mulier fiunt una caro" serves, in the "Ass. de Jér.," "Cour des Bourg.," 180, as a justification of the wife's

to be accounted for in the same way as the rights of survivorship of the barbarian period.¹ The share contributed by the wife increased, either because the value of her work became greater, or especially because she more easily had access to the paternal inheritance.² She was finally recognized as having more extensive rights by virtue of the marriage. The old constitution of the family was in opposition to this, but we have seen that the principle of the unity of inheritance and the strength of the power of the family head were all the time becoming weaker. Thus it was possible either to keep a separate estate for her, as in England and in Germany, or to consider her as a joint owner with her husband of certain possessions.³ This last system was preferred in France and elsewhere, for the very simple reason that it was the one which differed the least from the previous system, while at the same time it satisfied new needs.⁴ It was, as we have observed,

right to half the acquets, and, in Bracton, to account for her disability. From *Modestinus'* definition of marriage (D., 23, 2, 1: "consortium omnis vitæ"), must one infer the community?

¹ *Germanic Origin.* — (A) Either one is to derive the community from the old customs of Germania attested by *Tacitus*, 18 ("laborum periculorumque sociam") and from a loftier conception of marriage than that which could properly have been held by the Germanic race (*cf.*, however, *Modestinus*, D., 23, 2, 1). We have disputed this opinion, see *ante*, § 100. *Cf.*, however, *Beauchet* in *Typaldo-Bassia*, IV: this idea of marriage was the first basis for the conjugal community; it was developed under the influence of family joint ownership and of the "mundium," which placed all the belongings of the wife in the hands of her husband, thus establishing an external or formal community from whence issued the true community. These ideas, which were very much in favor in the time of *Mittermaier*, etc., have to-day scarcely any partisans left in Germany. — (B) Or else we find the community already in existence in the documents of the barbarian period, and its formation is to be accounted for by means of economic causes pointed out above (§ 520) or by means of the tendencies of the times towards the community. *Cf. Schroeder*, "R. G.," 723; *Ginoulhiac*, p. 285.

² If the family's rights of succession are not very great, as is the case in Normandy, the community comes to nothing. *Cf. Ficker*, §§ 1052, 1111; *Stobbe*, § 324.

³ Other systems which no longer need even be discussed. — 1st. *Roman Origin:* *Laurière*, "Gloss.," see "Comm.," *Bouhier*, on "Bourg.," I, 175. It is certain that the spouses could contract for a partnership between themselves at Rome (and even in Greece, *Xenophon*, "Econom.," VII, 12; *Beauchet*, "Dr. prive de la Républ. Athén.," I, 244), but this is something which is very exceptional: *Dig.*, 34, 1, 16, 3; "Laudatio Turiae"; *Girard*, "Textes," p. 777 (each spouse takes care of the other's possessions, but there need be no community for this to be so). A few texts are still cited: D., 23, 2, 1; 24, 3, 17, 1; 25, 2, 1; "Cod. Just.," 9, 32, 4; *Martial*, "Ep.," IV, 75; *Denys d'Halic.*, "Ant. Rom.," II, 25; "Colum. r. r.," 12. — *Van Wetter*, "Le Dr. Rom. et le Dr. Celtique," "La comm. des biens entre époux," 1898, has once more just taken up this abandoned opinion. — 2d. *Celtic Origin:* *Pasquier*, "Rech.," I, 398; *Grosley*, "Rech.," p. 8; *Pardessus*, "Ac. Inscr.," X, 752.

⁴ It is not always to the wife's advantage. The wife who is in a community runs risks, especially if one admits that she was not originally authorized to renounce the community.

a scarcely perceptible transformation.¹ A few favorable circumstances were sufficient to produce this slight variation.² In towns, where family possessions are rarely met with, there is nothing to offer an obstacle to its adoption; the marriage portion of the wife consists in the making of an investment, as would the share of a partner; the benefits resulting from commerce and industry, or acquests which are realized because of them, are shared, because the woman, owing to her fortune or her activity, contributes to their production.³ Community is thus the matrimonial system of the merchants. In the country the land does not belong to the peasant, but to the lord; the possessions of people of small power are reduced to movables, which, because of their very nature, are hardly to be distinguished from one another; they were declared to be common to the two spouses. The community is thus the system of the serfs and the commoners.⁴ It was more difficult for it to obtain a hold in the class of the nobility; the share brought by the wife was there, in fact, ordinarily very small (unless she were the heiress of a fief); she would be contented with her dower. In time the system of the community, however, was extended to the nobility themselves; but the queen of France never lived in a community of possessions with the king, which is a remarkable example of the survival of the early system.⁵

The opinion which sees in the conjugal community a variation of those secret communities⁶ which were formed among people of

¹ We have already pointed out the analogy existing between the rights of the survivor, rights of succession and the community rights allowed the married woman; the change from one to the other of these rights must have taken place without difficulty: *Stobbe*, § 122; *Heusler*, § 154.

² The Scandinavian law shows the community taking the place of a still older system analogous to that of unity of possessions, by means of agreements; at the end of a certain time of long or of short duration, for example three years, the wife becomes the husband's partner; this is an advantage which is granted her because of the share contributed by her, when the marriage has lasted a sufficiently long time for a presumption to arise that there will be no rupture. Cf. *Amira*, 163; *D'Olivecrona*, p. 94; "Saga de Nial," *Darestes's* translation, p. 3; *Lehr*, "Dr. civ. Russe," I, p. 28: in spite of the "Svod," which leaves to the wife the free administration of her personal possessions, there is in fact a real community between the spouses.

³ *D'Olivecrona*, p. 135 (laws of the Swedish towns). In the Danish towns there is an absolute community; in the country the personal belongings are not included within the community. Cf. *Stobbe*, IV, 119.

⁴ In Germany the community also appears to be an institution of urban law; but it is just as old among the peasants; its formation among the rural classes is to be accounted for by means of the influence of the "Ganerbschaften" which are so numerous in the regions where it was adopted, by means of the improvement in the wife's position in the family, and by means of the decline of the rights of the family over lands.

⁵ *Loysel*, XXII, 111.

⁶ "Conf. de Guénois," p. 601; "L. d. Dr.," I, 194.

power, generally brothers or relations by marriage,¹ owing to the single fact of their life in common during a year and a day,² is one which is usually accepted.³ It would have been surprising if the existence of this partnership, which is attested from the time of the barbarian period,⁴ had not facilitated the adoption and the extension of the community between the spouses. But there are too many differences between these two institutions for one of them to account sufficiently for the formation of the other.⁵ The

¹ "Gr. Cout.," p. 371; *Guy Coquille*, "Q.," 125.

² These communities are to be found in almost the whole of France: *Masse*, "Thèse," p. 383; *Glasson*, "N. R. H.," 1891, 446; *Dunod*, "Tr. de la main-morte," p. 87; *Ragueau*, see "Chanteau"; *G. Coquille*, on "Niv."; *Chassaneus*, on "Bourg."; *Chabrol*, on "Auv.," 189; *Lebrun*, "Tr. des comm. ou soc. tacites," at the end of his "Tr. de la comm. entre mari et femme"; *Lattes*, p. 267 (Lombardy: community between brothers); "A. C., Bord.," 67, etc. Cf. as to the German "Ganerbschaften," *Heusler*, I, 230; *Gierke*, "Deutsch. Privatr.," I, 664.

³ *Laboulaye*, p. 333; *Masse*, "Thèse," p. 383.

⁴ Capitulary of 818, c. 6; "Polypt. d'Irmion," II, p. 24, ed. *Guérard*.

⁵ *Beaumanoir* speaks of one and the other of them in the same chapter, but without confusing them. *Guy Coquille*, in his "Institutes," and *Lebrun* in his "Tr. de la Comm.," also compare them. Among other similarities, the following have been pointed out: 1st. The conjugal community at first only began at the end of a year and a day, just the same as silent partnerships did. 2d. Just like the latter (which are rare among nobles) it only existed and was carried on among commoners. These are two points which are very much discussed. In the sixteenth century, the number of Customs which only cause the community to begin after the year and a day are very limited in number; in the later texts this Custom scarcely makes its appearance. We do not find that the Customs which make the community between spouses commence a year and a day after the marriage reject silent partnerships; this rule is one of the newer laws and has exceptions: *Loysel*, 378. But let us observe that the delay of a year and a day in the formation of partnerships between relatives or strangers was only required in the absence of an agreement. Cf., however, "Gr. Cout.," II, 40. Thus brothers living in a state of joint possession after the death of their father became community owners of possessions immediately, and not at the end of a year and a day. As between spouses, there would always have been an agreement. — 3d. In the sixteenth century, silent partnerships, like the conjugal partnership in France, only include the movables and acquets; but in other countries the community between spouses is absolute; if we assume that at first silent partnerships were absolute, we shall no longer be able to account for communities of movables and acquets or of acquets alone, between spouses. — 4th, the enjoyment of the community possessions belongs to each one of the participants or to each of the spouses in proportion to their needs and not to the shares contributed by them respectively. — With these resemblances, which as we see amount to very little, let us contrast their important differences: 1st. The conjugal community is nothing more than a special method of regulating the interests of the spouses; on the other hand silent partnerships between relatives have their origin in the economic and social conditions of the late Middle Ages. — 2d. Married persons who became members of a silent partnership only counted as one individual (example, the community of the Jault); women, like minors, only had a right to their support and maintenance; when they married they were given a marriage portion in money or in movables, without touching the community lands; far from calling for the community between spouses, silent partnerships would rather

situation of married people and that of relatives or strangers who are associated together is entirely different; the difference in sex, the presence of children, the constitution of the family, carried with them differences which were inevitable. Also, provinces such as Normandy are found where secret partnerships existed in the old times, and where the community between spouses did not succeed in taking root.

We are led to believe that the community was more frequent originally among the commoners, and that it only became generally accepted among the nobility later on. But we cannot hide from ourselves the fact that there is a good deal of uncertainty upon this point.¹ There was no absolute obstacle to the formation of a community among members of the nobility, at least one restricted to movables. The right of survivorship of the Frankish period existed in the case of women of very high rank, as well as women who were free; in various localities it became transformed into a community right.² But there are to be found texts from which it clearly follows, or which allow one to assume, that in other localities the wife of the nobleman had no community possessions, and that she was satisfied with her dower and her legal reference-legacy in movables;³ this is because the old tradi-

have excluded it. Cf., however, *Viollet*, p. 796, who admits of the opposite evolution having taken place; according to him the wife originally counted as one individual, but the texts which he cites are recent ones: "Orl.," 213 *et seq.*; "Auv.," 14, 32 (and *Chabrol*, II, 399). See *L. Passy*, p. 35, Norman text of 1241. — 3d. The "head of the loaf," although called the master of the community, has not such extensive powers as the husband. — 4th. The separation of the spouses, in the time of Beaumanoir, did not mean the dissolution of the community; cf. the rule "the loaf parts the villein." — 5th. The community between spouses is divided into halves between the spouse and the children; in silent partnerships, the children of one of the participants do not divide his share among them, but each of them counts as one more member. — 6th. At the death of one of the participants, without issue, his fellow associates are given his share by right of increase, to the exclusion of his relatives and the lord; the share of the spouse who has died without issue goes to his heirs, although they are not members of the community. "Gr. Cout.," p. 371, protest of the relations by marriage (and not of the spouses).

¹ *Laboulaye*, p. 287. Cf. *Glasson*, VII, 359; *Schroeder*, "Güt.," 2, 2, 177.

² Beaumanoir and the "Livre de Justice" do not distinguish between nobles and commoners; the "Olim" set forth the right of the widows of nobles to the jointly acquired property. The "Anc. Cout. d'Anjou," ed. *B-B.*, I, 48, 192, 523, speaks of the community between spouses without specifying; but cf. IV, 261 (as between nobles an express agreement is necessary); "Meaux," IX, 51.

³ Contrast between nobles and commoners: "Et. de St. Louis," "Ass. de Jérus.," *loc. cit.* Cf. also *P. de Fontaines*, 15, 8; "A. C., Champ.," XII; "A. C., d'Artois," XXXIV; *Loysel*, 178: "the husband is the guardian of his wife"; now the guardianship of the noble spouse who survives over the minor children excludes the idea of any community between them. *Beaumanoir*, 21, 9 (notice that Beaumanoir does not say the community is continued among

tion was retained in this matter, as happens often enough in the law of the nobility, the social anatomy of this law being more archaic than that of plebeians; it is also because the exclusion from inheritance, to which all women were formerly subjected, lasted especially in the case of the nobility. Perhaps this peculiarity, better than any other explanation, will account for this remarkable fact: until 1580 the renunciation of community was only allowed in Paris to the woman of the nobility; in doing this she acted as an heiress rather than as a partner.

§ 555. **Various Forms of the Community.**¹ — (A) *General Community*. This system, which is opposed to the principle of the preservation of property in the family, has, nevertheless, been very widespread in Belgium,² Holland,³ in various parts of Germany,⁴ in Switzerland⁵ and Denmark,⁶ and even in Sicily⁷ and Portugal.⁸ It is only met with in France as an exception in a few of the northern provinces.⁹ It could only be established in urban

people of rank and not among gentlemen). — The legal reference legacy of the noble spouse is an anomaly in the community system. — Survivals: in the Sardinian States, the Code of Charles-Félix, Art. 174, still excluded the community among nobles. *Pertile*, III, 356, cites Italian statutes excluding "*bona conditionata*" ("*livello*," fiefs) from the community.

¹ The "*Ecloga*" (in 740), Tit. II, introduces into the Byzantine law the system of the community between spouses; if there are children, the surviving spouse keeps all the possession of the other, and the community continues to exist sometimes even between brothers. *Zachariae*, § 11. As to the "*hypobolum*" and the "*theoretum*," a sort of "*Morgengabe*," cf. § 14, etc.

² *Britz*, pp. 838, 858; *Van Wetter*, pp. 32, 41.

³ *Van Wetter*, p. 41.

⁴ *D'Olivecrona*, p. 56; *Stobbe*, IV, 200. In many places the absolute community only came into existence with the birth of children: *Ficker*, § 710 *et seq.*

⁵ *Wyss*, p. 119 *et seq.*; *Huber*, IV, 424. In this country, moreover, it is only with difficulty that the various matrimonial systems can be reduced to any clearly defined types. Cf. *Lardy*, *op. cit.*

⁶ *D'Olivecrona*, p. 114; in the country, community of movables and acquets, in the towns there came to be formed little by little an absolute community. Iceland, p. 97 ("*Gragas*"): the spouses had a right to establish by means of an agreement, either before or after the marriage, a community affecting all their possessions or else their movables alone, provided they both possessed a fortune which was about equal; they had the power of modifying or of cancelling this agreement; the community also came into existence by law when the spouses had lived together three years and the witnesses to the betrothals had died, and when the spouses had nothing when they married and acquired a fortune afterwards, etc. Norway, p. 103. Sweden, p. 136 (towns).

⁷ In Sicily, according to *Brünneck*, the community of possessions must have been introduced by the Normans: "*Sicil. Stadtr.*," p. xxxiv. The absolute community is there preferred, whereas in Sardinia only the community of acquets was known: *Pertile*, III, 353. In Istria, marriage "*ut frater et soror*," that is to say absolute community: *Ciccaglione*, "*Man.*," I, 445 (cf. Byzantine law).

⁸ "*Portug. Mon. hist., Leges*," I, 368.

⁹ *Viollet*, p. 775, states that the absolute community existed at Tournai,

surroundings, where the rights of the family over immovable possessions were declining rapidly, and in rural surroundings where personal belongings were unknown. It is sometimes difficult to distinguish this type of community from a certain form of that system which does not make use of community but exaggerates the powers of the husband to such a point as to allow him to dispose even of the immovables of the wife, and which gives the entire inheritance of the joint estate to whichever spouse survives, excepting that it makes these possessions incapable of being disposed of by the latter ("Verfangenschaft").¹

§ 556. **The Same.** — (B) *Partial Communities.* The most common forms are the **community of acquests**² and the **community of movables and acquests**. This last community³ became the common law in Customary France and came to be applied in a large portion of Germany. The personal belongings or possessions of the family are not included within it, but the movables of both spouses are included in it and are mingled just as in secret partnerships. The husband is free to dispose of them, and in this respect he enjoys the same prerogatives as he did under the matrimonial system existing previous to that of the community; property acquired jointly during the marriage forms a part of the community, which is perfectly rational, because the labor or the fortune of the spouses contributes to the production of such property; if acquests made previous to the marriage remain outside of this community, it is because they would be classed as personal belongings. — Clauses which vary greatly in practice modified the *Customary community*; thus there was formed little by little a *community by agreement*, which was an adaptation of the ordinary system to the particular circumstances of the marriage.

§ 557. **Freedom of Matrimonial Agreements.**⁴ — Originally, the Customary community seems to have been imposed upon the parties. The authors of the thirteenth century and the marriage contracts of that time never speak of the parties adopting a mat-

Boutaric, I, 76; at Arras, cf. "Cout. locales d'Arras," 1746, p. 37; at Daours and Bouthors, "Cout. loc. d'Amiens," I, 308; at Neuf-Brisach and other places in Alsace, *D'Agon de Lacontrie*, "Anc. Statutaire d'Alsace," p. 140, etc.; in Auvergne, in the fifteenth century according to *Barbier*, "Viatorum juris" ("R. de lég.," 1873, 224); *Donau*, "Comm. jur. civ.," 13, c. 16, 8.

¹ Cf., for example, "mainplévie" at Liège; *Heusler*, II, 203; *Brünner*, "Grundz.," p. 107; *Britz*, 838.

² In Franche-Comté the community is limited to the movables and immovables acquired during the marriage: *Stobbe*, IV, 268; *Ficker*, § 1194.

³ *Stobbe*, IV, 270; *D'Olivcrona*, p. 57; *Huber*, IV, 432.

⁴ *Ollier*, "Thèse," 1902; *Stobbe*, IV, 136; *Heusler*, § 155 ("hilix").

rimonial system; it follows that this system is and can only be the community, in the jurisdiction of the Customs which admit of it; the spouses were not free to adopt any other.¹ At the same time, from this period on, one finds clauses which modify the formation of the community or even its dissolution.² Little by little, they become more numerous,³ and in the sixteenth century they are frequent enough for the principle of the freedom of matrimonial agreements to be proclaimed.⁴ At this time the rejection of the community is even tolerated. This freedom is, however, not unlimited; we do not find that it was ever lawful to establish the inalienability of the marriage portion.⁵ The jurisconsults were then

¹ Beaumanoir does not even admit legal separate maintenance: "Gr. Cout.," p. 371; *Loysel*, 111.

² Stipulations for personal belongings: "Amiens," about 1249, Art. 70; between 1249 and 1292, Art. 50, use of the funds of the marriage portion; Charter of St. Louis of 1269 (*L. Delisle*, "Mem. s. les opér. financ. des Tempeliers," 1889, "Acad. Inscr."): deposit of a portion of the marriage portion of Blanche D'Artois at the Temple to be used by one of her relations chosen by her, for the purchase of land or rents; these acquests will be personal belongings in spite of all Customs to the contrary; the remainder of the marriage portion handed over to the husband to dispose of as he may see fit, shall be restored at the dissolution of the marriage. *J. Lecoq*, p. 83: right of the wife to take back the share contributed by her, if it has not been used, out of the community, before any partition takes place, and if not then out of the husband's possessions. Marriage contracts of 1292 and 1396, *Jamont*, "Thèse," 252, 267. Clause of unequal shares, "Olim," II, 74, 10. Cf. general formulæ, but of little probative force, of *P. de Fontaines*, 15, 8, and the 2d. Charter of Amiens, Art. 50; "Ass. de Jér.," "C. des Bourg.," 103.

³ *J. Lecoq*, 83: "conventiones in contractu matrimonii factæ sunt tenendæ quia alias forte non fuisset matrimonium factum." In support of this are invoked in the sixteenth century, Roman texts such as the "l. alimenta," "qui societatem," D., "de alim. et cib." (communities of possessions); "Orléans," 173; "Berry," 8, 8 (exclusion from the community); "Troyes," 83. At this time applications of this rule increased in every direction. *Boerius*, on "Bourges," states as being in general use in 1508, and consequently as dating from the fifteenth century, the clauses of Art. 144, of "free and clear"; Art. 161, of the retaking of the share contributed free and clear in case of renunciation. The "Coust. de Vermandois," 1448, (no. 231), take into account the reference legacy. *J. Faber*, on "Cod. Just.," "ad leg.," "de fideicom.," Tit. "de transact.," on the "Inst.," fo. 14, "de nuptiis"; forfeiting of the community. Act of 1389, "Docum. de la Soc. d'hist. de Fr.," 1884, 208; *id. Boerius*, on "Bourges," *loc. cit.*; *Desmares*, 129 *id.* (provision is also made for the clause of taking back the contributed share free and clear in case of renunciation, for it is said that the wife is not held liable for the debts, if she only takes back her contributed share; this would seem to us to assume that she could pursue some other course).

⁴ In the sixteenth century clauses in the marriage contract which would not be allowed elsewhere are validated: pacts on succession, gifts of future possessions, clause of taking back the contributed share free and clear by means of which a member is not affected by losses and profits: "Orléans," 202; "Lorris," 200; "Montargis," 8, 9; "Berry," 8, 7; *Britz*, 826.

⁵ The following are prohibited: 1st. Clauses cutting down the power of the husband in his capacity of head of the community; thus it cannot be agreed that the wife shall be the head of the community, or that the husband must have had the authorization of his wife before he can contract. — 2d.

able to declare that the Customary community was not formed "vi ipsius consuetudinis," but as a consequence of an implied agreement; from this there arose the important consequence that it was a personal regulation and not "in rem."¹ — Among the wealthy classes at least, the drawing up of a marriage contract was frequent.² The relatives of the spouses took part,³ even when the spouses had come of age, either for the purpose of discussing the clauses, or to make certain gifts, or to look after their hereditary rights. If the spouses were minors, the presence of their relatives seems to constitute a sufficient protection of their interests.⁴ "Habilis ad nuptias, habilis ad pacta nuptialia." They were looked upon as being capable of making agreements which were made use of in marriage contracts.⁵ Old institutions which were not much in harmony

Clauses cutting down the husband's power, for example, allowing the wife to do without the authorization of her husband, *cf.*, however, Separate Maintenance; some of the Customs allowed a general authority to be given in the contract of marriage ("Artois," "Flandre," "Berry") or even outside of the marriage contract ("La Rochelle," 23); *Pothier*, "Puiss. du mari," 67; *Valin*, on "La Rochelle," 23, 86; *Guyot*, see "Autor."; — 3d. Clauses by which the wife lost her right to renounce the community or her benefit of emolument; — 4th. Clauses of inalienability, *cf.*, however, *Bourd. de Richebourg*, III, 870. *Stobbe*, IV, 205: the German law allows the husband and wife to reserve "Sondergüter" for themselves. *Guénois*, "Conf.," 584.

¹ Legal system: the community could only be applied to immovables situated within the jurisdiction of the Custom which imposed this regulation; tacit agreement (*Dumoulin*): it affected all the possessions of the spouses no matter where situated. As the question was an unsettled one it was customary in Paris expressly to stipulate it: *Masuer*, t. "de dot.," 4; *Pasquier*, "Inst.," p. 367; *Pothier*, 16; "B. Ch.," III, 57 (in 1322). Contest between the Parliaments of Paris and of Rouen: *Dumoulin*, "Cons.," 39, 53. *Contra*, *D'Argenté*, "Bret.," 218, "Gl.," 6, no. 33.

² "Instrumentum dotale" of the Roman law, "Libellus dotis" during the Frankish period, afterwards marriage articles. The notarial deed is generally customary because of its practical advantages, of the importance of this contract and of the scarcity of deeds under private seal. "Arr. Cons.," of Dec. 13, 1635; Decl. of 1639; "Arr. Cons.," of Dec. 13, 1698; Decl. of Dec. 11, 1703 (prevention of the antedating of gifts between spouses). However the private deed was in use in Normandy, and in this province in the old times they were even satisfied with a parol agreement ("N. C.," 386, 387), the proof of which was obtained from the marriage record. There are other provinces where the private deed was lawful: *Tessier*, "Soc. d'Acquêts," p. 41; *Guyot*, see "Contr. de mar.," *Britz*, p. 239 (Lombardy). In Germany intervention of the law and publication: *Stobbe*, IV, 136. Forms of marriage contracts in *Ferrière's* "Parfait Notaire," and other works of this kind. *Jamont*, "Thèse," National Archives, "cartons" U, 1031-1033. *Guyot*, *loc. cit.* — *Cf.* Ordinance of Moulins, 54.

³ *Tacitus*, "Germ.," 18; *Beaumanoir*, 34, 49; "Bourg.," 1459, 1570, 26; "Norm.," 262. *Cf.*, however, "Arr. de Règl." of the 17th of May, 1762; *Pothier*, no. 16; *Guillemin*, "Thèse," 1885.

⁴ *Pothier*, 306. *Cf.* 103. — *Beaumanoir*, 34, 49; *Loyzel*, 106.

⁵ *Lebrun*, "Communauté," 1, 5, 2: the minor is not free to adopt any clause he pleases; for example, the conversion of real property into personal property and the absolute community are forbidden him. *Cf.* the Civil Code, 1398; *Pothier*, 303.

with the principles of the Roman law, such as covenants upon future succession, were upheld in these deeds, as a result, it was said, of the freedom of matrimonial agreements and the favor which was due to marriage. These family arrangements, which were veritable treaties, less between two individuals than between two sets of relatives, constituted the charter of the new household; they should be settled before the marriage, for it was only then that the freedom of the contracting parties was absolute,¹ and, once they had been settled, they could not thereafter be changed² ("immutability of matrimonial agreements").³ — The majority of the Customs make the community commence from the time of the celebration of the marriage,⁴ but there are some of a more archaic character according to which it dates only from the going to bed,⁵ like the right of dower, or at the expiration of a year and a day,⁶ or, finally, from the time of the birth of children.⁷

§ 558. **What the Community consists of.** — (A) *Assets*. The properties in the community are the movables, present and future,

¹ Annulment of counter-letters: *Pothier*, nos. 13, 16; *Laurière*, on "Paris," 258; *Loysel*, 106; *Stobbe*, IV, 138. — Germanic delivery (betrothals); "Orléans," 202.

² In countries of written law the marriage portion may be increased or settled, but not diminished during the marriage (prohibition of restoring the marriage portion in advance for fear the wife might dissipate it): *Serres*, "Inst.," p. 169; *Bouhier*, on "Bourg.," p. 407. Cf. dower, "Gr. Cout.," p. 321.

³ Formerly the settlement of the marriage portion or of dower were incontestable ("L. Rib.," 37), just as the fixing of the "pretium emtionis" was: *P. de Fontaines*, 15, 9; *Beaumanoir*, 34, 49. Afterwards in the indefeasibility of marriage contracts there was seen an assurance of peace and concord, a means of securing the prohibition of gifts between spouses, perhaps even a means of preventing the exposure to deception of third persons dealing with the spouses on the strength of the contract. Abroad this principle has not always been admitted. Cf. *D'Olivecrona*, p. 97 *et seq.*; *Britz*, p. 829. Even in France, at least in certain provinces, the spouses were permitted to return, during the marriage, to the common law system which they had given up in the making of their contract: *Viолlet*, p. 814; *Stobbe*, IV, 214; *Heusler*, II, 429: it was not generally admitted that the marriage contract had to be made before the marriage.

⁴ *Desmares*, 247; *Beaumanoir*, 21, 2 (but cf. 21, 25). See *post*, the maxim: "The husband lives as master and dies as a partner." *Toullier's* doctrine, according to which the community only comes into existence at the dissolution of the marriage (XII, 75).

⁵ "Bourg.," 21; "Niv.," 23, 2; *Stobbe*, IV, 120. *Viолlet* cites as applying to Strasbourg, *Silberrad*, "De acq. conjug. sec. jus Argent.," 1771; *Pertile*, III, 348; *Chaisemartin*, "Prov.," 28. Cf. "Paris, A. C.," 210, and "N. C.," 220.

⁶ "Gr. C.," II, 40, p. 371; "T. A. C., Bret.," 207; "A. C.," 469, 586; "Chartres," 57; "Dreux," 48; "Lodunois," 24, 1; "Châteauneuf," 66; "Anjou," 511; "Maine," 508; "Tour.," A. C., etc.

⁷ "Gr. Cout.," II, 40. Bayonne in the thirteenth century. Sicily, for example "Messina," 1; "Saga de Nial," *Daresté's* translation, p. 3. — In view of these rules one can understand clauses establishing the community for a term or upon some condition: *Pothier*, no. 278; *Lebrun*, 1, 3, 10.

of the spouses, the revenues of personal belongings,¹ and the jointly acquired property or immovables acquired for a consideration during the marriage.² — It is readily understood that the **movables** acquired for a consideration during the marriage come under the community. It is less easy to explain why it is the same with regard to movables of which the spouses are possessed when they marry, or which come to them by inheritance; if they were treated in the same way, it is because of the old rule which gave the husband the free disposal of them; when this old principle was lost sight of, the lack of an inventory at the time of the marriage seemed to be a sufficient reason to justify the solution which was admitted. Moreover, the mingling of the movables of the spouses was formerly far from presenting the disadvantages which it has to-day; movable belongings were not very highly developed, and those of high value had been classified under the head of immovables (offices, rent-charges). — The **property acquired jointly** is contrasted with **community personal belongings** or immovables which are not common property, but which remain the personal property of each one of the spouses. One might think that the personal belongings that are inherited are the only personal belongings subject to the community, as both of the spouses reserve to themselves their family possessions and nothing more; but this is not so; all the movables belonging to the spouses at the time of the marriage were placed outside of the community, as far as inheritance is concerned,³ whether they were personal belongings or acquests. The immovables acquired gratuitously during the marriage were also ordinarily personal belongings of the community. There was no difficulty in this with respect to those

¹ Under the more modern law one can say that these issues of the personal belongings form part of the community in their quality of issues and not in the quality of movables, for the *products* are personal belongings although they are also movables: *Pothier*, 95, 204. As to old times see *Beaumanoir*, 21, 2. The early rule was no doubt that the issues were acquired by being collected, and it was always applied to natural issues, arrears of quit-rents, tithes, produce claimed by the lord and the price of farm leases. From the Roman legal system was borrowed the idea of causing the civil issues to be acquired, such as arrears of rents, day by day, in proportion to the time the marriage lasted. At Frankfort profits realized in a separate trade are personal belongings, but advantages accruing from industry are not; *Stobbe*, IV, 247. In 1859 Canada gave the wife an absolute right to her profits and wages.

² Every immovable belonging to the spouses is looked upon as being jointly acquired: *Loysel*, 222. Cf. *Pasquier*, "Inst.," p. 499.

³ "Jointly acquired property is acquired by two, acquests are acquired by one." As a general thing acquests made during the marriage are treated like jointly acquired property. Cf. "Poitou," 229; *Marsal*, 33, 38, etc.; "Saint-Quentin," I, 1.

which were inherited, either directly or collaterally, and which it was sought to keep in the families from which they came. But with respect to gifts there was some hesitation. According to the rule, "There is no acquêt so fine as a gift," they should be jointly acquired property. The theory which prevailed saw in gifts coming from relatives, especially in the direct line, an advancement of heirship; this theory classed possessions that were given in this way with those that were acquired through inheritance.¹ With regard to gifts made to the spouses by people other than their relatives, they constituted jointly acquired property, unless the donor had stipulated otherwise, — a thing which no doubt often happened. The courts completed these rules, drawing inspiration from the spirit which had dictated them, by means of theories as to accommodating the families, — renoucement and recompenses.²

Marriage contracts departed from the regulation which we have just described, sometimes by restricting the community, and sometimes by enlarging it. The merging of the movables of both spouses in one single mass was prejudicial to the one who contributed a great deal and advantageous to the one who contributed little; this evil was remedied by no longer merging the property: 1st. *Partially*, by the clause of **conversion into money**³ or stipulation as to personal belongings,⁴ which likened certain

¹ "Cout. Not.," 183. In the collateral line it is jointly acquired property: "Paris," 246; *Desmares*, 26; a personal belonging: "Maine," 507; "Anjou," 513; *Loyse*, 393, 657; *Pasquier*, "Inst.," p. 362; *Britz*, 839.

² Exceptional cases in which immovables, although acquired for a consideration during the marriage, constitute personal belongings. — (a) Repurchase by a person of the same lineage: "Orléans," 382. As to the redemption, cf. *J. Lecoq*, p. 84. — (b) Real subrogation: see "Exchange" and "Reinvestment," *infra*. — (c) As to the acquiring of an immovable by the husband, of which his wife is a joint owner (Civil Code, 1408, 2), cf. D., "de j. dot.," 23, 3, 78, 4; *Roussilhe*, "Dot.," 556 (an acquisition imposed upon the wife). In countries of Customs, cf. the repurchase of joint possession; controversy: (1) Compulsory acquisition for the wife, *Lebrun*, 1, 5, 2, 3, 12; *Ferrière*, on "Paris," 220, 3, 13; *Bourjon*, I, 537. — (2) Option for the wife, *Valin*, on "La Rochelle," I, 493, Art. 22, 1. Cf. *Pothier*, no. 150. — Friendly acquisition resulted in the property being considered as jointly acquired.

³ Express or implied conversion into money (clause of investment, clause of contributed share): *Pothier*, no. 325; see *Denisart*, *Ferrière*, *Guyot*. As marriage portions were more often than not in movables, the conversion into money clause, which at an early time was frequently made use of, became almost a typical clause during the later stages of the old law. The investment clause which was made use of in the thirteenth century (see *post*, "Recompense") lost its importance from the time when the mortgage served to guarantee the wife's claims: *Renusson*, "Propres," VI, 7.

⁴ The husband may dispose of the personal belongings held to be such by the contract (and not of the real personal belongings) without the participation of his wife, unless the conversion into money has been stipulated for as

movables to the immovable personal belongings. 2d. *Absolutely*, by means of a **community reduced to acquests**.¹ This system, which is more fitted to our economic state, seems to have been little used formerly. Pothier only sees in it a variation of the conversion into money. The **conversion of realty into personalty**² and the **general community** produced the opposite effect by classing the immovables which were the personal belongings of the spouses with the movables which belonged to the community; they were clauses which were used when one of the spouses had only movables and the other only immovables.

§ 559. **The Same.** — (B) *The liabilities* of the community consisted of: 1st. The charges of the marriage (support of the spouses, education of the children), whereas under the marriage portion system, they were incumbent upon the husband alone. 2d. The interest and arrears of personal debts and the disbursements for support, usufructuary repairs of the property of which the community had the enjoyment. 3d. The debts of the spouses with respect to movable property contracted previous to marriage. 4th. The debts of inheritances which had accrued to them during the marriage. 5th. The debts contracted during this time by the husband or by the wife with the authority of the husband.³ — **Debts previous to the marriage** were a charge on the community by virtue of the old rule according to which debts could only be collected

applying to everything, — a clause which was not a very practical one, even during the last stages of the old law, and which could not have been allowed originally. Cf. "Olim," II, 151, 37; *Pothier*, no. 325; *Lebrun*, I, 5, 1, 3, 4. By means of the conversion into money one only obtained community personal belongings, but one could also obtain personal belongings appertaining to the succession: *Renusson*, "Propres," 6.

¹ An expression rarely made use of. Cf. partnership of acquests, *ante*. A conversion into money and a separation of the debts of the spouses take place at one and the same time.

² See *Ferrière*, *Guyot*, etc. *Pothier*, 304; *Lebrun*, I, 5, 1, 2.

³ Cf. the German law, which is in great confusion on this subject. As a general thing, however, one can contrast the personal debts with the community debts. Personal debts only affect the inheritance of the spouse who is liable for them; his share in the community cannot be reached until after the marriage has been dissolved. These debts are those contracted previous to the marriage, debts contrary to the interests of the community and debts contracted in the personal interest of one of the spouses. The community does not have to pay this sort of debt; still less is the spouse who is not the debtor liable for them. It is otherwise with the community debts, that is to say with the expenses of the marriage or debts contracted by both spouses or by one of them in the interests of the community; the creditors can secure payment out of the community possessions, and if these are not sufficient, then up to the amount of one-half of the debt out of the possessions of each of the spouses. At the same time the wife enjoys a privilege; she can escape responsibility for the community debts by means of the renunciation: *Stobbe*, IV, 279.

out of movables.¹ "Who marries the body marries the debts," says Loysel, 110; and this was equally true with regard to the system where there was no community, for the husband then also collected the whole of the movables.² Debts chargeable on immovable property and charges on possessions outside of the community could not be paid by it.—This repartition of the liabilities was no longer justified after the immovables became liable for debts, that is to say, after the end of the thirteenth century or thereabouts. It persisted, however; the disadvantages which it presented when one of the spouses had more debts than the other were remedied by means of the clause of "separation of debts."³ — **Debts of inheritances** accruing to the spouses during the marriage were originally subjected to the same system. Lebrun still maintained that the community ought to bear the debts chargeable on movables because it collected the movable assets, and because the spouse who inherited was held liable to pay the debts chargeable on immovables for the reason that he kept the immovables. As far as inheritance was concerned, the charge of debts ended by falling upon the heir of the personal belongings. The rule was the same as far as the community was concerned; the system of the repartition of the liabilities between the community and the spouses in proportion to the assets which they received, without making any distinction between movables and immovables, also prevailed, thereby conforming to equity and the Roman rules. Thus, when one spouse received an inheritance including movables and immovables together, if the movables were worth one-third of the entire inheritance, one-third of the debts chargeable to movables or to immovables was charged against the community: "Where the assets go the liabilities go."⁴

¹ *Beaumanoir*, 43, 26; *Desmares*, 181, 247; "Cout. Not.," 15, 70, 83, 139, 167; "Gr. Cout.," 2, 32, p. 322; but *cf.* p. 223; "L. de Dr.," 400; "A. C., Anjou," I, 482, III, 332; IV, 201, ed. *B.-B.*; "Ass. de Jér.," "C. des B.," 133; "Paris," 221; *Pothier*, no. 259.

² The wife's creditors could therefore not sue her for her personal belongings, but this was no longer the case when immovables became the creditor's pledge.

³ "Paris," 222; *Argou*, III, 7. This clause could be pleaded against the wife's creditors, if there had been an inventory. As to the "free and clear" clause, by means of which the relatives of the man about to be married certified that there were no debts and allowed a compensation for the wife should there be any, *cf. ante* § 557; *Argou*, III, 16; *Pothier*, nos. 351, 370. As to the clause which allowed the wife who made a renunciation to take back the share contributed by her, free and clear, *cf. Pertile* III, 335; *Stobbe*, IV, 279.

⁴ *Lebrun*, 2, 3, 2; *Péronne*, 198; *cf.* "Paris," 334; *Pothier*, no. 261.

The debts of the spouses contracted during the marriage came under the community, like acquests which they made during that time. It was necessary, however, that they should be contracted by the husband or with his authorization, for in his quality of head of the community he alone had the right to bind it.¹ He even binds it by means of his offenses, "Tam delinquendo quam contrahendo."² Originally, if his possessions were confiscated the community was also confiscated, and the wife lost her share. This was a harsh rule; and against it a reaction set in, having as its theoretical point of departure the Roman law of the Lower Empire, and as its real foundation the more and more energetic affirmation of the rights which the wife had over the community. Dumoulin relates that he had to struggle for more than forty years in order to have the old practice abandoned by the Parliament of Paris.³—The wife did not bind the community, either by her offenses⁴ or by making a contract under the au-

¹ The husband's debts are thus debts of the community and vice versa. Cf. *Stobbe*, IV, 281; *Britz*, 840: in Gand, the wife, even when she has obtained separate maintenance, is held jointly and severally liable for the debts contracted by the husband.

² *Loyssel*, 89; "Ord." of 1250, 4; "Béziers," 1303, 30; *Beaumanoir*, 30, 99, 100. Cf. "Troyes," 134; "Meaux," 26, 208; *Pothier*, 248 *et seq.*: the community is held liable for fines and civil damages which may arise through the husband's wrongful actions, excepting in so far as offenses punishable with a capital penalty are concerned, for, in a case of this sort, the judgment implies civil death and dissolves the community of absolute right; the husband's debt is thus contracted after the community has ceased to exist. Such is the subtlety by means of which the decline of the husband's powers was justified. It is interesting to compare with this what Pothier has to say with regard to the wife (no. 501). Civil death, which reduces the rights of the husband by one-half, should, when it affects the wife, mean the confiscation of her share of the community; far from having this effect, it prevents the rights of the wife from coming into existence. "Jostice," p. 219: in case the husband's possessions are confiscated, the wife does not lose her dower (and "a fortiori" her personal belongings), but after her death the property which is the subject of the dower reverts to the Treasury: "Ass. de Jér.," "Livres au Roi," c. 21; "T. A. C., Bret.," 118, 235; "A. C.," 423; "Anjou," ed. *B.-B.*, "E.," 78; I, 97; "Toulouse," 120; "Bord. A. C.," 21; *Stobbe*, IV, 98.

³ On "Vermandois," 12. *Loyssel*, 846, cites to the same effect an Ordinance, or Privilege granted in 1431 by Henry VI to the Parisians.

⁴ The wife's offenses. In the thirteenth century, the husband was still personally responsible for them, which caused the community to be charged with fines and pecuniary damages: "Jostice," p. 131; *Beaumanoir* 30, 55. In the sixteenth century the husband's responsibility had disappeared, excepting in a few of the Customs where he was protected by means of the order for separate maintenance. The dependency of the wife was no longer sufficient for one to be able to say that she had acted under her husband's influence. But as she had no possessions of her own, unless she could be subjected to bodily restraint, the victim of the injury had no remedy against her during the time of the marriage; nor had the victim any remedy against the husband. In case the possessions of the wife were confiscated as the result of a capital penalty, her share of the community went: (a) to the Treasury: "Bourb.,"

thority of a court.¹ She could only bind it by contracting under the authority of her husband,² excepting if she were a public tradeswoman in her own business,³ or in a few exceptional cases, such as to obtain the release of her husband from prison.⁴ When she acted with the authority of her husband, one may ask on what theory the community was bound.⁵ According to the early point of view, the husband alone had the right to bind the community; the act of the wife which was authorized was looked upon as the act of the husband; the wife was effaced and had only carried out this act in the quality of an agent. The result of this was that during the time the community lasted the wife could not be levied on as to her personal belongings, and that when the community was dissolved she was only held liable with regard to half (assuming that she did not use her right of renouncing — *post*, § 566 — nor of the advantage of emolument). The husband, on the other hand, could be levied on for the whole, just as though he had contracted himself. This point of view did not agree very well with the facts; the woman had spoken when acting, she had personally bound herself and bound those who were related to her; she was not merely the mouthpiece of the husband. In proportion as the idea of her rights over the community came to be better understood, the community was looked upon as being held on behalf of the wife, and the husband could only be sued for a half in his quality of a joint owner of the property, when the marriage was dissolved.⁶

266; "Tour.," 255; *Beaumanoir*, 30, 99; *cf. ante*, the husband's offenses; (b) to her heirs: "Orl.," 209; (c) to her husband: *Dumoulin*, on "Montargis," 5, 3; *Loysel*, 847; *Pothier*, no. 501.

¹ Formerly the authorization of the law was not made use of; if it were necessary, the wife could bind the community ("Jostice," p. 131; "Ass. de Jér.," "C. des B.," 191; *Boutaric*, I, 9) by acting alone. We have seen how the custom of having her disability removed by the courts came to be introduced: "Orléans," 201; "Paris," 224; *Loysel*, 124.

² *Argou*, III, 13 (it is presumed that she has bound herself on behalf of her husband); *Lebrun*, 2, 3, 1, 2; *Pothier*, 730.

³ *Beaumanoir*, 43, 28. The mere fact of carrying on trade with the husband's knowledge was equivalent to an authority: "Poitou," 227. *Cf.* the proverb: "The wife's apron binds the husband": "Et. de St. Louis," I, 47; "Ass. de Jér.," "C. des B.," 132, 191; "Paris," 234; *Loysel*, 57; *Stobbe*, I, 282.

⁴ A trace of the old law.

⁵ As to the personal status of the wife, according to *Beaumanoir*, *cf.* "T. A. C., Bret.," 40; "Const. du Chât.," 39; *Desmares*, 289; "A. C., Anjou," ed. *B.-B. Table*, see "Femme mariée"; "L. de Dr.," I, 184.

⁶ When the wife binds herself together with her husband she is only looked upon as his surety; in Brittany, "T. A. C.," 312, 314, she could plead that the remedy be exhausted against the principal debtor before the surety be proceeded against; the common law of the Customs left her equally liable with the husband to the prosecution of the creditors, but it gave her a remedy

§ 560. **Administration of the Community.** — This belongs to the husband, like the management of the personal belongings of the wife, because of his husband's power. "The man is the guardian," says Beaumanoir.¹ His power was so extensive that he is qualified as "lord and master of the community,"² and it is said of the wife, "Non est proprie socia, sed speratur fore." In the thirteenth century, however, there is a distinction to be made between movables and jointly acquired property; the husband has an unrestricted right to dispose of the movables, and his powers are rather those of an owner than those of the manager of a partnership; he can only dispose of the jointly acquired property with the concurrence of his wife. Over the wife's movables he has only preserved a right which he already had before the community existed; it follows that the wife is subject to the will of her lord as far as concerns her movables and the deprivation of her inheritance, — "provided that she openly sees her loss" (Beaumanoir).⁴ As far as jointly acquired property is concerned, the husband cannot dispose of it alone,⁵ — no more, however, than he could alone dispose of his personal belongings because of the dower which encumbered them. This limitation of his rights is all the more surprising as it had disappeared from the Customs of

against her husband, basing this upon the idea that the latter had alone benefited by her obligations (unless the contrary were shown): *Argou*, III, 13, etc. We can see how far removed the customary law was from the system of the Velleianum Senate Decree which forbade women to become surety for a third party: "T. A. C., Bret.," 329; "Cout. d'Anjou," ed. *B.-B. F.*, 1167; "E.," 228; I, 261; *Ducoudray*, "Orig. du Parl.," p. 799.

¹ *Beaumanoir*, 21, 3; 30, 99, 100; 31, 2; 57, 2; "Jostice," p. 169; "Cout. Not.," 14, 164, 175; *Desmares*, 70, 152, 161; "Gr. Cout.," II, 31; "Paris," 107, 110, 226.

² *Beaumanoir*, 57, 2.

³ Cf. certain German laws according to which each spouse can dispose of the community possessions (Munster), or else the spouses must both contract in order that the community may be bound (Nuremberg): *Stobbe*, IV, 209.

⁴ *Beaumanoir*, 21, 2; 30, 99; "Jostice," p. 173; *Desmares*, 152; "L. d. Dr.," 581, 884, etc.; *Boutaric*, II, 29; "T. A. C., Bret.," 82, 215, 211 (recompense for the wife when the daughters have been given a marriage portion out of the jointly acquired property).

⁵ "Jostice," p. 169; *Beaumanoir*, *loc cit.*; "L. d. Dr.," 829; "T. A. C., Bret.," 40, 211, 217: the wife has the same share as the husband in the jointly acquired property; *Jamont*, "Thèse," p. 50; *Glasson*, VII, 367. But cf. "Ass. de Jér.," "C. des B.," 162; *Desmares*, 70; "Paris," 225; "Anjou," 289; "Tours," 254; *Viолет*, p. 781; "Catane": the husband cannot alienate the community immovables without the assistance of his wife. Cf. in German law the practice of the "gesammte Hand." But as early as the twelfth century we also find the husband disposing alone, and without the assistance of his wife, of the immovable jointly acquired property: *Stobbe*, IV, 209. The question is of especially great importance under the system of absolute community.— Cf. "Conf. de Guénois," p. 557.

the fourteenth century.¹ It was perhaps due to the old rule that inheritances were not liable for debts; the obligations of the husband affected movables, but not jointly acquired property, and the wife by renouncing the movables preserved her share of the jointly acquired property. The husband, if he could not take this property away from her indirectly by contracting debts, should have been able, it seems, to alienate it, just as he could acquiesce made by him before the marriage; but the rights of his wife, which came into existence owing to the fact of the property having been acquired by both of them, were opposed to this; there was seen in her a joint owner in the joint tenancy, and the husband was bound to act only with her co-operation, so long as the immovables were a species of property the preservation of which was held to be very important. In the fourteenth century, on the other hand, the husband was given the right to dispose of jointly acquired property as well as of movables. Immovables were no longer incapable of being distrained upon;² thenceforth creditors of the husband could seize the jointly acquired property as well as the movables; in order to free herself from the debts of the community, the wife had to renounce both the movables and the jointly acquired property, — that is to say, she had to renounce the entire community property. As soon as jointly acquired property had to answer for the debts of the husband, the concurrence of the wife in their alienation became rather useless, inasmuch as the subordination in fact under which she found herself made of her presence a mere formality; it was preferred to give her other safeguards. Some of these consisted in restrictions upon the powers of the husband, and others, which we shall discuss later on, in the power which she had to withdraw herself from the conjugal partnership.

The limitations upon the powers of the husband principally affected his gifts and debts. He was allowed to dispose of the community property, even by means of a gift "inter vivos,"³ at his

¹ "Paris," 225; *Coquille*, on "Niv.," 23, 3; *Pothier*, no. 3; "Bretagne, A. C.," 414; "N. C.," 444 (cf. 443); "Cout. Not.," 175; *Desmares*, 152.

² The evolution which gave rise to this new principle has been sometimes more rapid, and sometimes slower, according to locality. *Boutillier* only mentions distraint upon movables and taking of inheritances, whereas *J. d'Ibelin*, 185, deals with the sale of the fief for a known and proven debt. The application of this principle, whether under its final form or whether by the indirect means which led up to it, to the matter of the community must also have varied.

³ "Cout. Not.," 175; *Desmares*, 152; "L. d. Dr.," 911, 929, 930, 937; "A. C., Anjou," II, 237. — *Pothier*, no. 3; *Ferrière*, on "Paris," 225; *Britz*, 841. —

own pleasure and will, without the consent of his wife, but only to a person who was capable of receiving it and if there was no fraud ("Paris, N. C.," 225). Now, there would be fraud if he secured any personal advantage from gifts of the community possessions (for example, by making a disposal for the benefit of those from whom he inherited or his heirs presumptive, or of his children by his first marriage, or of his bastards), or if he gave an undivided part of the community, "a fortiori" the entire community.¹ He was never allowed to make a will of more than his share in the community, for, as the will only went into effect at the death of the testator, the husband had at that time only a half of the community property.² — Though he still bound the community by his offenses, we have seen that confiscation had in the end been restricted to his share. — The theory of recompenses (*post*, § 567) prevented him from enriching himself at the expense of his wife, and the separate estate (*post*, § 565) obtained by the latter carried with it more than one restriction upon the powers of the husband; it implied the surrender of them. — In spite of these restrictions, it is nevertheless true that the husband did not cease to be the lord and master of the community; on principle, he kept the right of disposing for a consideration and gratuitously of the possessions which went to make up the community. He is not a mere administrator of somebody else's fortune.

§ 561. **Part played by the Wife.**³ — From the fact that the wife did not take any part in the management of the community possessions, it would be incorrect to conclude that she was a stranger to the community during the life of her husband.⁴ Dumoulin's

Prohibition of gifts "inter vivos": "Anjou," 289; "Maine," 304. — Prussian "Landrecht," 2, 1, 381; *Stobbe*, IV, 208 ("reclamatio uxoria" within a short delay). — Also, *Coucy*, I, 1, etc.

¹ As to gifts with a reservation of the usufruct see *Pothier*, no. 480.

² *Desmares*, 70; "Paris," 296; *Loysel*, 121. — But during the period of transition when the community was being formed, it no doubt happened that the husband was allowed to dispose of the community possessions by last will and testament. This is what is still done under the "Cout. de Lorraine," II, 7. — Cf. as to the absolute community, *Stobbe*, IV, 214.

³ Cf. as to the law of the present time, *Bassel*, "Thèse," 1896. As to the old German law see *R. Bartsch*, "Rechtsstellung der Frau," 1903. Switzerland: *Huber*, *op. cit.*

⁴ As to the status of the married woman in general see Chap. I, § 144. The wife living in a state of community has two sorts of rights: rights over her own possessions and rights over the community. — (a) When the old ideas as to the disability of women were abandoned and unmarried women and widows were allowed to act in the same way as men, — and we may observe that this did not take place without difficulty, without some hesitation and without inconsistencies, — thus in Brittany ("T. A. C.," 337) the wife cannot bind herself on behalf of third persons, whereas she can do so on behalf of

celebrated formula, "Non est proprie socia, sed speratur fore,"¹ is exaggerated; and this applies also to Pothier's paraphrase, "The right which the woman has is looked upon, as long as the community lasts, as only an imperfect right, which can be reduced to the right to some day share the possessions which will be found to compose the community at the time of its dissolution." The wife is systematically kept away from the affairs of the community; she is often invisible, but always present because of her future rights and because of the guaranties with which they are surrounded.² One can say with regard to her, as with regard to a person in a partnership which has an appointed manager, that her right is "potius in habitu quam in actu." Furthermore, there are occasions when this right is made manifest. This is not an allusion to the cases in which she manages the affairs of the household,³ or, again, to the case where she carries on business with the knowledge of her husband; her status of a partner has nothing to do with her part as mistress of the house, as pictures show her, carrying her keys and her purse at her belt; the proof is that she plays this same part under the system which has no community, and that she binds her husband under similar conditions; her position in this respect is that of an individual "alieni juris" in the Roman law, a slave or the son of a family placed in control of a sum of money or charged with certain transactions;

her husband, her father and mother and her children; elsewhere she cannot make her will without the authorization of her husband; marriage does not emancipate her everywhere, — in Burgundy acts done without authority are looked upon as being against good custom, etc., — at that time one might have recognized the married woman as having the freedom to dispose of her personal belongings, to bind herself with regard to them, upon condition of respecting the enjoyment of the community; the tendency in this direction, after having enjoyed a certain amount of favor, came to nothing. The married woman who was held to be under a disability had to be provided with the authority of her husband or with the authority of the law. — (b) The same disability, and still more so with regard to the community rights, for the management of community affairs is left to the husband. One may well ask, however, if this disability was absolute.

¹ *Dumoulin*, on 109 "Paris," no. 3; cf. on 37, 1, 1; *Pothier*, no. 497; *Laurière*, on "Paris," 225.

² In the Customs which admit of the dower of children, the consent of the wife to the alienation of the husband's possessions which are subject to dower does not deprive the children of their rights; so that the participation of the wife in this form of alienation becomes of little use and is no longer very often found: *Pothier*, "Douaire," nos. 85, 343. Cf. in the existing law, the wife's mortgage over the jointly acquired property and over the husband's personal belongings; the wife ordinarily takes part in the alienation of these possessions, because third party grantees require that she should give up her mortgage.

³ *Dumoulin*, on 114 "Paris," no. 3, calls her the agent of the husband; *Pothier*, no. 574; *Chaisemartin*, p. 324.

the same observation applies to the wife who is a public tradeswoman.¹ Where she appears as a partner is when she bequeaths her share of the community and concurs with her husband in gifts "inter vivos" of things which belong to the community, and also perhaps when she binds herself with the authorization of her husband,² and in this way binds the community. Upon this last point one can only speak doubtfully, because, as we have seen, our old authors did not agree upon the part played by the wife. In the time of Beaumanoir the wife was also invested, as matter of law, without the authority of court, with the powers of the husband whenever the husband was not present (absence, madness, imprisonment); but here again we must observe that she was in the same position under the system where there was no community; there were seen here cases of necessity which made the wife the provisional head of the household. At a later date, the authority of court was an indispensable thing,³ but she was none the less in a restricted way at the head of the community.⁴

§ 562. **The Wife's Personal Belongings.**—The husband has also the **administration of the wife's personal belongings**; ⁵ he cannot be deprived of this right, which belongs to him in two ways: (a) first, by reason of his husband's power, which also means that he possesses it under the exclusive system of community; (b) and then as head of the community, because it is natural that, having the enjoyment of the personal belongings, he should also be entitled to the administration of them. The

¹ *Desmares*, 77, allows the wife to act at law with regard to her wages without the authority of her husband.

² Old deeds containing formal authorizations: *Jamont*, "Thèse," p. 19 (in 1151).

³ This is what led to the saying that: "formerly a joint owner of the common mass from the time of the marriage, in spite of her rôle of a subordinate, she no longer has, in the sixteenth century, anything but a right in the community which is incomplete." From a partner kept in the background, she must have descended to the rank of a stranger. In this one will recognize the fatal influence of the Roman law. In our opinion this influence has been greatly exaggerated; the Roman law is often nothing more than the foreign flag which covers a species of merchandise which is quite a national one, the fashionable mask with which a theory must clothe itself in order to penetrate into the juridical world.

⁴ The absolute prohibition of these contracts between spouses is to be accounted for by the fear of indirect advantages, and by the idea of the dependency of the woman: "Gr. Cout.," p. 321; *Dumoulin*, on "Paris," 156; "Paris," no. 5; *Pothier*, "Don. entre mari," no. 78; "Niv.," 23, 27; "Bourb.," 226; "Norm.," 510; "Bourg.," 26 (the consent of the heirs presumptive is valid); *Lebrun*, 1, 5, 3, 4. Cf. separate maintenance: *Hauriou*, "Thèse," 1898.

⁵ *Beaumanoir*, 57, 2; 30, 99; 21, 2; "Gr. Cout.," 2, 32, p. 322.

result of this is that the wife could not, for example, keep for herself the management of a part of her inheritance.¹ Separate estate formed by contract makes its appearance only at the end of the Old Régime; and then it is still extremely rare. The powers of the husband thus extend over all the wife's possessions,² and, as these possessions were all brought to the husband in order that he should provide for the expenses of the household, one can say that they are all in the nature of marriage portion. The husband has the right to lease them out for the customary period (generally, nine years)³ and upon condition that he does not act in such a way as to defraud his wife of her rights.⁴ He can bring possessory actions, but not actions for title to property,⁵ nor can he alienate or encumber the immovables of his wife in any manner;⁶ as Loysel says, 119, "As to that which concerns ownership, it is necessary that both should speak, according to the Custom of France." This rule, in use for many years, was applied even in countries where the community was not recognized. If it had been infringed, the wife or her heirs had the right to reclaim the personal belongings which had been

¹ Nor could the husband grant its enjoyment, nor could his creditors distrain upon anything other than the emoluments as they came into existence: *Coquille*, on "Niv.," 107.

² As the nobleman's possessions of the wife went to the husband in his capacity of guardian, there arose the opportunity to pay for the buying back, "Ét. de St. Louis," I, 66, cf. "mortis causa," transfer: the husband paid the fealty and homage, could be known as marquis, count, or baron, if the seigniorship was a marquise, an earldom, etc.; he exercised the feudal rights (summons, feudal distraint, profits, etc.), the rights of justice (appointment and discharge of officers, etc.), the rights of patronage (presentation to ecclesiastical benefices, holy water and incense, funeral decorations, etc.): *Pothier*, "Puiss. marit.," 86; "Gr. Cout.," 2, 27; "Olim," II, 56, 8; *Loysel*, 118, 178; "L. d. Dr.," 444; "T. A. C., Bret.," 233. Cf. the question of knowing whether widows ought to pay fealty and homage for their dower: "Const. Chât.," 79 (ed. *Mortet*); "Cout. d'Anjou," ed. *B.-B.*, IV, 182.

³ *Contra*, "Blois," 179 (duration of the marriage); *Pothier*, "Puiss. marit.," 91, 93.

⁴ "Paris," 227. A lease made in advance by way of anticipation would be fraudulent: *Lamoignon*, "Arrêtés," XXXII, 59, 60 (right of renewing leases nine or eighteen months before their expiration). Cf. the Civil Code, 1430.

⁵ "Ass. de Jér.," "C. des B.," 222; *Beaumanoir*, 21, 2; "Cout. Not.," 161, 176; *Desmares*, 20; "Olim," IV, 336; *Boutaric*, II, 23; "L. d. Dr.," 75, 581; *J. Faure*, "Inst., de act.," "fuerat," no. 2. — *Contra*, "Melun," 214; "Poitou," 228 (*contra* to the "L. d. Dr.,"). — "Const. Chât.," 25, 80: in case the wife is absent the husband takes the possessions which come to her by way of succession and can plead in her place and stead.

⁶ *Beaumanoir*, 21, 2; 57, 4; "Jostice," p. 169, 170, 173; "Gr. Cout.," 2, 32; "T. A. C., Bret.," 10; "L. d. Dr.," 308, 484, 581; "A. C., Anjou," I, 575; III, 460; *Stobbe*, IV, 277; *Britz*, 841. In certain Customs of Lorraine, an alienation of the personal belongings is only valid if carried out with the consent of the relatives of the wife: *Marsal*, 40.

alienated from the third party who had acquired it, once the marriage had been dissolved,¹—that is to say, once the enjoyment of the community had come to an end. However, if the wife (*post*, § 566) had accepted the community, she was held in her quality of a member of the community for the obligation in warranty which was incumbent upon the husband who made the sale, and, as a consequence, upon the community. So that she was compelled to restore to the third party who had been ousted half of the price and damages.²

§ 563. **The Dissolution of the Community** results from the death (natural or civil) of one of the spouses, or from the establishment of separate estate.³

§ 564. **Continuation after Death.**⁴—After the death of one of the spouses the community is dissolved, as a general rule, but can be continued according to certain Customs if no partition takes place between the survivor and the children.⁵—(A) In the **thirteenth century** the continuation of the community, which never takes place excepting in the case of commoners,⁶

¹ Up to this point the widow was respected: "Jostice," p. 169, 170; *Boutaric*, p. 822; *Ferrière*, on "Paris," 226, "gl." 1, no. 4; *Lebrun*, 2, 2, 4, 18.

² Such is the general opinion. *Pothier* has dissented from this: "Vente," no. 179 (1762): reclaiming of one-half, for as to half the plea of warranty can be urged against her; "Communauté," no. 253 (1769): reclaiming of the whole, for the husband has exceeded his powers, but she has to pay back half the purchase price, which she has unjustly received, exclusive of all damages. Cf. "Puiss. du mari," no. 84; *Coquille*, "Quest.," 105; *Ferrière*, on "Paris," 226, etc.

³ **Absence:** when he would have reached the age of one hundred the spouse who is absent is presumed to be dead; the community is therefore dissolved when this time comes; up to that time there is occasion for the putting in possession of the heir presumptive of the absent person (after delays which vary according to the Customs). The community is then considered to be provisionally dissolved, but if the one who is absent reappears, it was considered as having been in continual existence; in fact the heirs of the absentee had the power to leave the present spouse in possession of the community property. Cf. the Civil Code, 124; see *Ferrière*, *Guyot*, etc.; *Pothier*, VII, 274; VIII, 106; see *Bretonnier*, *post*, "Civil Status."

⁴ *Loysel*, 386 *et seq.*; *Laurière*, on "Paris," 240; "Gloss.," see "Comm.," *Renusson*, p. 3; *Pothier*, 769; *Ferrière*, on "Paris," 240; *Stobbe*, 222, 241.

⁵ Also in Germany. Cf. *Stobbe*, *loc. cit.* and p. 232 ("communio bonorum prorogata," "fortgesetzte Gütergemeinschaft"). Cf. the similar institutions of the "Verfangenschaft," the "Alleinerbrecht des überlebenden Ehegatten." In certain localities the child who has received his share of the community property can no longer have any claim over the succession of the surviving spouse: *Ficker*, no. 721, etc.

⁶ *Beaumanoir*, 21, 9. The surviving spouse, if a noble, keeps all the possessions of the children because of the right of guardianship; this makes the forming of an association by them impossible: "A. C., Anjou," ed. *B.-B.*, II, 228. We have already seen that silent partnerships among nobles were rare. the "Gr. Cout.," 2, 40, makes use of general expressions: "Ét. de St. Louis," I, 139, 140, 143. Decision of the "Parl. aux Bourg.," in 1293, in

seems to have been merely a consequence of the community life;¹ the facility with which secret partnerships were formed seems to account for this.² But, if these were isolated cases, the effect of this fact would only have been the formation of a new community at the end of the year and a day; and Laurière has, in fact, maintained that there could be no question of anything else excepting a new community,³ even when there was no such intervening period.⁴ This proposition seems to be condemned by the texts; it is the same community which is continued by operation of the law⁵ between the children who have come of age and those who are minors.⁶ With what object? They used to say, to leave to the surviving spouse in the interest of the family the inheritance which was established when the marriage took place. This is what sometimes took place under the exclusive system of com-

Leroux de Linçy, p. 120: there exists no association between the survivor and his children, for one is head of the house and the others acquire on his behalf; no association comes into existence excepting one between children after the death of the survivor.

¹ At least in the sixteenth century the condition of cohabitation is not requisite, and it does not ordinarily exist between the surviving spouse and the collateral relations of the predeceased spouse: "Orléans," 216; "Berry," 8, 19; "Bourbon," 270. It is only alluded to when there has been no inventory and partition.

² The "N. C. d'Orléans," 213, abolishes the use of silent partnerships, which were sanctioned by art. 180 of the "A. C.," and yet at the same time it upholds the carrying on of the community in its Art. 216, between the surviving spouse who is not a noble and his heirs whether minors or not, and whether they be descendants or collaterals.

³ Laurière reasons as follows: (a) the survivor who is a mere administrator has not a right to make a disposal of the property such as the husband has, he being the head of the community; (b) the members of the community are not the same; everything acquired by either of the spouses goes to make up a part of the conjugal community; what is acquired by the children does not go into the continued community. — This last remark was perhaps not correct with regard to the old law. Cf. "Gr. Cout.," p. 371. The first remark is correct, but it does not prove anything against the maintaining of the community; in this there is something which is analogous to the German "Verfängenschaft."

⁴ *Beaumanoir*, 21, 8, does not mention the condition of a year and a day, but he seems to demand it further on, 21, 25. It is true that one is justified in asking whether he does not admit that a new community is formed, 21, 9; "Gr. Cout.," p. 265 (the survivor remains in possession a year and a day without making any inventory; the heirs can claim the community).

⁵ "Bourb.," 270; "Orl. A. C.," 182; "N. C.," 216; "Maine," 216; "Gd. Perche," 106, etc.

⁶ Does the community continue to exist even with the heirs who are not the descendants of the predeceased spouse? Certain of the Customs declare that this is the case, but we have our doubts as to whether they really represent the old law: "Montargis," 9, 3; "Berry," 8, 19; "Bourb.," 270; "Bassigny," 55; "Orl.," 216; "Châteauneuf et Thim.," 70; "Metz" town, 6, 9. To the contrary *Viollot*, p. 787. — Cf. "Gr. Cout.," 2, 40, pp. 365, 371; "A. C., Anjou," ed. B.-B., II, 230; IV, 263; "Poitou," 254; "Cambrai," 7, 11; "Ass. de Jér.," "C. des B.," c. 187.

munity, without there being any question, consequently, of community properly so called. This is also what took place under the community system to which the old institution adapted itself as well as it could. If the survivor of the spouses happened to be the father, it was natural that his children who were under his authority should not affect his position, — at least, during their minority; if it were the mother, the same solution, which made her the head of the community, was less easy to justify. Nevertheless, it was often to the interest of all not to parcel the conjugal inheritance by exercising the right of dower.

The continued community included, besides the possessions which had been part of the community during the marriage, acquests which had been made after the dissolution of the marriage by the surviving spouse. To compensate for this, the acquests made by the children were scarcely ever included in this community (because they did not arise from the income of the community, which was all in the hands of the surviving spouse, and they could not be the result thenceforth of anything but personal gifts). However this may have been, the surviving spouse had the same powers as the husband had during the marriage. Thus the widow as well as the widower was in charge of the community affairs; the co-operation of the children was required for acts of disposal affecting the personal belongings which would come back to them, just as during the marriage the co-operation of the wife was necessary for acts analogous to these. All the children together only counted as one person, which does not agree very well with the manner in which secret partnerships are organized. If one of the children died without issue his share went to the others by right of increase, without there being any possible question as to the inheritance or as to any right for the benefit of the surviving spouse.

The continued community came to an end at the death of the spouse or a second marriage; and, according to certain Customs, upon a partition which was carried out at the demand of the children when they had come of age; or, in certain localities, by the surviving spouse. In a case where the survivor remarried, the new community established between him and the new spouse was grafted upon the old community in such a way as to form a community with three heads, — the new spouse and the children of the second marriage only counting as one person. This is what

was called the "continuation of a composite community," as contrasted with the continuation of the simple community.¹

(B) In the **sixteenth century** secret communities disappeared; the continuation of the community should have disappeared with them, all the more so as the old institution from which it was derived had for a long time ceased to exist. The Custom of Paris, however, preserved it under the head of "a penalty against the surviving spouse," whether a member of the nobility or a commoner, who had neglected to make an inventory, and only for the benefit of minor children. Through his own fault, the surviving spouse ran a risk of depriving the children of the community share of the predeceased spouse. The children were authorized to claim one-half of the movables and acquests which were found in his possession at the time when they acted. In this way he could not enrich himself to their detriment, because he owed them a part of the advantages which accrued to himself.² But the remedy was worse than the evil. It resulted in the most extreme complications in the regulating of the respective interests of the parties, especially in the case of the community with three heads.

§ 565. **The Separate Estate (Judicial)** is one of the most powerful guaranties which were created for the benefit of the wife against the bad administration of the husband; in fact, it brings to bear upon the power of the husband a more serious check than renunciation of community or benefit of emolument. It was not recognized at first, even as a consequence of domestic separation (*post*, §§ 566, 567). According to Beaumanoir, 57, 2 and 4, the wife only had a right in a case of divorce to sufficient support for her maintenance, assuming that the separation had been pronounced in her favor;³ if it were pronounced against her,

¹ *Beaumanoir*, 21, 8 (community with three or four members, according as to whether there has been a second or a third marriage); "*Olim*," IV, 1176; "*Gr. Cout.*," p. 371. — *Cf.* Sicily, *Pertile*, III, 359; "*Messina*," 7 (the share of the spouse who has married twice, at death is divided into halves among the children of the first and second marriages). — *Stobbe*, IV, 285.

² "*Paris*, A. C.," 118; "*N. C.*," 240; *Pothier*, no. 769, etc.; Civil Code of Lower Canada, 1323. It depended upon the choice of the children as to whether the community should be carried on or not; if they decided in favor of its dissolution at the death, it was difficult for them to prove of what the community had consisted: "*Arr.*," of *Lamoignon*, 29, 114 *et seq.*

³ *Beaumanoir*, 57, 4: the wife is given by law "some of the community possessions for her support; but not when there is no division either by halves or by quarters," 5: she loses what she has received if she leads an evil life; *Pertile*, III, 356. Long before this the "*Ass. de Jér.*," "*C. des B.*," 171, 172, took precautions for the preservation of dower, when the husband impoverished himself; but there is no question of a partition of the community: *Viollet*, p. 790; "*T. A. C., Bret.*," 82, 215. At the same time the "*Olim*," III, 152

it carried with it the loss of dower and of her share of the community.¹ In Boutillier's "Somme Rural," if the husband loses his fortune, the wife asks for a separation of bed and board, or a portion of his possessions.²

The principal form of judicial separate estate was borrowed from the Roman law towards the sixteenth century.³ It was sanctioned by Art. 224 of the Reformed Custom of Paris. It was granted to the wife⁴ in a rather discretionary manner, starting from the Roman idea that the marriage portion was endangered by the disorder of the husband's affairs, "Vergit ad inopiam." The wife who was given a separation took back her personal belongings; but it was doubted whether she should have her share of the community. The very fact that the separation had taken place led to the assumption that the community was a bad one.⁵ However, practice granted her this privilege, for the wife had a chance to get back the remains of her fortune in movables in what was left of the common assets. — Separate estate was regulated by the courts in such a way as to safeguard all the interests of the wife without doing any injury to third persons.⁶ It could only result from a judgment; if it were done in a friendly way it would have allowed of too many pretenses and too much deceit. This judgment itself had to be surrounded with publicity (for it retroacted to the day when the separation was asked

(in 1304), gave the wife divorced by the Church her "bona immobilia et paraphernalia." Cf. Dig. X, 4, 20; 1, 4, 10.

¹ "Gr. Cout.," 2, 32, p. 322; "Jostice," pp. 217, 219 (one profits by the foolishness of the other); *Pothier*, no. 507.

² *Boutaric*, II, 8; "L. d. Dr.," 223; "Olim," *loc. cit.*; "Gr. Cout.," 2, 32.

³ Dig., 24, 3, 24; "Nov.," 97, 6; *Loysel*, 126, 395; "Orléans," 198; "A. C., Bret.," 408, etc.; *Argou*, III, 20. *Viollet*, p. 790, and *Glasson*, VII, 370, cite a document of the year 1396 dealing with a separate estate at law. *Desmares*, 129, does not provide for a case of this sort; *Stobbe*, IV, 215.

⁴ Some of the Customs allow the husband to obtain separate maintenance against the wife, because of the offenses committed by her and the responsibility which he incurs ("Maine," 145; "Anjou," 160). To the same effect *Lebrun*, 3, 1, 11, who cites an Order of 1602 of the Parliament of Paris pronouncing a separate maintenance for a husband whose wife was involved in 114 actions. This opinion did not prevail. Separate maintenance was made a privilege of the wife's, under the influence of Roman tradition and upon the basis that it was a remedy for abuses of the husband's power, a means of preventing the husband from squandering the marriage portion; *Pothier*, no. 513. German law is *contra* to this.

⁵ *Laurière* maintains that acceptance of the community is in direct opposition to separate maintenance. To the contrary *Lebrun*, etc.

⁶ Regulating Order of 1555 (Normandy). Claims made against the States General of 1614 (*Picot*, "Hist. des Et. gén.," IV, 69); Ordinance of 1629, 143, 193; Edict of Sept., 1703; "Arr." of *Lamoignon*, 29, 71 *et seq.*; *Pothier*, no. 518. Local regulations, for example at Orléans. As to the wives of traders, cf. Ordinance of 1673, Tit. 8; *Viollet*, p. 793.

for, so as to avoid the complete loss of the husband's fortune) and it had to be carried out without fraud. The effect of the separation was that the position of the wife was found to be greatly changed. Once more in control of her fortune, she had, according to certain Customs, its free disposal, just as though she had not been married.¹ The common Customary law, without going as far as this, at least allowed her the enjoyment and the administration of her possessions, but charged with paying to her husband a portion of her income to cover the expenses of the household.² The re-establishment of the community was possible if both spouses gave their consent to it; but it had to be established by means of a notarial deed, excepting in the case of a separation of bed and board, in which case it resulted from the re-establishment of the community life.³

§ 566. **Right of the Wife to choose between Acceptance and Renunciation.** — A partner cannot choose between acceptance and repudiation of the partnership when the latter is dissolved; he takes his share in the benefits and losses. It is otherwise with heirs called to a succession; they have the choice between two courses, — either to accept or to renounce. The wife living in a community is treated rather as an heir than as a partner; she has the power to renounce her share of the community in order to escape the consequences of the husband's bad administration. By this means, after this choice has taken place, she makes herself a stranger to the partnership when the liabilities are greater than the assets. They went even further than this; she was authorized to make an agreement to the effect that when she made a renunciation she should be able to withdraw what she had contributed; this is the "clause of the retaking of the share contributed free and

¹ "Bourbon," 170, 232; "Montargis," 8, 6; "Dunois," 58; "Sedan," 97; *Viолет*, p. 790. When separate maintenance is decreed, the wife may be given a general authority to alienate her possessions, according to certain of the Customs: "Berry," 1, 21; "Flandre"; see *Guyot*; *Pasquier*, "Inst.," p. 370. There are some who conclude from the "Gr. Cout.," 2, 40, p. 371, that the spouses, by making a division or a protest within a year and a day, were thereupon granted separate maintenance; we believe that a division or a protest of such a nature as to do away with the community could only be carried out by the relatives, which the "Gr. Cout." also mentions.

² *Loysel*, 126. There were two views as to the status of the wife who was separated from her husband: there are some who would allow her to dispose of her movables without restriction, at least for a consideration, and also to bind herself with regard to her immovables; others not wishing to allow her to dispose of her movables excepting to supply her needs and to allow her only to contract slight obligations not exceeding in amount the value of the movables.

³ Retroactive effect: "Orléans," 199; *Pothier*, no. 524.

clear."¹ Leaving aside a clause as exorbitant as this, let us note the fact that the right to renounce was justified by saying with Dumoulin: "Marito non licet onerare propria uxoris." If the wife had not been able to renounce the community she would have been liable to pay the debts of the husband which were at the same time debts of the community. Personal belongings would have been seized and the husband would have indirectly succeeded in depriving her of them. The renunciation of community was regulated in the same way as renunciation of succession. It had to take place at law or by notarial deed. The period granted within which to make it and which varied according to the Customs was, according to Loysel, forty days from the time of the inventory; and the inventory itself had to be made within forty days of the death: "The term of forty days and forty nights was the one generally in use among the French." The Ordinance of 1667, T. VII, Art. 5, gave the wife three months and forty days within which to make an inventory and come to her decision. At the end of this time she lost her plea for delay, which up to that time she had a right to set up in opposition to the creditors of the community; but not her right to repudiate.

During the fourteenth century the renouncing is presented under the form of a symbolical act consisting in the throwing of the belt, the purse and the keys of the widow upon the grave of the deceased, as soon as the body has been put into the grave; having done this, the widow had to take care not to return to the "house where movables are," but to go away and "live somewhere else." She should only take with her her regular dress. Under these conditions she was "clear of the debts forever."² This ceremony, performed as it was without any delay and without any time having been taken for reflection, bears witness

¹ Cf. *Desmares*, 129. Contrary to Lebrun's opinion the wife should then pay her debts contracted previous to the marriage. There was a tendency to make of this a typical clause: *Louet*, D., 39, 9; *Argou*, III, 6; "Arr." of *Lamoignon*, 23, 37.

² "Gr. Cout.," p. 375: *Lecoq*, "Q.," 131; "A. C., Bourges," 3; *Boutaric*, II, 21; "Bourg. A. C.," 38, 39; "N. C.," 4, 20 (*Chassaneus*, p. 749); *D'Achery*, "Spicil.," III, 721; *Loysel*, 132 (historical examples); *Pasquier*, "Rech.," IV, 8; *Ragueau*, see "Clefs, Ceintures." In the sixteenth century this usage was still to be found in certain of the Customs: "Vichy," "Meaux," "Lorraine," 2, 3, etc. Germany: "Schlüsselrecht" or "Mantelrecht": *Stobbe*, § 221. — No doubt the widow could also make a renunciation at law in cases where there was some obstacle in the way of the carrying out of the customary ceremony at the grave; thus a "Fragm. d'un Répert. de jurispr. Parisienne au XV^e s.," shows her to us placing her girdle, her purse and her keys upon the provost's desk. It was an easy transition from this to a mere declaration: *Britz*, 840.

to the rudimentary condition of this institution. What did the renunciation to the community consist of at this time? Did it exist at all? What is its origin? Upon this embarrassing question¹ let us observe first of all that the reason which was invoked in the sixteenth century in order to justify the renunciation did not exist at the beginning of the Customary period; in fact, the personal belongings could not be distrained upon. The husband might get himself into debt, but he could not by this means succeed in indirectly alienating the personal belongings of his wife, or in a general way in alienating the immovables which she possessed. If she made no renunciation, at the most the wife would have been liable to be sued with respect to her future movables, and especially the income of her personal belongings. This is an evil, undoubtedly; at the same time, it is a lesser evil than if she had been dispossessed of her lands. With creditors who were a little tolerant, and whose interests often compelled them to be patient, we can conceive of a system of community without renunciation.

The question is whether, in fact, it existed. Our old authors thought so. They believed that the right of renunciation was unknown originally, but that it was introduced for the benefit of the widows of the nobility, at the time of the crusaders, who had sunk their fortunes and those of their wives in order to go to the Holy Land to fight. This privilege would then have belonged to the wives of the crusaders, and later to the wives of the nobles, and finally, by a last step, to the wives of the commoners. The first trace of this explanation is to be found in a passage of the "Grand Coutumier de France," that is to say, in a work written a long time after the crusades. Absolutely no contemporary testimony confirms it.² No one accepts it to-day. There is, moreover, a point to which sufficient attention had not been given; the texts previous to the fifteenth and sixteenth centuries are not concerned with renunciations to the community looked upon as an indivisible whole; they only speak of renunciations of movables;³ in abandon-

¹ The authors are very much divided: *Loysel*, 112, 113; *Ginoulhiac*, 312; *Laboulaye*, 286; *Tardif*, *op. cit.*; *Guilhiermoz*, "B. Ch.," 1883, 489 (careful analysis of the texts); *Glasson*, VII, 371; *Viолlet*, 785; *Stobbe*, § 221, 222.

² "Gr. Cout.," p. 375. Cf. note by *Charondas*, h. l.; *Bidrey*, "Priv. des croisés," "Thèse," 1900. — Cf. *Maillart*, "Cout. d'Artois," p. 815; *Loysel*, 112.

³ Sometimes it is a question of the renunciation of the portion of the movables which ought to revert to the wife, and sometimes of the renunciation of all the movables (reference-legacy of the noble spouse): "Gr. Cout.," p. 375; "Coust. de fief," *loc. cit.*; *J. Lecoq*, 131; *Boutaric*, II, 11; "A. C., Champ.," 12; "Paris, A. C.," 115, 116; "N. C.," 237 *et seq.*; "Coust. de Verm.," 307;

ing her share of the movables the wife freed herself from the debts; this did not prevent her from having a half of the property acquired jointly.¹ On the other hand, the renunciation of movables is only allowed to the wife of a noble.² Upon both these points the law changed. The Old Custom of Paris, 115, did not yet give the right of renunciation to the widow of a commoner.³ It is only in the Reformed Custom, 237, that it was sanctioned, in conformity with the doctrine of Dumoulin. We do not know exactly at what period the renunciation, instead of being limited to movables, affected the whole community. Certain manuscripts of the "Grand Coutumier" mention the renunciation of movables and property acquired jointly. There is reason to believe that it was towards the end of the fourteenth century that this change took place.⁴

"A. C., Picardie," p. 110. The renunciation even makes its appearance under the system where there is no community, when the survivor takes all the movables with the power to dispose freely of them, whereas the immovables are conferred upon him, but with the reservation of the rights of the children. We have already pointed out this remarkable tendency towards the maintaining of the unity of the inheritance at the death of one of the spouses.

¹ "Olim," II, 240 (in 1284), and "A. C., Champ.," 12: does the word *inheritance* include the share of the jointly acquired property? Cf. "Vitry," 92; "Sedan," 88; Brittany, "T. A. C., Bret.," 315; Ordinance of John V, 1420, Art. 24: the wife who renounces shall not have any right to the acquests; *D. Morice*, II, 1058; "Paris, A. C.," 115; "Coust. de Verm.," 307.

² "T. A. C., Bret.," 35, 207; *Desmares*, 153; "Cout. Not.," 15, 83; *Boutaric*, I, 20; "A. C., Anjou," ed. *B.-B.*, I, 483; II, 338; III, 334; IV, 201. *Guilhiemoz*, p. 500: renunciations by princesses in the fourteenth and fifteenth centuries. They were looked upon with disfavor. In Burgundy the wife who renounced was deprived of her dower, her furnished chamber and her rings and jewels, etc.: *Loysel*, 398 (formerly loss of the mutual gift); "Conf. de Guénois," p. 578 *et seq.*

³ *Loysel*, 113 (*De Mesme*); "A. C., Poitou," *Guilhiemoz*, p. 497. — The clause in her marriage contract by which the wife prevented herself from making a renunciation of the community was held to be illegal; cf. however, "Orléans," 204. Thus the power of renouncing had become one of a public nature. — It was at first a personal right of the wife's; her heirs could lay no claim to it unless by virtue of a special clause in the marriage contract. Some Orders of the sixteenth century (of April 15, 1567; "Orléans," 204) allowed them the power of renouncing: *Pothier*, no. 550. — The extension of this right in these two directions shows us that it did not naturally belong to the wife living in a state of community; it was a right which she only attained with difficulty. The formula of the fourteenth century: "*conquestus mobilia et debita esse communia*," also excludes the idea of a renunciation: "Gr. Cout.," p. 321; *J. Lecoq*, 83. Cf. also "Gr. Cout.," p. 218 (the wife held liable to pay the debts contracted by her jointly and severally with her husband, although all the movables have been confiscated).

⁴ In the printed editions of the "Gr. Cout.," p. 375, only the renunciation of movables is dealt with, but in several manuscripts both the movables and the jointly acquired property are mentioned. In the "*Coutumes de fiefs*" (abridged by the "Gr. Cout.," p. 298), "*B. Ch.*," 2d s., V, 56, the wife renounces all the movable possessions and all the husband's debts and all the possessions of every kind which she and her husband have held (excepting her dower); this indefinite formula does not seem to take the immovables

This was, moreover, perfectly logical; for the day when immovables became a pledge for the creditors, the wife could no longer withhold her share of the jointly acquired property without contributing to the debts.¹ The division of the community into two portions, movables and jointly acquired property, has in it nothing contradictory to the very old law; it is about the same as the distinction which is made with relation to succession between the heirs to the movables and the heirs to the personal belongings. It is not so easy to explain why the renunciation of movables seems to be reserved for the nobility alone. If it is a favor that was conferred upon them, one has to seek the motive for it in vain; for it seems very difficult to believe that the nobility were the only people who got into debt, in spite of the proverb, "The villein has ready money, a noble prince has never a sou"; if it is a right which they exercise, it should also belong to commoners. By supposing (*ante*, § 554) that the community was not originally used by the nobility the problem would be found to be solved in a rather satisfactory manner; the status of a community owner of possessions or a partner prohibited the commoner from making a renunciation;² on the other hand, the spouse who was a noble was entitled to a right by survivorship, which he was free to give up.³ It is true that this theory of the history of

into account; *cf.* *Boutaric*, II, 21; "C. de Verm.," 203 *et seq.* On the other hand in a document dated during the latter part of the fourteenth century, the "Notables Points de l'usage de France," ed. *Bordier*, "Rec. de textes rél. aux Cout. de Paris," 1845, the renunciation is applied in one paragraph, at the beginning, to movables, and in another paragraph, further on, to the jointly acquired property. It must therefore be at this time that the change takes place; the noble widow, in order to be free and clear of the debts, should renounce the movables and the acquets at one and the same time: "A. C., Bourg.," 1 (*Giraud*, II, 268); "A. C., Berry," 57 (renunciation of the movables, jointly acquired property and debts). *Glasson*, VII, 371: in 1396, in Paris, the renunciation of the noble wife is limited to her former effects. "Fragm. d'un répert. de jurispr. Paris, au XV^e s.," p. 89, *cf.* p. 21. Three years later it assumes a much more general form before the Provost of Paris. Finally the "Cout." of 1510, Art. 115, requires that the renunciation also affect jointly acquired property.

¹ Italy: the Sardinian and Istrian statutes allow the renunciation (*Pertile*, III, 357) of the acquets; in view of this the wife protects her personal belongings.

² It was possible to introduce the renunciation and the benefit of emolument for the benefit of commoners by means of special clauses which became typical ones and which in the end were sanctioned by the Customs: *Dumoulin*, on "Montargis," 8, 8; *Loysel*, 396 (extended to include the heirs).

³ *Beaumanoir*, 13, 9, declares that the widow can choose as to whether she will leave all the movables and all the debts to the heirs of her husband and take her dower free and clear, or whether she will take her share of the movables and debts. He does not make any distinction between the noble wife and the commoner. On the other hand he makes no allusion to the share of the jointly acquired property which comes back to the widow (*cf.* 14, 29). Nor is there

the community has not been admitted by everybody, but we think it is possible to draw from this theory a conclusion which can be correctly applied to all systems, and that is that the nobility as a class showed more attachment for tradition than did the commoners. When the community right was substituted for the rights by survivorship of the barbarian period, the nobility kept for it a few of the characteristics of the latter, — a thing which was all the more natural as, had it not been for this, the widow would have run the risk of losing by this change.

§ 567. **Transactions Previous to Partition; Reinvestment and Recompenses.** — If the wife accepts the community, it becomes necessary to arrange this divisible mass¹ by distinguishing the personal belongings of each spouse from the possessions owned in common, — whether they exist in kind, or there has been a reinvestment — that is to say, whether they have been replaced by possessions which are their equivalent — or whether, finally, in case there be no reinvestment, it is necessary first to deduct from the assets of the community recompenses or indemnities for personal belongings which may have been alienated.² The theory

any question as regards them in the letters of 1343, in *Achery*, "Spieil," III, 721. "Olim," II, 240: it is a well-known custom of the Ile-de-France that the widow, by renouncing her share of the movables, escapes from the payment of the debts for which she was liable, or for which she and her husband were liable (that is to say debts of the community); she does not have to pay them either out of her dower or out of her "hereditagium" (does this latter word only mean the wife's personal belongings? does it also include her share of the jointly acquired property? were there any jointly acquired possessions included in the schedule?). The matter under consideration refers to the widow of Bouchard de Montmorency, that is to a noble's wife; but the argument by means of which this decision is justified is not based upon this rank of a noble wife; an accepted usage is relied upon, without any mention of anything which might lead one to suppose that it was one which applied especially to nobles. Cf. "Quest." 131 of *J. Lecoq*, and the other texts cited; *Guilhiermoz*, *op. cit.* The "A. C., Berry," 57, does not make any distinction either. — On the other hand only the wives of nobles are taken into account in the "Gr. Cout.," "Paris, A. C.," 115, etc.: "Et. de St. Louis," I, 17; "A. C., Artois," 34; "A. C., Picardie," ed. *Marnier*, p. 116; "Coust. de Verm.," § 238. This inconsistency is a difficult one to settle. *Beaumanoir* is too precise for us to have any right to imply that he meant only to speak of the noble wife. He was far too familiar with the neighboring Customs not to have pointed out a divergency between them and the Custom of Beauvais, had there been one. Finally, according to him, one cannot assume that there are divergences in the law, the wives of commoners having lost the right of renunciation, and having regained it in the sixteenth century.

¹ *Ferrière*, on "Paris," 317; *Pothier*, nos. 529, 537, 690. Penalties for embezzlement: loss of the right of renunciation ("Gr. Cout.," 2, 29) or of the advantage of emolument, and of the share in property set aside: "Coust. de Verm.," 303; *Britz*, 84; *Loyset*, 133, 397; *Picot*, "Hist. des États gén.," IV, 72; "Arr.," of *Lamoignon*, 29, 89.

² Same transactions in case of renunciation, for the wife always has a right to her personal belongings.

of **recompenses** rests upon a strict distinction between the inheritances of the two spouses and that of the community. It can be summed up in the principle that neither one of them should be enriched at the expense of the other; this assumes that they each have their own special accounts and their assets and liabilities clearly distinguished from one another. The very old law knew nothing of this complication. In the thirteenth century there was no question either of "reprisal" or of recompense. It was especially in cases where the personal belongings were alienated that recompenses were due from the community. Now, it was formerly the principle that the price of the personal belonging which had been alienated should form part of the community by way of movable and without indemnity. Thus it was said that "the husband should get up three times in the night in order to sell the property of his wife."¹ He gained the power of disposing of the price, just as of other communal movables, and when the partition took place he took one-half of the price. Undoubtedly, alienation was not possible unless the wife gave her consent; but how many times did she not yield to the pressure brought to bear upon her by her husband? If recompenses due from the community to the spouses were not known, still more was it the case with regard to recompenses due from the spouses to the community in a case where valuable assets were taken from the funds of the community in order to acquire or to improve personal belongings. In so far as the husband had done nothing more than make use of his powers, he was free, in fact, to dissipate the possessions of the community, "a fortiori," to make use of them for his own advantage or for the advantage of his wife.

This old law had the defect of attacking the principle of the preservation of personal belongings in the family and the prohibition of gifts between spouses. It could only have been permitted at a period when legislation was not very well fixed in the direction of the prohibition of gifts between spouses,² as witness the usage of the mutual gift and the benefit resulting from the conferring of the wife's movables upon the husband, under the exclusive system of community, and of the mingling of the movables

¹ "Gr. Cout," 2, 32; "L. d. Dr.," 285; "Lorraine," 2, 16; *Loysel*, 116 (rule which has been discarded). Cf. "T. A. C., Bret.," 215, 211. — The principle: "res succedit in locum pretii et pretium in locum rei": *Stobbe*, IV, 274. — "Jostice," p. 242; *Fremont*, "Thèse," 1899.

² *Beaumanoir*, 70; "Montfort," 149; "Maine," 334; "Auvergne," 14, 39 and 46; "Arr.," of *Lamoignon*, XXXII.

of the spouses under the regular community system. In time new principles came to be introduced. "By means of a clever system of reprisal and of recompense," says Gide, "they succeeded in reconciling these two irreconcilable things, the mingling of the inheritances of the spouses and the preservation of each one of them intact." They were all the more concerned to prevent reciprocal gains by spouses, to which the system of community indirectly lent itself, because they were not freely consented to, and because the spouses had sometimes not even given them any thought, and thus found themselves to be making gifts without knowing it. The danger was especially great for the wife; in fact, the husband virtually possessed the right of investing the community possessions, for the benefit of his own personal inheritance; still more was he liable to abuse his influence over his wife in order to induce her to alienate her personal belongings.

In law the theory of recompense may be of service to the husband; in fact, it constitutes a new guarantee for the benefit of the wife, a means of protecting her against her husband, an essential part of that system of counter-checks which goes to make up the community. It comes to light in some few cases after the fourteenth century, but it does not reach its full development until the period of the drawing up of the Customs.¹

§ 568. **The Same.** — (A) *Recompenses due from the Community*, for example, movables converted into money, the price paid for personal belongings alienated, the buying back of rents belonging to one of the spouses.² — (I) *Movables invested as a Fund*. The investment of the funds of the marriage portion, that is to say, their conversion into immovables, which was in use in countries of written law, here furnishes a precedent from which the people in the countries of Customs drew their inspiration. In 1269 a charter of Saint Louis relating to the marriage of his niece, Blanche d'Artois,³ sets forth that a part of the marriage portion should be

¹ Cf. as to German law, *Stobbe*, IV, 230.

² The right to the recompense is all the more natural in this case, because the rent can be bought back in spite of the spouse who owns it; it is against his will that his personal belongings are changed into community belongings. Consequently this can be extended to include other hypothetical cases.

³ Cf. this very important deed in *L. Delisle*, "Mém. s. les opér. financières des Templiers," 1889 ("Acad. Inscr.," XXXIII, 2d p.), p. 105; *Jamont*, "Thèse," p. 44 (cf. investment in Brittany before the end of the thirteenth century); *J. Lecog*, q. 83: it is a matter of the investment of the funds of the marriage portion and not of a sum of money given by the husband to the wife; *Boerius*, "Dec.," 209; *Buche*, "N. R. H.," 1884, 646.

deposited at the Temple in Paris in order to be invested in lands or rents through a relative or a third party to be designated in the future; the remainder should be paid over to the husband to dispose of at his pleasure, but at the dissolution of the marriage he was held bound to restore the sum which he had received. In the first case the reprisal took place in kind, just as though the wife had contributed as a part of her marriage portion the immovable which had been bought out of its funds.¹ In the second case, one can say that she had a right to a recompense by virtue of a clause in the contract of marriage.² The right of the wife to take possession of the property of the husband until she should have been paid was often stipulated for; in this way the payment of the recompense was assured.³—(II) *Reinvestment and Recompense*. (a) *Agreements for reinvestment* (frequent from the fourteenth century).⁴ In contracts of marriage or upon the alienation of a personal belonging it could be agreed that the price should be invested with the object of obtaining another immovable, which was intended to be subrogated to the former one, — that is to say, to take its place; this operation was too much like an investment of the funds of the marriage portion not to be looked upon as lawful. In default of precedents in this direction, they should naturally have been led to the idea of subrogation by the simple and practical case of an exchange; the reinvestment is in the last analysis only an exchange divided into two distinct acts, separated by a longer or shorter interval of time. If there was no clause of reinvestment, the spouse had no right originally to the recovery

¹ The husband should swear when he withdraws the money that it will be used without fraud to pay the purchase price of a piece of land which has already been bought. Cf. "Gr. Cout.," 2, 32; *Lecoq*, 83; *Loysel*, 394; *Coquille*, on "Niv.," 23, 12; "Quest.," 112.

² If the investment had not been made at the time of the dissolution of the marriage, the wife could take back the amount of the marriage portion, according to the Charter of St. Louis. See the controversy on this question in *J. Lecoq*, 83. *Id.*, "Amiens," 1249, Art. 70; "N. C., Paris," 93; *Loysel*, 394. — "Arr.," of *Lamoignon*, 29, 9.

³ "Olim," II, 96, 31 (in 1277); *P. de Fontaines*, 15, 8. There then came into existence a contract-lien on the husband's possessions (either over all of them, or over some of them only); they were set aside to be used for the restoring of the marriage portion. This was a public nam of immovables which was carried out under the three forms of sale with redemption, the engagement and the obligation. See §§ 427, 428. In "Nivernais," 23, 12, the contract-lien is still considered as a sale in the sixteenth century, and it carries with it transfer of ownership: *Loysel*, 117. Cf. 120; *Coquille*, "Quest.," 113. Cf. "Bourg.," 4, 17; *Bouhier*, I, 167; *Ragueau*, see "As-signal." As to the "seat" in Brittany and the "consignment" in Normandy, see *Ollier*, "Thèse," p. 110 (bibl.).

⁴ "Melun," 255; "Sens," 277; "Auxerre," 197, etc.

of the price.¹ (b) *Reinvestment independent of all agreement.*² The validity of the reinvestment was now not made dependent on a preliminary contract; from the fourteenth century, at least, this is the case.³ In the last stage of the old law reinvestment was possible under the following conditions: 1st. A declaration *upon the acquiring* that it is made with the funds resulting from the alienation of a personal belonging, and that it is made in order to take the place of a reinvestment.⁴ 2d. In case of a reinvestment in the interest of the wife, an acceptance by her, the acceptance being no longer possible once the community had been dissolved.⁵ (c) *Security on the community possessions and on those of the husband.* Instead of proceeding to a reinvestment, on acquiring of property belonging to third parties, the husband may grant to his wife the jointly acquired property of the community, or even certain of his own belongings, for the price of the personal belonging which has been alienated.⁶ Instead of making her a grant in ownership, he may content himself with conferring upon her a security on these possessions; if these transactions are

¹ In his "Qu." 1, *J. Lecoq* asks the "pretium rei hereditariæ reputari debeat hereditagium." Equity would require "pretium loco rei succedit"; the custom is otherwise.

² The reinvestment clause served to give a right to a recompense; when this right was recognized, even if there were no agreement to that effect, it allowed the wife to ask for separate maintenance, if, because the agreement should not have been carried out her marriage portion was found to be in danger of being lost.

³ "Gr. Cout.," p. 321: the husband declares before the judge that he is about to buy a piece of land to take the place of his personal belonging which he has alienated; if this declaration is made, the new inheritable piece of property will not be a piece of jointly acquired property. "Jostice," p. 242.

⁴ *Lebrun*, 3, 2, 1, 2, 69. But cf. *Pothier*, no. 198; "Arr.," of *Lamoignon*, 29, 53.

⁵ *Duplessis*, I, p. 447. Cf. the Civil Code, 1425. The property having been left at the community's risk, it would hardly be equitable for the wife to be able to take away from the community the advantages resulting from any increase in value which may have taken place. If it were made at the right time, the wife's acceptance had a retroactive effect: *D'Aguesseau*, 27th "plaid"; *Pothier*, no. 200. Cf. *Labbé*, "Ratific. des actes d'un gérant d'affaires," 1856. — *Bacquet*, "Dr. de just.," XXI, 300.

⁶ With the price received from the alienation of one of the personal belongings, the husband acquired an immovable, and after having done so he made a declaration of reinvestment (instead of making it at the time of acquiring). There thus took place a transformation of a piece of jointly acquired property into a personal belonging without third parties having any notice given them; the retroactiveness which would have in the meanwhile caused established rights to accrue to the advantage of third parties could therefore not be recognized. Cf. *Lebrun*, p. 372; *Louet*, "R.," 30; *Le Prestre*, II, 83. — In favor of retroactivity are cited: *Dumoulin*, on "Bourb.," 238, and "Blois," 264. This last text merely establishes the right of the wife to a recompense: *Guy Coquille* on "Niv.," rights of married persons, art. 12; *Loyseau*, "Déguerp.," I, 8; cf. "Lorraine," 2, 16; *Bassigny*, 47; *Loysel*, 117, 120.

allowed for the investment of the funds of the marriage portion, it is hard to see why they should be forbidden in the case of reinvestment.¹ (d) Dumoulin maintains in the sixteenth century that the husband was authorized to acknowledge afterwards the right of the wife to a recompense independent of any contract of reinvestment or of security. (e) Finally, the Custom of Paris of 1580, Art. 232, sanctioned² the right of the wife to a recompense, a legal reinvestment or "reprisal" in the absence of any contract or recognition on the part of the husband.³ Its rule was extended by the courts to those Customs which were silent or even hostile.

The principle of reprisal once having been admitted, the courts had to determine upon the manner in which it should be exercised. Various systems were suggested, — that of the implied security on the jointly acquired property of the community, and, in default of this, of the personal belongings of the husband;⁴ that of the "half-funds," which made an ordinary claim of one-half of the part retained for the wife;⁵ and, finally, that of "previous deductions," which prevailed.⁶ The wife, before

¹ On 238 "Bourb.," "Blois," 164.

² If it is one of the wife's immovables which is alienated she stipulates that the husband shall invest the price, "Olim," I, 149, 4 (reinvestment in his own inheritable property in kind), or else she demands that her husband promise her an indemnity to be previously deducted from the community. *J. Lecoq*, q. 1. From before the time of the reforming of the "Cout. de Paris," there were Orders which adjudged that the recompense must legally be given for rents of the wife's which were bought back. It was also thought advisable to stipulate in marriage contracts that all the personal belongings of the wife without any distinction should be reinvested; there was no desire to make a purchase of inheritances obligatory, but merely to reserve a recompense. It was this clause which had become a typical one, which the "Cout. de Paris" implied (1580, 232).

³ Art. 232; *Louet*, "R.," 30; *Renusson*, "Propres," 4, 3, 5 (Orders of 1574, 1579). — Some of the Customs, however, still excluded the reinvestment, if it were not stipulated for: "Blois," 164; "Lorraine," 2, 16; "Bassigny," 46, etc.; "Arr.," of *Lamoignon*, 29, 90.

⁴ *Louet*, "R.," 30; *Pocquet de Liv.*, "Fiefs," 3, 5, 3. Cf. *Charondas*, I, p. 367. The jurisprudence of the seventeenth century rejected this system under the pretext that subrogation was a narrow interpretation of the law: *Rousseau de Lac.*, "Remploi." In reality it was because the mortgage had taken the place of the contract-lien.

⁵ The possessions of the community are divided into halves between the spouses. Each one taking half of the community paid themselves, because of the mingling of the property, one-half of their claim. As to the other half, each spouse was a creditor of the other (the wife having a mortgage). The claim at maturity became part of another community, being treated as a movable. With this system the recourse and actions between the spouses were too numerous: "T. A. C., Bret.," 217, 218, 230; *Loysel*, 381.

⁶ The system of half-funds recalls the time when there were no recompenses. The system of previous deductions for the benefit of the wife may be considered as a simple method of payment instituted for greater simplicity in

any partition, deducted from the community specific things representing a value corresponding to the amount to which she had a right; if the community possessions were not sufficient, she could then take them out of the inheritance of the husband. Upon his side, the husband only exercised his right of reprisal on that which was left of the community after the wife had been paid; he was never allowed to take the personal belongings of the wife (even by virtue of a special clause). In this respect the wife thus found herself more favored than the husband, a new measure of protection in her favor.¹ If she was placed before the husband, should she not also be preferred to the creditors of the community in the exercise of these reprisals? Reinvestment assured her this preference, for the possessions which were acquired by force of the reinvestment were substituted for her personal belongings which had been alienated; she was regarded as having always possessed it, and this fiction put to one side the creditors of the community. If there were no reinvestment she could not call herself owner; she could only present herself in the quality of a creditor to the amount of her personal belongings, and as such she came in at so much in the pound with the creditors of the community. Over the community movables she was not recognized as having any lien;² but there was nothing to prevent her from taking advantage of her mortgage over the jointly acquired property of the community and the personal belongings of the husband, so as to precede those of the creditors whom she could rank.

the interests of the spouses themselves, in order to avoid the sale of their possessions. It was also sought to account for it by saying that the wife acted more as an owner than as a creditor; a "greater right over the community" was spoken of; but the very vagueness of this expression shows that the theory under which it is made use of is scarcely well founded. *Pothier*, "Succ.," 5, 1, sees in it a new opinion. Interest: this right will be movable or immovable according as the taking back affects movables or immovables; it will go, according to circumstances, to the heir of the movables or to the heir of the immovables; finally the wife shall be preferred in her claims over the community movables even to the creditors of the community: *Esméin*, "R. crit.," 1877 (and authors cited), p. 83; *Pothier*, "Fiefs," 459: previous deductions did not give rise to the collection of the assessment of one-fifth.

¹ The "Cout. de Paris" was silent with regard to this. But these privileges had been introduced in practice, by way of compensation, for the benefit of the woman, because of the dependent position in which she was placed with respect to her husband. She treated him in the same manner as a minor treated his guardian (cf. mortgage): *Renusson*, "Propres," IV, 4, 4; *Lebrun*, III, 2, 1, 2, 66. It was not so much the liquidation of a partnership as the rendering of an account to a person under a disability by his manager.

² *Pothier*, 583, 701 (previous deduction of the sum at which the reclamation was valued); *Denisart*, see "Dot," 25, 6 (ed. of 1788) (the wife has no privilege over the movables); "Actes du Châtelet," 1711 and 1745; *Pont*, "R. crit.," 1854, p. 556 *et seq.* (authors cited). Cf. "Blois," 164.

§ 569. **The Same.** — (B) *Recompenses due from the Spouses to the Community.*¹ It often happened that the inheritance of the spouses was enriched at the expense of the community; it was with the money of the community that they made acquisitions, and that they made improvements upon their personal belongings, because the spouses could not have sums of money or objects which belonged to them individually. But this enrichment did not seem of such a nature as to be the basis for a right to the recompense; when the husband could dissipate the community possessions it mattered little whether he made use of them in his own interest or that of his wife. Yet though there was no recompense, analogous results were arrived at in certain special cases. Thus, when one of the spouses exercised the right of the repurchase by a person of the same lineage, and to carry it out made use of the community funds, the immovable which was acquired came into the community in the quality of jointly acquired property; the spouse who was of this same lineage only obtained it upon the dissolution of the marriage and by the exercise of another repurchase, which was called that of the "half-funds."² He paid the other spouse a half of the price which had been paid out. The result was the same as though there had been a recompense made to the community. The immovable finally came to be looked upon as a personal belonging, and no longer as a piece of property jointly acquired. The idea of the recompense was thenceforth accepted without difficulty. One can say as much of the case where one of the spouses bought out a rent which encumbered one of his personal belongings. The community which paid for the repurchase was looked upon as acquiring the rent. The latter existed as a piece of property jointly acquired. When the community was dissolved, the rent was divided between the two spouses, and the debtor found himself under the alternative of paying half of the arrears to the other spouse or of paying back one-half of the rent. It would have been more simple to say that the personal belonging had been released, and that the rent had been extinguished. This is what the parties really intended, and in order to obtain this result it was only necessary to pay a recompense to the community. They did not yet dare to go so far as this in the Custom of Paris in 1580; they did, indeed, admit that the land was freed, but they decided that a new rent was

¹ Desmares, 152; Loysel, 391; "Paris," 244 *et seq.*; Pothier, no. 613.

² Beaumanoir, 14, 20; 44, 48; "Arr.," of Lamoignon, 29, 42.

created, — half of the amount of the former one.¹ Thus it was that they came gradually to establish recompenses against the spouses in case they acquired personal belongings with the funds of the community. In the case of the improvement of personal belongings,² the idea of the recompense rested upon the fact that the husband was acting in fraud of the rights of his wife, or upon the desire to forbid indirect enrichment between the spouses. The jurists by way of generalizations laid down the two following rules: a recompense is due every time the spouses have enriched themselves at the expense of the community;³ the amount of the recompense is equal to the profit realized by the spouse (if it is of greater value) or to the sum paid out by the community; to put it better, to whichever of these two amounts is the smaller.⁴

§ 570. **Partition.** — (A) *Assets.* As a general thing, partition took place by halves⁵ between the husband and the wife or their heirs. But this rule, however natural it may seem to us, was established with some difficulty; until the end of the old law special agreements were frequently made in derogation of it. Thus, partition sometimes did not take place until there had been children of the marriage; if there were no children, the surviving spouse kept the entire community.⁶ Or, again, he was given the whole of the movables and a share of the immovables. One method of partition which was very widespread was that which consisted in only giving the wife or her heirs a third of the community possessions.⁷ These old practices, which had disappeared as a general thing from the French Customs, persisted under the form of agree-

¹ "Gr. Cout.," p. 324; "A. C., Paris," 119; "N. C.," 244; *Loysel*, 392; "Arr.," of *Lamoignon*, 29, 41.

² "T. A. C., Bret.," 215: recompense for the improvement of lands held by commoners. — *Contra*, "Et. de St. Louis," I, 16.

³ The powers of the husband are also found to be limited by this means. Cf. marriage portion of a child of both spouses or of a child of the first marriage consisting in the community property: *Lebrun*, 2, 2, 1, 15; *Pothier*, 656; "Arr.," of *Lamoignon*, 29, 28 (preservation of the personal belongings).

⁴ *Pothier*, 636. The community cannot be treated like a banker who demands the exact sum he has loaned.

⁵ *Stobbe*, IV, 231, cf. 229.

⁶ Also right of succession of the survivor, *ib.*, 285. Clause by which the survivor has the enjoyment of the community: *Argou*, III, 9; "Cout. de Dîesse," 25, 5.

⁷ "Olim," II, 74, 10 (in 1276); "T. A. C., Bret.," 217, 42: partition by thirds among commoners, the children taking the share of the dead besides their third; *Loysel*, 385. Sicilian statutes, "Messina," 1, 9, 49; "Palermo," 45; "Catana," 3, 16, etc.; *Pertile*, III, 358. Scandinavian law: *D'Olivcrona*, p. 108 et seq. *Bonvalot*, "Cout. de Lorr.," p. 47, 95; "Cout. de Ferette" (Upper Alsace), XVI (cf. *Guyot*); *Viollet*, p. 775; *Déglin*, "Thèse," 1883, p. 108; *Stobbe*, IV, 231. In Lübeck the husband can by last will reduce the wife's share.

ments. For example, they would agree that the wife should only bear one-third of the joint expenses, or that her heirs would only have a certain sum in lieu of all their rights over the community ("forfeit of the community").¹ Similar clauses to these, which were fixed by tradition in certain localities, were consequently considered as marriage agreements, and not as gifts which were prohibited. They were justified by saying that the inequality of the shares was due to the fact that the industry or the estate brought by one of the spouses was of more importance. Only a few of these clauses were done away with, and they were the ones which would have been too much against the spirit of the new law, — for example, the conferring of the entire community upon the surviving spouse;² this was, in fact, the denial of the idea of a partnership and a survival of the exclusive system of community. One of the most frequent clauses was the stipulation for a "reference-legacy made by agreement."³ It was obviously derived from the old custom of conferring certain possessions outside of his share upon the surviving spouse, such as the weapons and the horses of the husband, the dresses and the jewels of the wife. Another archaic remnant: the "legal reference-legacy of the noble spouse."⁴ According to the Custom of Paris, 238, if there were no children the surviving spouse who was a noble had the power to previously deduct all the community movables,⁵ being charged with the payment of the debts of the community and with bearing the expenses of the funeral of the predeceased spouse.⁶ The "Grand Coutumier de France," 2, 41, seems to see in this the counterpart of the nobleman's lease or custody; the surviving spouse took all the movables by right of being a guardian if there

¹ "Olim," III, 860, 39. Cf. *Bannelier*, on *Davot*, VII, 160; "Arr.," of *Lamoignon*, 29, 4, 7.

² *Britz*, 858 ("mainplévie" at Liège); *Stobbe*, IV, 231, 242.

³ "T. A. C., Bret.," 207; "A. C., Picardie," p. 110; *Glasson*, VII, 379 (Strasbourg), etc.; *Stobbe*, IV, 101.

⁴ *Bonvalot*, "Cout. du d. de Lorraine," p. 37: all the movables devolve upon the survivor whether a noble or a commoner; *Stobbe*, IV, 231, 242.

⁵ Excepting those situated in Paris (beginnings of a reaction against the reference-legacy). Cf. *Pothier*, no. 428. As to claims opinion was divided, cf. "A. C.," 131; "N. C.," 231.

⁶ Can the surviving spouse, after having accepted the legal reference-legacy, give up his emolument in order to escape having to pay the debts? There were some who said not, comparing him to the nobleman guardian who, having accepted the guardianship, is held liable for the debts of the minor, even those which are "ultra vires," and cannot escape them by giving up the emolument connected with the guardianship. *Pothier*, no. 439, was not of this opinion; from his point of view the beneficiary of the reference-legacy was a mere donee, and it is a recognized principle that the donee is only held liable up to the amount of his emolument.

were children, and by virtue of the reference-legacy if there were none.¹

§ 571. **The Same.** — (B) *Liabilities.* The debts of the community were divided in the same way as the assets, — so, as a general thing, by halves. (a) *Execution by the creditors.* 1st. The *husband* can be levied on for all debts contracted in his own right and chargeable upon the community.² As to the debts which were contracted in the right of the wife, debts previous to the marriage, or due through inheritances which had accrued to the wife during the marriage, there was a difference of opinion. Some who were more true to the old principles of the matrimonial system treated these as the debts of the husband; others, on the contrary, inspired by more recent conceptions, said that the husband was only held in his status of a community owner of possessions and could only be sued for half of them. We have already come across a difficulty of this nature with regard to debts contracted by the wife with the authority of her husband. 2d. The *wife* here enjoys a new privilege: she has the **benefit of emolument**.³ At first she could only be sued to the extent of her half for debts contracted in the right of her husband chargeable upon the community. Later on she was not even under the necessity of paying this half when she was asked for more than the amount which she had withdrawn from the community; she could be cleared with respect to the creditors by giving up to them her "emolument." It was not the same with respect to debts contracted in her own right; as she had personally bound herself, she could be sued for the whole amount, even if she made a renunciation.⁴ The benefit of emolument does not seem to have been known before the sixteenth century.⁵ It was especially useful in the Customs which

¹ It might be thought that this could be accounted for by the employment of reference-legacies established by agreement; but if this were so, then why should it have been peculiar to the noble spouse? By making it depend, as we do, on the old tendencies, it is more readily understood; this anomaly, under the community system, only exists among the class of nobles, that is to say where there was the greatest difficulty in having the community accepted.

² Cf., however, *Bacquet*, "Dr. de Justice," c. 21.

³ "Paris, N. C.," 228; "Orléans," 187. — *Contra*: "Ass. de Jér.," "C. des B.," 191; "Bourg.," cf. *Bannelier*, on *Davot*, VII, 332.

⁴ *Loyseau*, 398.

⁵ Perhaps it was introduced under the form of agreements and clauses which were practical. After 1543, *Papon*, "Arr.," 15, 1, no. 25, there were Orders which applied it in the absence of any clause, in spite of the silence of the Custom: *Coquille* on "Niv.," 23, 7 (Order of 1567). These Orders only took into account commoners. The "N. C., Paris," 228, made it a lawful right of all wives without distinction, whether they were noblewomen or

refused to give the wife the right of renouncing.¹ But it was introduced even elsewhere and became general, either in imitation of the benefit of inventory with regard to inheritance, or finally in order better to assure the preservation of personal belongings in case the wife made an unwise acceptance. Originally, the wife who wished to make use of this benefit had to provide herself with royal letters; but it was not long before courts were content with the making out of an inventory.² (b) *Contribution to debts.* Once the creditors had been paid, there had to be a final settlement between the spouses, so as to have each one bear half of the community debts, whatever may have been their origin. But here again the wife could set up against her husband the benefit of emolument; the latter, or, rather, his heirs, could not compel her to bear community liabilities beyond the amount which she had withdrawn from the community. She had recourse against them for everything which she had paid beyond this.

§ 572. **The Married Woman's Mortgage.** — Besides the privileges and guaranties which have been dealt with, the courts granted to the wife a general mortgage over the possessions of her husband. This mortgage was of Roman origin. Admitted in very old times in countries of written law, it seems only to have been recognized in countries of Customs in the sixteenth century.³ At this time it was introduced without difficulty by virtue of the principle that every notarial deed meant a general mortgage; the marriage contract, being drawn up most of the time in the form of a notarial deed, a mortgage dating from the execution of the deed arose therefrom for the benefit of the wife. It was equally admitted that the mortgage would have existed if there had been no contract; but then it no longer had the same date, it only dated from the celebration of the marriage. It guaranteed all the claims of the wife, — dower, marriage portion funds, reference-legacy,

commoners. By reason of this they found themselves in the same position as a silent partner or partner with a limited responsibility. It was no more permissible to deprive oneself of the advantage of the emolument by marriage contract than of the power of renunciation.

¹ "Orléans, A. C.," 1509, Art. 167, 188; *Brillon*, "Dict. des Arr.," II, 263; *Dumoulin* on "Poitou," 259, no. 28.

² *Boucheul*, on "Poitou," 239, no. 29; *Coquille*, on "Niv.," 34, 28; *Pothier*, VIII, 127.

³ *Loysel*, 497; "T. A. C., Bret.," 207 (there is no question of the wife's mortgage because of what she takes back). See *ante*, p. 759, note 2: texts which take into account the implied mortgage or assignment arising because of the existence of dower, in the fourteenth century; "Gr. Cout.," 2, 32 (but *contra*, 17), p. 321; "A. C., Anjou," ed. *B.-B.*, I, 197; *cf.* as to the assignment, "Niv.," 23, 8; "Bourb.," 248; *D'Argentré*, on "Bret.," 410, 3, 4.

and recompenses. Although on principle she only had one and the same date for these various claims (by analogy of guardianship, "initium garendæ administrationis") at the same time one already finds in the Customs and in the decisions attempts at a classification of them; thus with regard to the claim for the price of a personal belonging which has been alienated, or for the indemnity because of an engagement entered into with the husband, they tried to give the mortgage the same date as these claims, — that is to say, the date of the alienation¹ or of the engagement.² In giving her consent to the alienation of the husband's possessions the wife could renounce the right to invoke her mortgage over the possessions which had been alienated,³ which meant that the protection which had been established in her favor (very serious in appearance and very annoying for the husband, whose credit it might ruin) ran the risk of being of scarcely any effect. Yet the wife who lived in community, thus differing from the wife who had a marriage portion, was free to alienate her personal belongings and free to give up her mortgage. It was even proposed to allow her to grant the benefit of this mortgage to the creditors of the husband, to subrogate third parties for herself.⁴ What did it matter, to those against whom this mortgage was set up, whether it was the wife who exercised it or another person in her stead? In any case the creditors of the wife who had a general mortgage over her possessions, and, in consequence, a mortgage on her mortgage, received, in the order which was settled for the distribution of the price of the husband's possessions, the dividend to which the wife had a right; and they divided it up among themselves by means of the complicated proceeding of subdistribution.⁵

¹ "Bret.," 439; "Norm.," 539, 542; *Pothier*, "Douaire," no. 343.

² Parliament of Paris of 1702, 1740, 1742 ("Lyonnais," etc.); *Bannelier*, on *Davot*, VII, 25.

³ *Pothier*, IX, 477. — There was in this a sort of co-obligation, which was contrary to the Velleianum Senate Decree. *D'Argentré*, on "Bret.," 409, "gl.," 3, no. 2 *et seq.*, criticises the employment of the renunciation. But this renunciation allowed the wife to take part in the affairs of the community. In our day practice in developing the tendencies of the old law, "has made of it a true 'means of credit' at the disposal of the wife and the principal element of her influence in the household."

⁴ Those who had dealings with the husband would ask that the wife should also become bound, by giving a mortgage on her possessions; by this means they benefited by the wife's mortgage over the property of her husband.

⁵ This procedure of Sub-Orders, which was in use as early as the seventeenth century in the Parliament of Paris, was confirmed by the Ordinance of the 30th Dec., 1681: *Pothier*, no. 766; "Prov. civ.," nos. 585, 656; *Héricourt*, "Vente des imm.," 11, 14; Code of Civil Procedure, 775 (suppression).

CHAPTER SIX

STATUS AND CAPACITY OF PERSONS

TOPIC 1. CERTIFICATES OF CIVIL STATUS.

TOPIC 2. PERSONS UNDER A DISABILITY.

TOPIC 3. LEGAL PERSONS.

TOPIC 1. CERTIFICATES OF CIVIL STATUS

§ 573. Early Methods of Proofs.

§ 574. Certificates of Religious Status.

§ 575. Certificates of Civil Status.

§ 576. Secularization of Certificates of Civil Status.

§ 573. **Early Methods of Proofs.** — We have not always had special methods of proof for **birth**, **marriage**, and **death**, that is to say, for the principal facts relating to the civil status of persons.¹ For a long while recourse was had to ordinary means in order to establish them, such as testimony,² writings, a confession even, or an oath,³ presumptions;⁴ for example, the requisite age

¹ There are others, which are, however, of less importance; for example, emancipation, etc.

² Ordinary proof by means of witnesses or general repute ("fama"). Admission of the testimony of women with regard to birth: *Beaumanoir*, 16, 6; 39, 30; 49, 54; *Masuer*, 16, 45; "Toulouse," 31 (near relatives). Primogeniture when there are twins: *Brunner*, "Z. S. S., G. A.," 1895, 64. Birth of kings: the confinement is surrounded with a sort of publicity. — As to questions connected with the above: the rule "Infans conceptus pro nato habetur"; likelihood of living ("L. Alam.," 95, and "Wiss.," 4, 2, 17, 18); monstrosities and the custom of putting them to death (which has been kept up among the people), cf. *Stobbe*, § 37; *Post*, I, 15; hermaphrodites ("Zwitter"), *ib.* § 39.

³ *Pertile*, III, 262.

⁴ Especially as to death: *Pertile*, III, 202. — As to absence, see *ante*, and *Bourjon*, I, p. 103; *Britz*, 540; *Stobbe*, I, 268 (history); *Bruns*, "Verschollenheit, Kl. Schr.," 1882; *Tamassia*, "Arch. Giur.," 1866; *Pertile*, § 104; *Glasson*, VIII, 321; *Lehr*, "Dr. Angl.," p. 30. They are dealt with in the writings of the Romanists: "Dissens. Domin.," Index, see "Rest. in int." Cf. Procedure ("Capit.," VII, 226: prohibition of judging persons who are absent; 229). — Domicile: *Homeyer*, "Heimath," 1852 ("Berl. Akad."); *Argou*, I, 12; *Pothier*, I, p. 3, ed. B.; *Glasson*, VIII, 405. — The Italian doctrine established the presumption which was formerly generally accepted: that one was supposed to be dead when a hundred years had elapsed since the time of one's birth: *Brettonnier*, "Quest.," see "Absents"; *Gierke*, "D. Privatr.," I, 365.

for doing homage or exercising certain functions was guessed rather than proved by means of the "aspectus corporis."¹ Marriage and filiation depended ordinarily on the possession of status ("nomen," "tractatus," "fama").² The keeping of registers of civil status relegated to the background these imperfect modes of proving; they were only allowed when registers were lacking, that is to say, when the registers had perished or had not been kept up. As a contrast to this, full faith was given to these registers, which had the advantage of furnishing a preconstituted proof established under the best conditions of impartiality and sincerity.³

§ 574. **Certificates of Religious Status.**—The origin of our legislation on the subject of certificates of civil status is not to be found in antiquity,⁴ but in the customs of the Church.⁵ By the fifth century the clergy made a practice of drawing up lists of baptisms. This practice disappeared, only to reappear in the fifteenth century in the regulations of a few bishops with the special purpose of furnishing information upon the spiritual relationship resulting from baptism, and, consequently, upon the impediments to marriage which were connected with it.⁶ There could be nothing more irregular than the keeping of these records. Nevertheless, in case of need, they were used to prove civil status, being rounded out with the assistance of oral testimony, household registers, and documents, and especially with the "Livres de Raison."⁷ As to

¹ Primitive means of establishing the fact of puberty ("attrectatione barbæ," "alarum," "pubis"): "Schwabenspiegel," 27; "Sachsenspiegel," 1, 42, 1; "F. de Navarre," 3, 4, 3; *Pertile*, III, 262.

² *Pertile*, III, 262. Or even by means of public rumor alone.

³ The Canon law does not bar other forms of proof; it is monarchic legislation and jurisprudence which have done so. Cf. *Fournier*, "Officialités," 1880.

⁴ Entering in the register of the phratria at Athens: *Beauchet*, "Hist. du Dr. privé de la Rép. Athén.," I, 350. In Rome, registration of the newly born, under Marcus Aurelius: *Mommsen and Marquardt*, "Man. des Ant. Rom.," French translation; "Vie privée des Rom.," I, 57, 99, 398; *Derome*, "R. de l.," 1849, 261; *Jèze*, "R. gén. de Dr.," 1894.

⁵ Besides the texts of the Canon law relative to the sacraments and the commentators upon them of old or of recent times (cf. *Hinschius*, § 200; *Friedberg*, §§ 133-156; *Richter*, § 592, etc.), see *Morel*, "De eff. baptismi," 1598 (French author of the eighth century); *Thiers*, "Supperst. q. reg. les sacrem.," 1704; *Corblet*, "Hist. du baptême," 1882; *Duchesne*, "Orig. du culte," 1889; *Viollot*, p. 457 (bibl.); *Gautier*, "Chevalerie," p. 106.

⁶ Henri le Barbu, Bishop of Nantes, 1406.

⁷ That is to say books of accounts (kept by the heads of families, which had become frequent since the sixteenth century, especially in the South): *Tamizey de Larroque*, "Bibliog. des Livres de r.," 1892; *D. D'Aussy*, "R. q. h.," 18th year, p. 239; *De Santi and Vidal*, "Deux liv. de r.," 1896.

marriages¹ and burials,² the clergy were also in the habit of keeping special registers in order to prove them; they aimed by this means to assure the collection of offerings or remunerations which they received when burials took place, and which they even demanded, contrary to the old ecclesiastical discipline.³ These were really account books; the oldest of them date back to the middle of the fourteenth century. Like the registers of baptism, they were often not complete; the keeping of neither of these registers was well regulated or quite general. The Council of Trent in 1563, it is true, made the previous practice regular by ordering the parish priests throughout Christendom to keep registers of baptisms and marriages (Session 24, "De Ref. Matr.," 1 and 2); but it said nothing about deaths, and its orders were not always strictly respected.

§ 575. **Certificates of Civil Status.** — The royal power regulated the keeping of these certificates, and also made it absolutely obligatory. In order to prevent the abuses resulting from the exercise of the pope's right of priority in the matter of the bestowal of religious offices,⁴ the Ordinance of Villers-Cotterets, August, 1539, Art. 50, decreed that the clergy of the kingdom should keep a register of the death and burial of those who had held such office. At the same time, in its Article 51 it established registers of baptism everywhere with the object of proving "the time of coming of age or of minority." In practice there was included in the burial registers even the burial of those who had not received religious office. The Ordinance of Blois, May, 1579, which reenacted these precepts, borrowed besides, from the Council of Trent, the keeping of a register for marriages whose solemnization in the face of the Church was henceforth prescribed under penalty of nullity. This matter was definitely regulated by

¹ As to the proof of marriage, cf. *Esmein*, "Mar.," I, 191; "A. C., Artois," ed. *Tardif*, 49, 5. — Italy: custom of keeping among the archives of the churches the contracts of the marriages which had been celebrated therein: "Nov.," 74, c. 5; *Pertile*, III, 264.

² As to burials: Dig. X, 3, 28 and the Commentaries; *G. Durand*, "Specul.," 4, 3, "de sepult.," *Lancelot*, II, 24; *Héricourt*, "G.," XII. Cf. *Friedberg*, § 95 (bibl.); "Siete Part.," I, 13.

³ There are in existence such records from 1335 to 1350, and of the year 1378: "Mém. Acad. Dijon," 1865, XIII, 31; *Viollet*, 461. In Italy there were still older customs: *Pertile*, III, 263.

⁴ Cf. *Thibeaudeau*, p. 69. The papacy gave a preference to those which bore the earliest date at Rome after the death of the one entitled to the office, provided that the messenger sent with the request had not started out before the death: *Fleury*, "Inst. au Dr. ecclés.," II, 21. If the date of the death was not legally proven, frauds became an easy matter: Code of Henry III, 1, 17.

the Ordinance of 1667, T. 20, and the Declaration of April 9, 1736.¹ The depositing of the registers with the clerk of the royal judges assured their preservation, and it was forbidden for the judges to receive any other proof of civil status (excepting when no registers had been kept or they had been lost).²

§ 576. **Secularization of Certificates of Civil Status.** — The monarchy did not always keep up the observance of its laws in matters of civil status with all the strictness which was desirable. Perhaps these laws would have been better respected if the keeping of the certificates of civil status had been confided to public functionaries who were more dependent upon the State than were the clergy. This progress was only realized in the last years of the Old Régime, and then only in the case of the Reformers. Protestant ministers had at first kept registers of civil status according to the example of the Catholic priests; but the Decree of October, 1685, which revoked the Edict of Nantes, abolished this practice. The Protestants were under the necessity of having their children baptized by Catholic priests if they wished to have a legal proof of their filiation; they had to be married before these same priests in order that their marriage should be valid and proved. The Edict of November 28, 1757, caused this inhuman treatment to cease by allowing them to apply as they might wish to the parish priests or to the officers of justice in the locality; moreover, the parish priests in these cases set aside their religious character in order to act as a public functionary. This was only a half measure, because legislation had become secularized with respect to those who were not Catholics, but remained religious with respect to those who were Catholics.³

¹ A double set of registers are kept, but ordinarily there is only one: *Isambert*, Table, see "Actes de l'état civil." Details given in *Thibaud*, pp. 74, 81, 166, 169 (taking of holy orders), 101 (facts established "de visu" by the parish priest, and facts which are reported to him by the persons making the declarations); *Sagnac*, p. 261.

² Italy: municipal registers of emancipation from the fourteenth century on (they had begun by making a memorandum of these certificates, because of their character, upon the registers which contained the decrees of the communes). Registration of proclamations at about the same date. From these customs there perhaps arose, in the fourteenth and fifteenth centuries, the establishment of registers of civil status in the Italian towns, at first at Sienna, at Bologna in 1454, etc. Nevertheless the system of registers kept by the clergy prevailed until the time of the French Revolution: *Pertile*, § 105.

³ *Isambert*, Table, see "Actes de l'état civil," "Culte protestant"; *Guyot*, see "Religionnaires"; *Thibaud*, p. 224 (Alsations), p. 174 (Jews); Declaration of the 11th Dec., 1685: register of the deaths of reformers kept by the royal judge.

The Constituent Assembly, adopting a more radical system, which was the only one in harmony with the principle of the freedom of conscience, secularized the registers of the civil status for all Frenchmen, without any exception. Their keeping was entrusted to the municipalities by the Legislative Assembly, and to the mayors and their deputies by the Law of the 28th Pluviôse of the year VII.¹

¹ "Const." of 1791, 2, 7; Decree of Sept. 20-25, 1792; *Thibeaud*, p. 239; *Sagnac*, p. 271. In Germany and Switzerland the secularization only dates from 1875.

TOPIC 2. PERSONS UNDER A DISABILITY

§ 577. Status and Capacity of Persons.

§ 578. Foreigners or Aliens.

§ 579. The Same. — (A) The Feudal Law.

§ 580. The Same. — (B) Transformation of the seigniorial right into a domanial right.

§ 581. The Same. — (C) Nationality.

§ 582. The Same. — (D) Disability of aliens or right of succession to the estate of deceased aliens.

§ 583. The Same. — (E) How did the Crown's succession to the estate of a deceased alien disappear?

§ 584. Those Civilly Dead.

§ 585. Entering Religious Orders.

§ 586. The Penal Civil Death.

§ 587. Lepers and Outcasts.

§ 577. **Status and Capacity of Persons.** — The enjoyment of rights varied a great deal in the old times according to nationality (foreigners, non-residents),¹ religion² (clericals,³ monks, crusaders,⁴ heretics,⁵ Jews),⁶ social condition⁷ (nobles, commoners, serfs,⁸ slaves), and penal condemnations (civil death, public disgrace, dishonorable professions). Sex, age, and infirmities, which to-day have hardly any effect excepting upon the capacity "stricto sensu" or fitness to exercise the rights which one has ("Handlungsfähigkeit"), formerly affected even the enjoyment of these rights

¹ As to the Bohemians or "gitanos" who appeared in France in the fifteenth century, cf. *De Rochas*, "Parias de France," 1876, see "Gr. Encycl."

² *Gierke*, "Deutsch. Privatr.," § 54; *Ruffini*, "Liberla religiosa," 1901; *Bonet-Maury*, "Hist. de la lib. de consc.," 1901.

³ *Poncet*, "Thèse," 1901; "Tract. univ. jur.," VIII (privilege of students, etc.).

⁴ *Bridrey*, "Cond. jurid. des croisées," "Thèse," 1900.

⁵ Cf. "Wis.," 12; Dig. X, 5, 7 and the commentaries; *G. Durand*, IV, 4; *Lancelot*, "Inst.," IV, 4; *Corvin*, IV, 7; *Héricourt*, "E.," 24; *Delamare*, "Police," II, 4; "Siete Part.," VII, 26; "Tract. univ. jur.," XI; *Pollock and Mailland*, II, 542. — On the Inquisition see *Lea*, "Hist. of the Inquis.," French translation, 1900, and the articles by *Alex. Bertrand*, *Ch.-V. Langlois*; *Douais*, "Doc. pour servir à l'hist. de l'Inquis.," "La procéd. inquisit.," 1900; "Ann. du Midi," 1902, XIV; "Mgr. Douais et l'Inquis.," — As to the Protestants, cf. "Code civ. interm.," see "Religionnaires."

⁶ See among other texts, "Wis.," 12; Dig. X, 5, 6 and the commentaries; "Capitul.," Table, see "Judæi"; see *Du Cange*; *Delamare*, "Police," II, 3; *Britz*, 509; *Fischer*, "De statu Jud.," 1763 (Metz); *Stobbe*, "Juden in Deutschland," 1866; "Handb.," § 46; *Gierke*, "D. Privatr.," § 55; *Pollock and Mailland*, I, 451; *Pertile*, 99; *Glasson*, VII, 74. Theses: *Gasnol*, 1897; *Lucien Brun*, 1900; *M. Maynial*, "La quest. juive en 1789," 1903; *Fauchille*, "La quest. juive s. l'Empire," 1884; *Iteinberg*, "Z. Gesch. d. Juden" (Switzerland), 1902.

⁷ *Heusler*, § 36; *Stobbe*, § 46; *Gierke*, "Deutsch. Privatr.," § 46 et seq.; *Regnier*, "Thèse," 1900 ("Dist. des classes dans la société Allemande actuelle"); *Ritou*, *id.* (Basques); "R. h. Dr.," I, 407 (Oviedo); *Michelin and Legrand*, "Cond. des pers. d'ap. le Koran," 1879; *Post*, § 125; "Tract. univ. jur.," XVI.

⁸ *Chopin*, "Privil. rustic.," 1875; "Tract. de privil.," 1582.

or the fitness to have them ("Rechtsfähigkeit"). This is what we have already seen with regard to public law and the family. It remains only to complete upon a few points the explanations which have already been given.

§ 578. **Foreigners or Aliens**¹ were in the early times without any rights in the social group to which they did not belong.² Everybody was free to ill-treat them, to make them slaves, or even to kill them with impunity; there was nobody to avenge them.³ It is in pursuance of these ideas that the shipwrecked sailor belonged for a long time, body and possessions, to the lord of the land where he came ashore.⁴

¹ "Albanus" from "Albi," elsewhere (popular Latin), "alibanum"; etymology which is certain and which relieves us from the necessity of mentioning the current fanciful explanations. Charter of 820 giving the Bishop of Paris jurisdiction "de incolis qui rustice albanii appellantur," over the land owned by Notre-Dame: *Lasteyrie*, "Cart. de Paris," 1887, I, no. 31 (discussion as to its authenticity). — Other names: "Peregrini" (pilgrims), see *Du Cange*; "advenæ"; "alalienigenæ"; "Wargangus," "L. Fr. Cham.," 9; "Roth.," 367, cf. "Wargus," the person outside the law (outlaw); various explanations: a person who begs alms from house to house ("alilanti," which is equivalent to "der Elende"); *Grimm*, "R. A.," II, 335; or a person who is protected, "wara" meaning protection, *ib.*, II, 143. Cf. "Sal.," 45: "homo migrans," that is, a stranger in the village, the inhabitant of another village who migrates; he is not a foreigner, i.e., one who is not an inhabitant of that country; also there is no question of anything save a legal expulsion declared against him. See also the collective responsibility of communities, *ante*, § 356. English system of the frankpledge, *Pollock and Mailland*, I, 554.

² The majority of them were malefactors, persons who had been banished, exiles or else spies sent by the enemy.

³ *Viолет*, 265; *Post*, I, 448; *Grimm*, 396; *Michelet*, 406. — *Salvien*, "De gub. Dei," V, 9; *Méginhard* (ninth century), "Transl. S. Viti," 13: "Transl. S. Alex.," 13. Cf. "Burg.," 38, 39; "Ina," 20: he is treated as a thief "si nec vociferaverit nec cornu insonuerit"; thenceforth, if he takes care to call out, he is neither killed nor reduced to slavery: *Siegel*, § 130. — As to the Moors, cf. "Siete Part.," VII, 25; *Dig. X*, 5, 6; *Glasson*, VI, 662.

⁴ Right to wreckage, "lagan" ("laga," law); see *Du Cange*; *Pertile*, III, 200. It is difficult to see in this an extension of the right of occupation of "res nullius" which was admitted of by the Roman law, for the things which happened to be cast up were not "res nullius," and the person who took possession of them ran the risk of being punished as a thief: "Cod. Just.," II, 5, 1; Pact of Sicard de Bénévent in 836. Cf., however, *Zanetti*, "Legge Romana ret. coir.," p. 125; "Cod. Euric," 282; "L. Wis.," 7, 2, 18, ed. *Zeumer*. Reprisals against the Normans and other pillagers must have contributed towards the maintenance or even towards the development of the right to wreck. According to certain very old documents, the Pagans regarded the ocean as a cow which gave itself up to them; as soon as a vessel in distress made its appearance they all ran down to the shore with drag-hooks in order to take possession of the wreckage: *Grimm*, "R. A.," 250. In the eleventh century the Church, going back to the Roman tradition, excommunicated those who availed themselves of this barbarian right: *Dig. X*, 5, 17 (1179). Frederick II abolished this right in his Constitution in favor of foreigners, in 1220, c. 9: "M. G. H., L. L.," II, 243; Authentic "Navigia" under "C. J.," 6, 2, "de furtis," 18; *Schroeder*, 520; "Const. Sic.," I, 29; "Rôles d'Oléron," 29. But it still continued to exist in many places under the name of local custom. The "Ass. de Jér.," "C. des B.," 46, had also done away with it. In France

Hospitality¹ imposed by Customs,² and sometimes by the law,³ tempered the severity of this right; the foreigner ceased to be treated as an enemy as soon as there could be found a member of the community to take him under his protection, to become surety for him, and to admit him as a guest in his own family.⁴ So the first aim of the foreigner came to be to find himself a patron (from this arose the old custom of going to sit at the fireside of the family under the protection of the household gods).

Following the invasions and the mingling of races which was the result of them, and following the establishment of the Frankish State, whose subjects were of various nationalities, and following the conversion of the Alamans to Christianity and the influence of the Roman customs, the prejudice against foreigners lost its force. Those who belonged to the divisions of the Frankish State were not looked upon as foreigners when this State was divided up into several kingdoms; this division was often only provisional, and there subsisted a certain moral unity and rather frequent relations between the new States. But still more than the nationals did strangers find themselves under the necessity of having a patron (*cf.* "right of the lord"). The patronage of the king had always been especially sought, because it was more effective; it alone was exercised in a beneficial way over the travelers and the pilgrims who were passing through the

a treaty of 1231; Ordinance of 1277, 1461, etc.; *Isambert*, Table, see "Bris et naufr."; *D. Vaissette*, V, 1114. *Cf.* "Aucassin et Nicolette," ed. *Suchier*. The Ordinance of 1681, 4, 9, 1 and 45, placed under the protection of the king vessels which were wrecked, and punished with death those who lighted fires at night on the shore in order to attract and shipwreck them. As the right of wreck disappeared it became necessary to determine what was to become of the things washed ashore which nobody claimed. *Cf.* the Ordinances of 1543, 1567, etc. — *Pappafava*, p. 22 (*bibl.*); *Linyer*, "Le Dr. d'épaves dans la législ. actuelle," 1903.

¹ *Cf.* *Post*, I, 449; *Osenbrüggen*, "Stud.," p. 19; "Dig. Ital.," see "Alberghi"; *Lehmann*, "Abhandl.," 1888.

² Texts of Scripture: "Exodus," xxii, 21; xxiii, 9; "Leviticus," xix, 33, and xxxiii, 22; "Deuter.," x; xviii, 19.

³ *Cæsar*, VI, 23; *Tacitus*, "Germ.," 22; "Burg.," 38: penalty against any one who sends away a guest refusing to receive him, and against the Burgundian who sends him to a Roman; *Cassiod.*, "Var.," 14; "Bal.," 3, 14; Capitulary of 802, 27 (I, 96); *Anség.*, I, 70; Capitulary of 803, 20, etc., I, 131, 193, etc.: *Bened. Lev.*, I, 364. *Cf.* *Rozière*, "Form.," nos. 27 *et seq.* — *Grimm*, "R. A.," 400. Rights of the passer-by: "Roth.," 358; "Wis.," 8, 4, 27, etc. — "Cout. de Bigorre," 24; "Wis.," 11; "Barcelona," 629 (peace of the roads).

⁴ On principle the foreigner observes the law of his patron, but the king sometimes authorizes those who are under his protection to live according to the law of their domicile of origin: "Roth.," 190; *Rozière*, no. 27 (Jews). *Cf. post*: "guidaga," "ducatu," during the feudal period, for the foreigner who is only passing through, or the merchant: *Dareste*, "N. R. H.," 1903, 483.

kingdom. It became subsidiary, that is to say, the king made himself a patron of those who had no patron.¹ For this protection the king collected an annual rent, the "Wergeld" and the inheritance of those who were subject to it,² at least, if they died without heirs. By means of an order³ it was prescribed that the "missi" should draw up a list of the foreigners who were found within their circle of inspection.⁴

§ 579. **The Same.** — (A) *The Feudal Law*⁵ continued the Barbarian law, but emphasized it. Instead of becoming the exclusive monopoly of royalty, the patronage of aliens and the beneficial rights which it admitted of became dispersed more and more among the lords.⁶ Annoying consequences resulted therefrom; (a) thenceforth the individual who does not belong to the lords' domain is looked upon as a foreigner, even if he be a Frenchman;⁷ (b) at the same time, the greed of the lord's treasurer exaggerated his rights over aliens, as over other persons of inferior condition besides. The alien had to declare himself the man of the lord upon whose lands he established himself;⁸ he was ordinarily granted for this a period of a year and a day,⁹ at the expiration of which he

¹ Schmid, "Ges. d. Angels.," p. 126; Council of Paris, 996 (*D. Bouquet*, X, 627); I, 125. Also with regard to the Jews, it seems that the king, from the Frankish Period on, exercised over them a general patronage. At the same time this point is one which has been discussed: *Gierke*, "D. Privatr.," I, 438.

² "L. Fr. Cham.," 9; "Ina," 23; "Cnut," 40; "Bai.," 4, 30; "Capit.," I, 447, c. 2; *Mabillon*, "Ann. Ord. S. B.," II, 699; *Mühlbacher*, "Reg.," no. 152. The Lombard law, "Roth.," 390, does not allow them to dispose of their possessions "absque jussione regia"; however, if they have any legitimate children the latter will receive them in their capacity of heirs. Can they receive an inheritance? It would seem not (argument to the contrary in the Capitulary of 806, c. 9, "Divisio regni": the subjects of those kingdoms established by having been divided may succeed one another); "Epist. ad Offam." Cf. "Rib.," 31, 3; 36.

³ Particular measures, such as the "Præceptum pro Hispanis," 812, 815. See also *Imbart de la Tour*, in the "Mél. P. Fabre," 1902 (agricultural colonies and occupation or cultivation). Cf. German colonies, *Blondel*, *Meitzen*, *op. cit.* Cf. *Sée*, "Classes rurales," p. 62; *Flach*, "Orig.," II, 139.

⁴ Capitulary of 803, 6, and of 806 (I, 115, 447); *Bened. Lev.*, VI, 222; "App.," II, 4.

⁵ *Du Cange*, see "Albani," etc.; "Olim," see Table; *Ragueau*, see "Aubaine."

⁶ Terms: estray, unrecognized, alien, etc.: *Du Cange*, see "Forenses"; *Rastall*, see "Foreign." — *Pertile*, III, 193.

⁷ Strangers to the bailiff's jurisdiction, to the diocese: *Loudunois*, 2, 5; "Tour.," 2, 3; *Brussel*, "Us. des fiefs," III, 16; *Stobbe*, I, 310.

⁸ During the year and a day the alien may declare himself to be the man of another lord or of the king: "Et. de St. Louis," II, 30; "Agen," 33 (a year and a month within which to choose one's lord); *Laroque-Timbaut*, 51; *Loysel*, 44. Sale of the "justitia albanorum." Act of 1232 cited by *Demangeat*, p. 99.

⁹ Oath of aliens: "Gr. Cout.," 2, 29. The alien keeps his station; if he is a commoner he does not become a serf, etc.

could be seized, body and possessions.¹ Assuming that he made the declaration, he was often treated like a serf,² and this is what happened in the domains where serfdom was the rule, where the "air makes one a slave" (excepting in the case of gentlemen);³ on the contrary, in domains where the "air makes one free,"⁴ or serfdom does not exist or is only an exception, he is free. In the former case his condition is easy to determine; let us notice especially that he is subject to mortmain. On the second supposition, he is treated like the commoners of the locality in which he lives, subject to the same rights, and, furthermore, affected by incapacities which varied, the most common of these being the following: his inheritance belongs to the lord ("liber vivit, servus moritur"),⁵ at least if he does not leave any descend-

¹ "Et. de St. Louis," I, 92; 100. Difficulties arise as to these texts. The mistake has been made of trying to draw a distinction between the foreigner of unknown origin (c. 100) and the foreigner coming from a neighboring feudal jurisdiction (c. 92): *Viollet*, p. 366, n. 5; *Du Cange*, see "Explectabilis."

² This comparison with the serf has been contested. But cf. *Beaumanoir*, 45, 19; *Châteauneuf*, II, 20; "Cout. d'Anjou," ed. B.-B., I, pp. 232, 311; *Math. Paris*, "Hist. Angl.," in 1213. Prosecution of aliens: *Du Cange*, see "Albani." Marriage out of one's station: *Bacquet*, *op. cit.*; "Châlons," 16 (argument to the contrary). Rent, "cens," "census," "forasticus": *Demangeat*, p. 100 *et seq.* (texts of the eleventh century); *Viollet*, "Et. de St. Louis," IV, 303. Mortmain: "Et. de St. Louis," II, 31 (II, p. 439); "Jostice," p. 255; *Loysel*, 68, 101; *Ragueau*, see "Parcours." — "Wildfange" (especially in the Palatinate): *Grimm*, "R. A.," 327, 399. — In the same way the Jews were considered "servi principum": *St. Thomas*, "Summ. theol.," sec. q. x., Art. 2; "Schwabenspiegel," 260 (214). They were not foreigners properly speaking, for they did not come from some outside country. In the Frankish Period they had already been placed under various disabilities which were not due to anything but religious prejudice; but they were not likened to slaves: Edict of Chlot., 2, 10; Capitulary of 850, c. 24. How does it happen that their position became worse afterwards? *Heusler*, § 35. Influence of the crusades.

³ *Vitry*, 72; see *Ragueau*.

⁴ *Beaumanoir*, no. 972, ed. *Salmon*; *Larroque-Timbaut*, 53. The majority of the municipal charters provide for the settling of the foreigner: *Loysel*, 24; "Toulouse," 155, 156; "Lézat," 2; "Montpellier," 31, 45, 93, 105; "Albi," 4; "Agen," 33; "Charroux," 3; "Martel," 18; "Apt," 38, etc. Sometimes they provide for favors to be conferred upon the foreigner: *Pertile*, III, 290. Protection by way of guidance, safe-conduct, an escort, especially when fairs and markets were being held: *Huvelin*, "Thèse" (escort, letters); *Du Cange*, see "Ducatus," etc. Opposition between the inhabitants and the citizens: *Soulages*, "Cout. de Toulouse," Municipal Ordinance of 1731. — German "Gastgerichte": *Osenbrüggen*, *op. cit.* England: (*Lehr*, p. 27) mixed juries, Court of Piepoudre (for alien merchants). Cf. as to this expression, "L. Burg.," 140; "L. d. Dr.," no. 486.

⁵ To allow a foreigner to inherit, would have been to have allowed him to take out of a lord's domain the property which was to be found therein, which amounted to the same thing, according to the ideas of that period, as the commission of a species of theft at the expense of the lord. Sometimes he was absolutely refused the right of inheriting, sometimes the lord was allowed to keep a portion of his possessions. The lord was authorized to enforce a restraint of this same nature over the possessions of the person who left his domain ("gabella emigrationis"): *Stobbe*, I, 312, 316. Fre-

ants born in the lord's domain;¹ he cannot make a will,² nor can he inherit upon intestacy or by will; he is forbidden to acquire lands³ or to exercise any public function;⁴ his penalties are more severe and his taxes are higher;⁵ he is subject to reprisal,⁶ to arrest or dstraint carried out by an individual,⁷ and to expulsion.

The reaction against this severe treatment thus inflicted upon the foreigner came from the Church and the monarchic power. In 1220 the Authentic "Omnes Peregrini" of Frederick II,⁸

quently the inheritance of the foreigner was found to be without an heir to take it, for his relations were either unknown or far away. *Cf. Pertile*, III, 189. Possibly these ideas would not have sufficed to give rise to the right to the succession to the estates of deceased aliens, but they had a sufficient amount of influence to keep up, on this point, tradition which was hostile to the foreigner and which refused to give him any rights: *Brunner*, "D. R. G.," I, 275.

¹ "A. C., Verm." nos. 140, 141 (right to make a will): *Pertile*, III, 196; "L. d. Dr.," no. 376.

² *Cf.*, however, "Et. de St. Louis," *loc. cit.*; "A. C., Verm.," p. 80; *Picot*, "Hist. des Etats Gén.," I, 469.

³ "Sal.," 45; "Salon": consent of the Court: *Giraud*, II, 260. Italian Statutes: *Pertile*, III, 191. Sometimes prohibition of giving any marriage portion to the woman who married a foreigner, *ib.*; especially in Italy and in Germany: *Stobbe*, I, 310 ("landsassiatu plenus"). Repurchase of merchandise: "Montpellier," in 1205, 6. In England, until 1844, foreigners could not acquire any immovables (or ships) by any right whatsoever, under penalty of having them confiscated. The foreigner married to an Englishman could not therefore have any dower, and the foreigner married to an Englishwoman could not enjoy the advantage of the curtesy of England: *Blackstone*, II, p. 54, French translation. *Cf.* on the establishing of these rules, *Pollock and Maitland*, I, 445 (relations existing between France and England). In Languedoc the Jews possessed lands: *Saige*, *op. cit.* But this was not generally so.

⁴ "Arles," "Salon," "Carcassonne," etc.: *Giraud*, II, 131, 153, 254. Italian Statutes: the position of notary, or of advocate: *Pertile*, III, 190. Sometimes even he was excluded from the practice of certain professions. They could only become members of corporations after the Edict of August, 1776, Art. 9. "Montpellier," 109: they could not fall back upon the legal tariff for merchandise; their testimony was not admissible in court; surety "judic. solvi," *ib.* In their case penalties were more severe ("Arles," 17, 18) and procedure more strict, *ib.* Creditors who were members of the nation were given preference over foreign creditors. — Marriages between members of the nation and foreigners sometimes burdened with formalities, and at other times looked upon with favor: "Montpellier," 93. — *Tonneins*, 91. *J. Faure* questions as to whether a foreigner may be a guardian, I, 26a (*cf.* Table).

⁵ Arles, 1235, in *Giraud*, II, 6 *et seq.* *Cf.* penalties at fairs: *Huvelin*, "Thèse," p. 467.

⁶ "Montpellier," 23, 29 to 34; "Carcassonne," 138; *Pasquier*, "Inst.," 176; *Stobbe*, I, 318; *Pertile*, § 34; *Pappafava*, p. 29; *Huvelin*, p. 443; *Del Vecchio and Casanova*, "Rappresalie n. communi medievale" (Florence), 1894.

⁷ "Montpellier," 29 *et seq.*; "Arles" in *Giraud*, II, 165; "Albi," 5; *Martel*, 19, 23; "Bord., A. C.," 101; "Arch. lég. de Reims," I, 38; *Pertile*, III, 191. No giving up of possessions: Ordinance of 1667, 34, 1; 1673, 10, 2; *Stobbe*, I, 318. *Cf.* franchises of fairs: "Cod. Just.," 4, 60, 1; *Huvelin*, "Thèse," p. 438.

⁸ "Const. Frid.," II, § 10; following the "L. Feud." (or "M. G. H., L. L.," II, 243, c. 8); Authentic on "C. J.," 6, 69; *Isambert*, III, 128. *Pertile*, III,

re-enacted by Louis the Headstrong in 1315, granted them the right to make a will, and, if they had no heirs at law or testamentary heirs, conferred their possessions upon the poor or upon the Church. It is true that these provisions were scarcely ever applied. At the same time, local causes which were more efficacious, — relations, commercial or otherwise, between towns and lords' domains, — caused the right to the succession to the estate of a deceased alien to disappear, especially in the interior of the kingdom.¹ Sometimes, for example, at Nice, in the thirteenth century, one finds the principle of reciprocity established; there foreigners were treated in the same way as the inhabitants of Nice were treated in their country.²

§ 580. **The Same.** — (B) *Transformation of the seigniorial right into a domanial right.* Through an evolution similar to that which took place during the Frankish period, the avowry of the king became subsidiary but ended by being exclusively recognized. In the domain of the crown every alien who had not been made one of the lords' men within a year and a day became the king's man.³ In time the alien could not, indeed, recognize any other lord than the king; this was so from the thirteenth century in the District of Orléans.⁴ About the same period an Ordinance inserted in the "Olim" of Parliament, II, 456, under the significant title of an "Ordinance Relating to People Subject to Mortmain, Aliens and Bastards," bears witness to the frequency of the contentions between the lords and the agents of the king with relation to the inheritances of these three classes of persons.⁵ Only the rights of the high lords-justices are recognized; moreover, it was necessary that there should be no adverse possession. During the reaction which took place after the reign of Philip the Handsome these rights were still recognized in 1315. But at the end of

195, cites earlier provisions enacted by the Holy See as applying to its domain (1169). Cf. texts which confer one-half of the inheritance upon the host and the other half upon the town. The host took the clothing of the foreigner: *Stobbe*, I, 315.

¹ "Montpellier," 30; "Châtelblanc," 1303, Arts. 5 and 6; "Châtillon," Art. 25 (*Giraud*, II, 346); "Albi," 1220, 1 and 2; "Saint-Maurin," 1352, 2, etc.; "Montpellier," 108, 114; *R. Caillemer*, "Admin. de success. par les pouv. publics," 1901.

² *Pertile*, III, 197.

³ "A. C., Champ." (*B. de Richebourg*, III, 218).

⁴ "Et. de St. Louis," II, 31. Cf. Charter of Juvisy in 1136; *Glasson*, VII, 67. A similar evolution as far as the Jews are concerned: "Schwabensp.," 214 (w.): they are the serfs of the "camera" (treasurer) of the Roman king.

⁵ "Olim," II, 456; III, 211, 223; *Vuitry*, "Et. s. le rég. fin. de la France," I, 442; *Ducoudray*, "Orig. du Parl.," p. 809.

the fourteenth century (1386) Charles VI was seen to appropriate to himself the inheritance of aliens throughout the whole of Champagne, no matter in what jurisdiction of high justice they might have died.¹ The same phenomenon of concentration had taken place in the domains of the great feudatories. As the king inherited from them, a universally royal succession to the estate of the deceased alien² was the system which was in force from the sixteenth century, excepting under certain Customs which, stopping half way along this path, still connected the right of succession to the estate of deceased aliens with high justice.³ This change had happy consequences for foreigners. It made their condition uniform and moderated it; at the same time, it diminished their number, because there was no longer any question of foreigners to the lord's domain, but only foreigners to the kingdom.

§ 581. **The Same.** — (C) *Nationality*.⁴ Feudal particularism for a long time obscured the idea of nationality; one was a Breton or a Gascon rather than a Frenchman. But with the absolute monarchy and the long wars against neighboring peoples this idea became rooted in public opinion just as it did in the law. The fact of birth decided first of all what was one's nationality; anybody who was born on French soil was a Frenchman, whether his parents were French or foreigners ("*jus soli*").⁵ In the sixteenth century there were certain disputed cases; in the eighteenth century a new principle came to light in some cases, that of the "*jus sanguinis*." It was said that nationality and the attachment which one has for a country could not depend upon an accident such as birth during the progress of a journey or during a very short and sometimes compulsory sojourn. Chance should no more create nationality than it does relationship. Thenceforth there is a *tendency* to

¹ "Ord.," VII, 156; *Desmares*, 295; *Lecoq*, 290.

² When he delivered letters of naturalization, the king took away from the lords their right to the estates of deceased aliens.

³ Exceptions: *Ragueau*, see "Aubenage"; *Dumoulin*, on "Anjou," 41; "Maine," 48; "Tours," 43; *Loysel*, 71; *Glasson*, VIII, 296. But in the eighteenth century no attention was paid to Customs which might be contrary to this, the sovereignty of the king not being subject to prescription: *Argou*, I, 11.

⁴ *G. de Lapradelle*, "Nationalité d'origine," 1894.

⁵ The English law is one of those which most logically have admitted the "*jus soli*" (cf., however, *Pollock and Maitland*, I, 441: discussion in 1343; *Blackstone*, II, p. 54, French translation): whoever is born on English soil is an Englishman, whether his parents were English or not; and no one else is an Englishman (excepting he be naturalized); on the other hand, he who is born an Englishman can only cease to be such with the consent of the sovereign (perpetual allegiance). Oath of allegiance: *Blackstone*, II, p. 46.

take into account the nationality of the parents in order to determine that of the child;¹ thus the child who is born abroad of a French father is a Frenchman, — unconditionally if the father has not given up all expectation of return;² and, upon condition of setting up a domicile in France, if he has given up this expectation. Conversely, the status of being a Frenchman is lost by the establishment of a domicile abroad without expectation of returning.³ In case there is a return to France, then, “*ipso facto*,” one becomes once more a Frenchman (without any retroactive effect).⁴

Foreigners became Frenchmen, apart from the annexation of territory, by becoming naturalized. At first only the connection with some lord's domain or the acquiring of citizenship in some town was recognized; later on the citizenship of the king, when it took on a personal character, served as a preliminary step to the acquiring of nationality. From the middle of the fourteenth century the king could give **letters of naturalization** without consulting any special body of citizens.⁵ There were no other conditions required than the pleasure of the king.⁶ At the same time, scarcely any people were naturalized excepting those who resided in France.⁷ The delivery of these letters⁸ ordinarily was based on the payment of a fee which was in proportion to the fortune

¹ *Blackstone*, II, 57, French translation, says that in this, differing from what takes place in England, a child born in France of foreign parents is a foreigner. But *Pothier*, nos. 43 *et seq.*, says the contrary.

² *Pothier*, no. 65; “*Arr. de l'Anglaise*,” 1576; *Boerius*, “*Decis.*,” 13. But *cf. Glasson*, VIII, 282; *Bacquet*, II, 128.

³ Penalties against the Protestant Reformed refugees under Louis XIV; the revolutionary legislation against the émigrés is nothing more than an imitation of the provisions taken by the Old Régime against the Protestants: *Maria*, “*Acad. lég. Toulouse*,” 1903.

⁴ *Pothier*, nos. 62, 63, 66 (details).

⁵ Manuscript letters cited by *Viолет*, 372, 1 (in 1341: we declare A. G., together with his children already born and to be born, to be our citizens of Paris, of Montpellier and of all our kingdom) and 2 (in 1340). *Viолет*, 371, cites a case (which is very exceptional) of naturalization by the lord in 1497. — See *Ferrière*. — *Glasson*, VIII, 286, distinguishes between letters of naturalization and letters of a declaration of intention of becoming naturalized.

⁶ The giving of letters of naturalization gave rise to abuses; too many of them were given. The “*Etats de Blois*,” 1576, asked that they only be granted to those who had resided ten years in France: *Bacquet*, p. 73. A Declaration of February, 1720, revoked all letters granted to non-residents. — The English law placed many obstacles in the way of naturalization and did not allow a naturalized person to sit in Parliament.

⁷ In old times the attainment of citizenship assumed ordinarily the establishment of a residence, the acquiring of a house or lands: “*Arles*” in *Giraud*, II, 89; “*Salon*,” *ib.*, p. 248.

⁸ Registration in the Chamber of Accounts: *Pothier*, no. 51. Entering (Edict of Dec., 1703): *Glasson*, VIII, 284.

of the person becoming naturalized.¹ Sometimes these letters were collective,² and they were then practically confused with that which is ordinarily called the "benefit of the law." The naturalized foreigner, on principle, had the enjoyment of the same rights as native Frenchmen;³ but his children only had the advantage of this naturalization if they had been expressly included within it.

§ 582. **The Same.** — (D) *Disability of aliens or right of succession to the estate of deceased aliens* "sensu lato." Aliens were excluded from ecclesiastical benefices and public office,⁴ even from guardianship.⁵ But they had the enjoyment of many private rights; the distinction between those which were refused them was rather arbitrary and rather to be connected with old tradition. Moreover, there was a *tendency* for this doctrine to depart from its theoretical foundations; it granted to aliens the enjoyment of those rights which formed a part of the law of nations and refused them rights based on local law, — a learned standard, but one which did not have any great practical bearing.⁶ As a matter of fact, the acquisition even of immovables and granting "inter vivos" were allowed them, — for example, the gift. On the other hand, they were incapable of acquiring and giving "causa mortis" (right of succession to the estate of a deceased alien "sensu stricto"); thus they could not receive any inheritance upon intestacy or by will;⁷ nor could they have heirs at law (with the ex-

¹ Exception (*Viollet*, p. 372), for Laurent de Médicis, 1519.

² Converted Portuguese Jews, 1550. Workmen of the Gobelins, of Beauvais, etc. Declaration of 1687: those who have served five years in the army or navy.

³ A few restrictions: *Demangeat*, p. 166: Ordinance of Blois, 1579, 4; *Warnkoenig*, II, 187. Exemption from the right of taking the estates of deceased aliens only conferred rights of succession: *Pothier*, no. 60. Denization in England differs from naturalization, although it carries with it some of the effects of the latter; it results from letters patent from the king, whereas naturalization has for a long time required an act of Parliament. The denizen became a British subject, but had not the same rights as an Englishman by birth. He could acquire lands, excepting by succession or grant from the king; he remained subject to the special taxation which affected foreigners; he could not hold public office nor have a seat in Parliament: *Blackstone*, II, p. 53, French translation; *Pollock and Maitland*, I, 443.

⁴ *Pothier*, *loc. cit.*; *Glasson*, VIII, 287, 303 (special provisions against foreigners).

⁵ Also in the application of these disabilities there are controversies which it is practically impossible to settle: the alien is recognized as having a right to marry, to contract, and to acquire ownership; but can he gain by prescription? Can he make use of the repurchase by a person of the same lineage, etc.? *Glasson*, VIII, 290.

⁶ The foreigner can have a domicile, which is a piece of property in fact.

⁷ Cf. treatises on the law of succession, for example *Lebrun*. According

ception of their legitimate children born and residing in France)¹ nor dispose of their possessions by will (they only had a right to make a will of five sous for the salvation of their soul).² They could marry and enjoy the majority of the family rights.³ Outside of civil disabilities the foreigner was subjected to certain rules of procedure in the absence of which he would have been able to "suck the blood and the marrow of Frenchmen and then to pay them by becoming bankrupt and by going back to his own country." 1st. The plaintiff who is a foreigner must provide a surety "*judicatum solvi*," that is to say, a surety guaranteeing the payment of any sentence pronounced against him.⁴ 2d. The Ordinance of 1667, 34, 1, restricting the application of insolvent arrest, applied only to natives; the privilege of the assignment of property was refused to foreigners. 3d. Foreigners could be sued before the French tribunals by Frenchmen⁵ (or even by

to *Viолет*, this rule dates from the fifteenth century, for privileges previous to that time make no mention of it: "*Ord.*," IV, pp. 52, 430, 670. It is quite certain that they could not succeed another alien, because the latter's possessions went to the Treasury. But we do not see why they could not receive the property of their French relatives. We are inclined to think that the silence of the old texts is to be accounted for in another manner; in the old times cases of relationship between natives and foreigners were very rare; when they became more numerous there was a tendency in this direction. *Loyse*, 67; foreigners living outside of France could receive property situated in France by way of succession. This in our opinion is erroneous. Cf., however, *Glasson*, VIII, 294.

¹ Only "the heirs procreated of his body in lawful marriage" succeeded to the alien, to the exclusion of the king: "*Et. de St. Louis*," II, 31. Having native-born children was equivalent to the alien's having letters of naturalization; for the Treasury having no further interest, it became possible to abide by his last will and testament: *Loyse*, 70.

² It is hard to believe that the right to make a will, which was looked upon with so much disfavor formerly, could have been given to aliens. Cf., however, a few exceptional texts: "*Et. de St. Louis*," III, 51, ed. *Viолет*; "*Cout. d'Anjou*," ed. *B.-B.*, III p. lx; "*Coust. de Verm.*," p. 80; *Viолет*, 368.

³ *Bacquet*, I, 4: formerly one must have the permission of the king in order to marry.

⁴ The giving of surety "*judicatum solvi*" is only the public name of the Customs to abide by the law, kept as an exception for the foreign demandant, whereas formerly it was required for everybody, whether demandants or defendants, natives or foreigners: *Littleton*, 198; *Pollock and Mailland*, I, 442; "*Abbeville*," 37; "*Montpellier*," 1205, Art. 2; *Laroque-Timbaut*, 9, etc.; *Loyse*, 858; *J. Lecocq*, 47, 49; *Imbert*, "*Prat.*," I, 30; *Bacquet*, VIII, 3. It is said that the defendant no longer needs to furnish it because the defense is a right of natural law: *Stobbe*, I, 317; *Pappafava*, p. 32; *Glasson*, "*Procéd. civ.*," I, 471.

⁵ Even if he resides outside of France: *J. Lecocq*, 148. In matters relating to real property, competence of the tribunal of the locality where the land is situated; in matters relating to personal property, of the tribunal of the domicile or the residence of the foreigner, or if he has none then of the defendant's domicile. In the old times (*Boutaric*, I, 3), the courts were taken to the frontier; later (Ordinance of 1667, 2, 7) to the houses of the Attorney-General of the Parliaments: Ordinance of 1673, 12, 17.

foreigners)¹ contrary to the ordinary rules of jurisdiction which would have held that they should be judged in their own country. We have already seen whether it was possible to apply the national law in their case.²

§ 583. **The Same.** — (E) *How did the Crown's succession to the estate of a deceased alien disappear?* This right, after having been restricted as to its effects by the monarchic system, was again partially done away with: (a) by means of exemptions for the benefit of certain classes of foreigners (those who came to fairs, merchants, Lombards, and Caorsins, Swiss and Scots in the service of the kings, workmen employed in the royal manufactories, those who held rents from the Hôtel de Ville, and diplomatic agents) or in certain localities (Toulouse, Lyons, Bordeaux, Marseilles, Langue-doc, 1484, and the jurisdiction of the four great Parliaments of the South, etc.);³ (b) by means of international treaties; in the

¹ *Louet*, "C.," 42, 3. Actions between foreigners were formerly judged by their **Consuls**. Cf. on the institution of the consulate, treatises on international law, for instance *Bonfils-Fauchille*, etc.: *Valroger*, "N. R. H.," 1891; *Goldschmidt*, I, 181 and "Mitth. oest. Gesch.," XIII, 337; *Schaube*, "Konsulat des Meers in Pisa," 1888; "La proxénie au moyen âge" ("R. h. Dr. int.," 1896, 525); *Pappafava*, p. 32 (bibl.). A distinction must be made between three kinds of consuls: 1st. The "baile" or national consul, a true magistrate sent by the metropolis to the districts or factories of the East (at least after the first crusade). 2d. The consul elected locally by a foreign colony, when they did not have any consul "missus"; thus according to the Statutes of Pisa (cf. ed. *Bonani*), wherever five natives of Pisa happened to be they were allowed to choose a consul for themselves; this usage must have been fostered by the custom of each trade body appointing its own head who was often known as their consul; thus at Pisa, the "ordo maris" (those who carry on maritime trade or exercise a profession connected with it) has its consuls or "consuls of the sea"; the consuls "missi" or "electi" abroad are naturally under them; but in France the consulate of the sea only existed at Perpignan and Montpellier, to which places it must have come from Barcelona; the consular jurisdictions established at Toulouse, in 1549, Paris, in 1563, and Marseilles, in 1565, are more probably connected with the judicial powers of the consuls of the merchants; cf. also the jurisdiction of fairs (custody of fairs, and in the fifteenth century preservation of fairs). 3d. The consul who might be called "proxène," because of the analogy with the old "proxenies"; that is to say he is an inhabitant of a town where a foreign colony has been established; this colony, with the consent of the metropolis, makes a contract of hospitality with him; he will be the host, the protector and the judge of these colonists (example, consul of the inhabitants of Narbonne at Pisa, in 1275: *C. Port*, "Essai s. l'hist. du comm. marit. de Narbonne," 1854). The expansion of trade caused the consul to lose his character of host; he ceased to furnish stores and lodgings and became merely a patron and defender. This form of consulship was developed, especially among the Germanic nations; thus until 1867, Prussia had only had foreign consuls.

² Should the French courts judge foreigners according to the French law or according to their own laws (in proportion as the right to the estates of deceased aliens ceased to exist)?

³ Cf. details and texts in *Demangeat*, p. 198 et seq.; *Glasson*, VIII, 298; *Isambert*, Table, see "Aubaine," etc.; *Pigeonneau*, "Hist. du commerce,"

last half of the eighteenth century France thus entered into agreements with sixty-six States, which abolished the right to the inheritance of deceased aliens;¹ but this system, which was called one of diplomatic reciprocity, still left in existence,² ordinarily as a reduction of this right, the right of "withdrawing" (a deduction of from 10 to 20 per cent from inheritances which had devolved upon foreigners),³ and the right of succession to estates of deceased aliens itself once more came into existence if the treaty happened to be repealed.⁴ The Revolution, being inspired by the writings of the philosophers,⁵ took more radical steps; the right of inheriting the estate of a deceased alien was abolished in general by the Constituent Assembly on the 6th of August, 1790, as being "contrary to the principles of fraternity which ought to bind all men together."⁶ This generous beginning found so little echo in the other countries that the framers of the Civil Code thought that France played the part of a dupe, and once more

I, 205 *et seq.* We see the Lombards as early as the twelfth century, "disputing with the Jews the monopoly of trade, of banking and usury"; under Philip the Handsome, they administered the royal finances, "conducted the commercial and financial education of France." Later on, it was contended that the inhabitants of Milan should be exempt from the effects of the right to the estate of deceased aliens, because they had originally come from a country which had belonged to the kings of France; but in the eighteenth century this theory was abandoned: *Britz*, 509; *Demangeat*, p. 206; *Glasson*, VII, 93. Merchants and inhabitants of Caor, in England: *Pollock and Maitland*, I, 447; *Huvelin*, "Thèse," *loc. cit.*

¹ Report of *Roederer*; *Locré*, "Legis. civ.," II, 117; *Isambert*, Table, see "Traité."

² The incapacity of transmitting was generally done away with; but the foreigner only took the succession of his French relatives if he were naturalized.

³ "Gabella hereditatis," "Detractus realis" as contrasted with the "Gabella emigrationis" or "Detractus realis": see "Encycl. méthod. Jurispr.," III, 687; *Stobbe*, I, 315; *Gierke*, "D. Privatr.," I, 450.

⁴ Declaration of war; ordinarily strangers had a certain time given them within which to leave France; when this time had expired they were liable to arrest and to have their possessions confiscated.

⁵ *Montesquieu*, "Espr. des Lois," 21, 17; *Guerra*, *op. cit.* Necker, in 1787, pointed out that the fiscal advantages of the right to the estates of deceased aliens were of very little importance in themselves, and that they were as nothing compared to the impediments which its exercise placed in the way of trade: *Glasson*, VIII, 298, 303 (*Montchrestien*, "Econ. polit.," p. 35 *et seq.*: very hostile to foreigners; *Babeau*, "Ville," I, 20).

⁶ This Decree, according to general opinion, only contemplated the incapacity of transmitting. The incapacity of taking was done away with by means of the Decree of April 8, 1791, Art. 3: Decree of Aug. 13-17, 1791; "Const." of Sept. 3d, 1791, VI; Decree of the 5th Fruct., year III, Art. 335; *Viollat*, p. 854; *Sagnac*, p. 246. — Strangers were still subject to give surety "judicatum solvi," and to physical compulsion (Decree of the 4th Flor., year VI), etc. The law of the 28th Vend., year VI, allowed the government the right of expelling them by means of a mere administrative provision, a right which, be it understood, the Old Régime had practised: "Code civ. interm.," see "Aubaine," "Etrangers"; *Glasson*, VIII, 288.

established the incapacity to grant and to receive by way of a gift,¹ which had formerly affected foreigners, and contented themselves with the suppression of the name of the right to inherit from deceased aliens. The only thing which could make it disappear was a treaty establishing reciprocity. This was a measure of reprisal whose deplorable consequences were felt in the crisis which was experienced throughout France following the wars of the Empire; the Restoration re-enacted the abolition above referred to (Law of July 14, 1819) with a view to drawing foreign capital into our impoverished country. Thus from motives of interest it did what the Revolution had done with a humanitarian motive.

§ 584. **Those Civilly Dead** are, 1st, the monks, following their renunciation of the world; 2d, those condemned to capital punishment as a consequence of conviction.

§ 585. **Entering Religious Orders** resulted in the eyes of the Church in death to the world. From this it should have been concluded that from the time of his entrance into a monastery the monk could not acquire anything, and that the possessions which he had at that time should pass to his heirs. But this is not the rôle given to him by the Justinian law.² According to this legislation he becomes a sort of "alieni juris," who can have nothing of his own, but who can receive for his monastery; all his present and future possessions, even those he inherits from his relatives, go to the monastery, without his testamentary heirs or heirs at law having any claim whatsoever over them. The Theodosian Code did not go so far as this;³ it made a distinction between the present and the future; with respect to the future the personality of the monk was absorbed by that of the monastery. He acted as a means of receiving for the benefit of the monastery; with respect to the past his possessions were conferred upon his testamentary heirs or heirs at law; the monastery only took when one or the other of these heirs was lacking. It is with the Theodosian tradition that the old French law seems to be connected.⁴ Once he had

¹ Civil Code, Arts. 726, 912. Even by gift (contrary to the old law).

² "L. Deo nobis," "Cod. Just.," 1, 63, 56, and Auth. "Ingressi," "Si qua Mulier," "Nunc autem"; "Cod. Just.," 1, 2, 13; 1, 3, 20; "Nov." 5, c. 5; 76 and 123, 38; *Gratian*, c. 7, 9, 10, c., 19, q. 3; c. 11, 13, c., 12, q. 1; c. 16, c., 18, q. 2; *Dig.* X, 3, 35, 6; "Petrus," 1, 24, 25, 26, 56 (reservation of the "Falcidia, sic," for the descendants).

³ "Cod. Théod.," 5, 3, 1; "C. Eur.," 335; "Wis.," 4, 2, 12.

⁴ "Capitul.," Index, see "Monachus," "Monasterium," "Sanctimonialis"; "Cap.," 1, 114 (authorization of the sovereign necessary before a free man could enter a monastery); 1, 137 (the free man who becomes a monk may give his possessions to the monastery); 5, 379 (a monk leaves his monastery);

entered a monastery,¹ the monk, stripping off his own personality, could only receive for the benefit of his community;² in the same way as children who were not emancipated could receive for the benefit of their family. But the monastery did not take those possessions which he had at the time of his entering it; he was regarded as being dead at that time, and from this fiction there arose two consequences: 1st, his inheritance vested for the benefit of his relatives;³ 2d, he was thenceforward incapable of inheriting upon intestacy or by virtue of a will, either in his own interest or in the interest of the monastery.⁴ In this sense the civil death with which he was affected was the equivalent of real death.⁵

all his possessions remain the property of the monastery, even those which he did not take into the monastery); 5, 381 (*id.*); 6, 110 (all the possessions of the monks belong to the monastery, even if they have children). Cf. "Petrus," *loc. cit.*

¹ As to the entering of religious orders see *Loysel*, 346. Nullity of this if done secretly: Ordinance of 1566, 55; Declaration of July 10, 1566; *Dumoulin*, on "Blois," 147; *Louet*, "C.," 8, 42; Register of the taking of the habit of a friar and of novitiates; Ordinance of 1667, 20, 15; Declaration of April 6, 1736, etc.; *Isambert*, *loc. cit.*; *D'Aguesseau*, ed. 1772, IV, 49, 100. As to the necessity that the Order be one recognized by the State, in order that the entering of it should be valid, see: *Le Vayer de Boutigny*, "Autor. des rois touchant l'admin. de l'Eglise," p. 234; "De l'autor. du roi touch. l'âge nécess. à la prof. relig.," 1669, 1751; *Landry*, pp. 69, 73.

² *Innocent IV*, "in t. de Privel.," c. 13, no. 3. Cf. "Nov." 5, 5 and 123, 38. — "L. d. Droiz," I, 24; *Bucherellus*, "Inst.," p. 181; "Decis. Cap. Tolos.," Table, see "Monachus." Monks could be called upon as witnesses before the law, because their honor was absolute: Ordinance of 1670, 6, 3; represent their Monastery before the court; have a benefice or a "peculium": *Landry*, p. 37. But they could not hold public office: Capitulary VI, 124, etc.; *Boutaric*, II, 2. A Conclave of Nantes, c. 19 (*Labbé*, IX, 473), forbade unmarried women and widows consecrated to God to take part in the sittings of the courts. — England: before the Norman conquest the fiction of civil death does not seem to have been strictly enforced.

³ He could not make a will: "Lib. de l'Egl. Gallic.," 26; Ordinance of 1579, 29; of 1735, 21; *Landry*, p. 45.

⁴ *Richer*, p. 677, cites an Order of the Exchequer of Normandy in 1207; *Brodeau*, on *Louet*, "C.," VIII, 22, an order of the King's Court in 1225 (*Lizet's* note); *Marnier*, "Echiq. de Norm.," p. 116; *Glanvill*, 13, 5, 6. William of Auvergne, Bishop of Paris, 1128-49, was filled with indignation at seeing children compelled to enter monasteries, "quemadmodum catuli et porculi quos matres non sufficiunt enutrire" with the object of having them become civilly dead ("civiliter moriantur"), that is to say, in order that they might be deprived of their hereditary share: "Tract. de moribus," c. 9; *P. de Fontaines*, p. 49; "Gr. Cout.," 2, 40; "Summa Norm.," 25, 10; *Loysel*, 345; "Paris, A. C.," 132; *Laurrière*, on "Paris," 337; *Landry*, p. 13. Nor could they receive any gifts: *Richer*, p. 804. Cf. *Loysel*, 343 and *Laurrière's* notes. Ecclesiastics inherited from their relatives, and their relatives from them; they also had the right to make a will: Ordinance of 1368; "Stil. Parl.," III, 37. According to the ancient custom the church with which they were connected inherited at least the possessions which they had acquired since their promotion to the priesthood: "Petrus," I, 26; *Buche*, "N. R. H.," 1884, p. 573.

⁵ "Capit.," I, 38, c. 16 (Compiègne); 40, c. 21 (Verberie); Dig. X, 4, 6, 3; Council of Trent, s. 24, 9; *Richer*, p. 241. — "Sachsensp.," I, 25; "Preuss. Landr.," § 1199.

From the thirteenth century it is found to be accepted with all its consequences by the Church as well as the State, at least in France. There are two reasons which especially account for the French Custom: (a) in the conflict which took place between families and monasteries it applied the principle of the preservation of property in families; like the man who is emancipated, the monk might find himself impliedly disinherited, simply owing to the fact that he had left the paternal house; in shutting up younger children in a cloister, their parents often had no object other than that of creating a better share for their elder children;¹ (b) the disabilities of monks had their special place in the old system of restrictions as against people in mortmain; it was feared that they might monopolize all the possessions in the kingdom.²

At the same time that it did away with the religious orders, the Revolution allowed the incapacity of inheriting which affected their members to remain for some time; but a decree of the Conventional so did away with this.³

¹ Law of May 24-June 2d, 1825, Art. 5: limitation, in the interests of the family, of the right to dispose belonging to nuns who were members of an authorized community (one-fourth of their possessions).

² "Gr. Cout.," 2, 21, p. 258 (nothing shall escape them); *Chassaneus*, on "Bourg.," 7, 13.

³ The Decree of Feb. 13, 1790, no longer recognized monastic vows; as a consequence the religious orders were done away with; the monks were free to leave their monasteries but were not obliged to do so. The civil death which had formerly existed was found to be abolished by these provisions. — The Legislative Assembly, on the 17th and 18th of August, 1792, pronounced the dissolution of religious communities; their houses were vacated and their possessions sold as national possessions; it was desired "to dispel the remains of fanaticism to which the former monasteries offered an all too easy refuge." "Believing that a State which was truly free should not allow the existence of any corporation in its midst, not even those which, devoted to public enlightenment, have deserved well at the hands of the fatherland," the Assembly also did away with every lay or religious corporation, whether of men or of women, even those which were devoted exclusively to the hospital service. The members of religious orders who were thus expelled had a right to a pension, on condition of taking the oath of citizenship, if they were men. The wearing of ecclesiastical clothing was forbidden: *Aulard*, "La Révol. Fr. et les Congrég.," 1903. The Law of Feb. 13-19, 1790, no longer recognized monastic vows, and yet the Law of Feb. 20, 1790, declared that members of religious orders who should leave these orders still remained incapable of inheriting and could only receive rents for life by will or as gifts. However, according to the Law of March 19-26, 1790, they were to inherit before the Treasury. But a Decree of the 18th Vend., year II, allowed them to inherit generally: Decree of 5 Brum., year II, Art. 4; 17 Niv., year II, Art. 3 (retroactiveness going back to July 14, 1789); "Code civil interim," Table, see "Religieux." In every other respect they had gone back to civil life by 1790 (thus they could marry): *Sagnac*, p. 252. As to the dissolution of congregations cf. expulsion of the Jesuits in 1764: *Gazier*, "R. hist.," XIII, 308; *Douarche*, "La banqueroute du p. Lavallete" ("France judic.," 1880-81, I, 73); *Couzard*, "De edicto Rothom.,"

§ 586. **The Penal Civil Death** of the Old Régime makes one think of the system of outlawry in the Germanic law, the "capitis deminutio" and infamy of the Roman law, and the excommunication of the canon law. The Germanic process of outlawry¹ meant a true civil death in the full force of the term, for the individual who was subjected to it lost his possessions and his family rights.² The *banishment* of the Carolingian and feudal times, which is only a milder form of it,³ made one lose the right to appear in court, but did not deprive one of the right of living,

1603," 1900. See also the trial of the Templars, *Ch.-V. Langlois*, "Rev. des Deux-Mondes," 1891, p. 384.

¹ "Sal," 56; "Chilp. Ed," 10, etc.

² Cf. formulæ in *Grimm*, 40: you shall be outside the law, your wife shall be a widow, your sons shall be orphans, your fiefs shall revert to the lord, and your possessions go to your sons, your body shall become the prey of wild beasts, etc. It would have been the same thing had they said that he was looked upon as dead, and this is what was already done by the "Capit. Saxon," 797, 10; "Const. Sic.," 2, 3; *Alb. de Rosate*, "de stat.," 4, 14; "Inc. Auct.," 2, 10, 3: "finitur (societas) morte naturali vel civili." — Outlaw, "utlagatus," "exlex," in England: see *Du Cange*. — The German terminology is a confused one: "rechtlos" (without any right); "ehrlös" (without honor); "echtlos" (unlawful, without a right to be considered, "privatio legalitatis"). The "Rechtlos" has a "wergeld" which is very small and sometimes a mockery; "Sachsensp.," III, 45: a cartload of hay for the bastard, the shadow of a man for the buffoon, the reflection of a shield in the sun for the champion, etc. There is a question as to whether he lost his social rank, for example, his title of nobility. — *Budde*, "Rechtlosigkeit," 1842; *Hillebrand*, "Entz. d. bürg. Ehre," 1844; *Gierke*, "D. Privatr.," § 52 (bibl.). According to the latter, the "Echtlos" or "elos" is confused with the "Friedlos." The "Rechtlos," who cannot appear in court ("juri stare"), cannot be a judge, a witness, etc., but keeps his family rights and has an inheritance; offenses against him are punishable. One is "rechtlos": 1st. Because of a judgment condemning to corporal punishment ("Hals und Hand," "Haut und Haar"). 2d. As a consequence of the exercise of a dishonorable profession. 3d. As a consequence of being born out of wedlock. One is "ehrlös," generally speaking, when one is declared to be so by a judgment; in a case of this sort, one can neither lend nor be heard as a witness nor hold public office. After the reception of the Roman law, the theory of infamy at law and in fact overthrew these old ideas. As to the honor of each class of society, cf. *ib.*, I, 422, "Scalbarkeit," "Anruchigkeit," *ib.*, and *Stobbe*, § 47.

³ The effects of banishment have varied greatly according to localities, but they have often preserved a great severity until a comparatively recent period. The man banished is "omni jure omnique actu legitimo ipso jure privatus," according to the "Const. pacis" 1235, 10. He loses his rank, his fiefs, his judicial power; his property is confiscated; he can no longer appear in court, either as a party or as a witness: "Sachsenspiegel," I, 38; II, 51, 1. At Milan in 1216, the first comer would without fear of punishment attack him in person or property. At Rome in 1425, his murderer was only punished with a fine of twenty livres. According to the Venetian law, in 1531, his nearest relations themselves cannot shelter him without incurring the penalty of banishment. Even in the time of *Alb. de Rosate* the question of the upholding of his marriage was still being discussed: "de statutis," 4, 4; according to general opinion there was no occasion for anything more than separate maintenance. The "Jura min. Col.," 7, allowed his wife to receive him, but declared that their children would be illegitimate: *Pertile*, § 101.

if one can speak of it in that way.¹ It was the same thing with *excommunication*; and there was this special feature, that the person excommunicated recovered his rights if he should be absolved. The secular tribunals even ended by no longer taking into account the plea of excommunication which was set up against parties in order to avoid answering them.² It was upon these customs that the Roman ideas of the "*capitis deminutio*" and infamy³ were superposed. The term civil death became a technical one⁴ and below it was placed infamy, with its two degrees, — infamy at law and infamy in fact.

Civil death was on principle likened to natural death, excepting upon certain points where the too severe effects of the fiction had been done away with by reason of humanitarian or religious ideas.⁵ Thus the person who was civilly dead was left free to perform those acts without which it would have been impossible for him to live (to contract, to acquire for a consideration and to appear in court through a guardian). Thus, again, although he was held as being incapable of marrying in the future, the marriage which he had already contracted before the judgment was not dissolved; the religious tie of the sacrament was not affected,

¹ As to the freebooter, the bandit, "*diffidatus*," "*forjudicatus*," etc.: see *Du Cange*, and "*Exterminare*." Cf. *Michelet*, "*Orig.*," p. 398; "*Bord.*," A. C., 28 (part played by the dead); *Beaumanoir*, 34, 32; "*C. d'Anjou*," L. 28. Cf. *Beaumanoir*, 34, 32; 30, 36; 39, 16; 61; *P. de Fontaines*, 13, 6 et seq. (loss of the right to be heard and to reply in court); 17, 8; "*Jostice*," Table, see "*Forb.*"; "*A. C., Bord.*," 27, 42; "*Ass. de Jér.*," I, p. 114; "*T. A. C., Norm.*," 88 (devastation); "*T. A. C., Bret.*," 109; "*Et. de St. Louis*," I, 28.

² "*Capitul.*," V, 62; *Friedberg*, 104 (bibl.); *Hinschius*, § 261; Dig. X, 5, 39, etc.; *G. Durand*, "*Spec.*," 4, 4; *Lancelot*, "*Inst.*," IV, 13; *Héricourt*, "*E.*," 22. Measures taken by the secular power in order to lead persons who had been excommunicated to repent; Capitulary of 789, 35 (I, 326; II, 214); VI, 142; Ordinance of 1228, 1269, etc.; *Corvin*, "*Jus. can.*," 4, 43. But according to the "*Gr. Cout.*," II, 45; "*non repelluntur ab agendo*." Ordinance of July 3d, 1371 (the secular judges shall compel them to obtain absolution, but they shall not be compelled to pay too dearly for absolution); "*T. A. C., Norm.*," 2, 3; *Giraud*, "*Essai*," II, 31, 93, 121; *Desmares*, 155; "*Et. de St. Louis*," I, 127; "*L. d. Dr.*," 645; *Boutaric*, II, 12; *Pollock and Mailland*, I, 461; *Viollot*, "*Hist. des inst. polit.*," I, 380; II, 269. We have seen that excommunication was used in order to give more force to rights (*Briegleb*, "*Gesch. d. Executiv. process*," 1845, p. 132); against dead persons and animals: *D'Adossio*, "*Bestie delinquenti*," 1892.

³ *Stobbe*, I, 364.

⁴ As early as the fourteenth century the expression "civil death" was in current use: *Gui Pape*, "*Q.*," 547, "*de morte civili et naturali*."

⁵ In the latest stages of the law, civil death results from condemnation to a natural death, to the galleys for life and to banishment for life. Moreover, the condemnation must have been pronounced after the defendant has had a hearing, for the man who is condemned by default is in a special position. Cf. as to this position, *Pothier*, no. 98. See also *Humbert*, p. 193 (validity of contracts in the "*jus gentium*").

they said, by the sentence of the judges, although it no longer could produce civil effects. The man civilly dead lost the power of the husband and the power of the father; the system of possessions between him and his spouse ceased to exist, but in the eyes of the Church this spouse was none the less married and could not contract a new marriage. The possessions of the man civilly dead were confiscated.¹ He could not transmit them upon intestacy or by will, nor could he take any inheritance nor receive as a gift (excepting for maintenance).² Civil death disappeared from the penal code of 1791; but this did not prevent the Revolution from declaring the "émigrés," and generally the deported also,³ to be civilly dead. It is found once more in the Civil Code.⁴

The infamous⁵ were excluded from holding public office; they could not be witnesses in court or to notarial deeds; finally, they were also held as being incapable of making a will. Infamy resulted as matter of law from certain penal sentences⁶ (a term at the galleys, flogging and branding, the pillory, the iron collar, censure, and public penance).⁷ It was also connected with the exercising of shameful professions,⁸ but in the last stages of the law

¹ Cf. *Loysel*, 839 *et seq.*; *Domat*, I, pr. 2, 2, 12; *Tanon*, "Inquis.," p. 623.

² As to letters of remission, pardon, recalling, cf. *Pothier*, no. 105.

³ Decree of March 28, 1793. Cf. Decree of Sept. 17, 1793; *Laferrière*, "Hist. des principes de la Révolution," 1850, p. 294. Cf. Protestant refugees after the revocation of the Edict of Nantes.

⁴ Abolished by the Law of May 31, 1854. General confiscation had been abolished by the Charter of 1814, Art. 66.

⁵ *Tacitus*, "Germ.," 6; "L. Wisig.," ed. *Zeumer*, see Table, "Capitul.," see Table; Capitulary of 789, 44; 809, 28, etc.; "L. long. Car.," 45, 67; "Siete Part.," 7, 5 and 6 (as to infamy); *Sachsenspiegel*, 1, 38, 2; *Beaumanoir*, 39, 42, 63, etc.; *P. de Fontaines*, c. 13; "Ass. de Jér.," "C. des B.," 151; *Boutaric*, 2, 2; *Loysel*, 835; "Lib. de l'Egl. gall.," 22; "Tract. univ. jur.," XI; *Pertile*, III, 227; *Krunt*, § 49.

⁶ Disgraceful penalties in use during the latter part of the Middle Ages: *U. Robert*, "Les signes de l'infamie au moyen age," 1889; *Tanon*, "Hist. des trib. de l'inquis.," p. 490; *Michelet*, 377. — As to persons who have failed, insolvents, "Arch. stor. lomb.," March, 1876; *Kohler*, "Shakesp.," 50, etc.

⁷ Letters of rehabilitation restoring the disgraced person to all his rights. Cf. letters recalling a banishment: *Pothier*, no. 108 *et seq.*

⁸ Disgraceful professions are ordinarily the following: usurers ("Const. de Catalogne," I, 154; *Peguera*, "Decis.," 1613, XXXI, no. 1; *Stobbe*, I, 359; "T. A. C., Norm.," 49); keepers of gambling houses and professional gamblers ("Const. Sic.," III, 90; *Delamare*, "Police," 3, 2, 4); women of evil life, and "lenones" or bullies (Regulation of 1380 for Perpignan; "Siete Part.," VII, 22; "Cout. d'Anjou," F, 559; *Delamare*, "Police," 3, 3, 5; *Muyart de Vouglans*, "Loix crim.," III, 4); "baratieri," "ribaldi," debauchees (see *Du Cange*; "Siete Part.," VII, 16, 9; *Pertile*, III, 229: the chief or king of the debauchees has a disciplinary power over women of the town in various places; "Siete Part.," *loc. cit.*); the executioner (he is often chosen among malefactors or debauchees: *Pertile*, III, 230; *Caldero*, "Decis. Cathol.," 1726, I, 156); champions in the duels at law ("Sachsenspiegel," I, 37); story tellers, buffoons or actors ("Sachsenspiegel," *ib.*; see *Guyot*). These "personæ turpes"

this was an infamy in fact, something like the Roman "levis nota,"¹ whose effects are vaguely defined, thus differing from those which were produced by the infamy at law.²

§ 587. **Lepers and Outcasts.** — The formidable malady of leprosy has always been known in Europe, but after the crusades it became an epidemic and raged with such intensity that those who were affected with it formed a class of pariahs. The Church and the State had to borrow from the Mosaic legislation³ its severe measures of segregation in order to prevent all contagion. The unfortunates, "mesels" or "meseaux,"⁴ who were affected with the malady of St. Lazarus or St. Ladre⁵ and called "ladres" like him, were segregated from the rest of society,⁶ shut up in lazarets or leper-houses,⁷ or else compelled to live in a separate house, bound to wear garments of some striking color⁸ and to

among whom bastards or children of priests were included ("Sexto," I, 11; *Pertile*, III, 230) could neither bring an accusation nor appear as witnesses in court, etc. Cf. "Capit.," VI, 362, and also III, 88; "Siete Part.," VII, 6. At Perpignan, the Jews were grouped together at the "Caill," the gamblers at the "Tafurerie," the women of the town at the "Partit," the executioner and his assistants at the "Escarcerellerie," and the persons who were vagrants in certain low alleys: *Desplanques*, "Les infâmes dans l'anc. dr. roussillon," 1893.

¹ Cf. our certificate of good conduct and morals: *Argou*, I, 25; "Dec. Cap. tolos.," q. 174.

² The barbarian laws drew a distinction between witchcraft (love-potions, magic draughts, etc.) and vampirism (the "strix," "masca," "lamia," to devour and to dry up the blood of men, "intrinsicus comedit"; feast of vampires or nocturnal revels). Details in *Hansen*, *op. cit.* There was a regular epidemic of witchcraft in the fourteenth and fifteenth centuries; when the Albigeois had disappeared the sorcerers were persecuted. Cf. Dig. X, 5, 21; *Lancelot*, "Inst.," IV, 5; "Siete Part.," VII, 24; *Brillon*, see "Démon"; *Delamare*, "Police," III, 7, 4; *Ferrière*, see "Sortilège"; *Funck-Brentano*, "Le drame des poisons," 1900, 4th ed. As to bewitching, cf. the trial of Robert d'Artois, by Guichard Bishop of Troyes. — "Tract. univ. jur.," XII. — *Pollock and Maitland*, II, 544.

³ "Leviticus," xiii *et seq.*

⁴ From "misellus," which is a derivative of misery: *Loysel*, 419 (wretched, sickly swine); *Ragueau*, see "Langeieur"; "Cout. de Tonnien," Arts. 15 and 16.

⁵ Cf. the parable of Dives and Lazarus, "Luke," xvi; "John," xi.

⁶ They cannot be witnesses in court nor can they present themselves there in person: *Beaumanoir*, 39, 33; 63, 10.

⁷ Although leprosy was looked upon as a punishment from heaven, more than any other form of illness (Mary sister of Moses; Gehazi the servant of Elisha), both the Church and society tried to alleviate the hard fate of its victims, by granting that there were extenuating circumstances in the case of those whom God had afflicted without hope of mercy: special asylums, charities, order of St. Lazarus (the master of which had to be a leper): "Olim," Table, see "Lepros." The Bishops were obliged to support the lepers within their diocese: "Conc. d'Orl.," 549, c. 21; "Lyon," 583, etc.; afterwards this charge falls upon the parish, or upon the commune: "Roisin," 234, 247; "Lille," 22, *Isambert*, V, 367.

⁸ *U. Robert*, "Les signes d'infamie au moyen âge," 1889.

shake a clapper or rattle in order to give notice of their approach. In certain localities, in finding cases of leprosy,¹ they celebrated over those who were affected with it a requiem mass;² they were dead to the world.³ This idea of civil death was not always and everywhere applied with the same severity. In the old times their marriage was dissolved;⁴ but the Decretals of Gregory IV broke with this old rule and considered lepers as being capable of marrying.⁵ Their dignities and their possessions ceased to belong to them.⁶ They only lived upon charities and became incapable of acquiring anything, and, consequently, incapable of inheriting from their relatives.⁷ Ordinarily, their inheritance vested for the benefit of their heirs. At the same time, a few Customs allowed them to dispose of a portion of their possessions by will.⁸ This legislation fell into disuse towards the end of the fifteenth century, when leprosy became rare.

However, the evil seems to have persisted in certain localities under a milder form, the "leuce" or white leprosy.⁹ Those who

¹ The ecclesiastical judges were for a long time charged with deciding as to whether a case were one of leprosy or not: "Reg. de l'off. de Cerisy," no. 9, 25 a, etc. Cf. "Leviticus," *loc. cit.*

² Synodic Statutes of the diocese of Troyes, 1430 (ceremonial): the priest celebrates mass which is attended by the leper, who is apart from the other worshippers and has his face covered as though he were dead. When the service is over the priest takes earth from the cemetery in a spade and puts it on the leper's head, saying: "My friend, this is a sign that thou art dead to the world." He then leads him to his dwelling at the head of a procession and at the threshold says: "Friend, thou knowest and it is true that the head of the leper-house of Troyes has in writing denounced thee as a leper, wherefore I forbid thee to violate any of the following articles: thou shalt not enter any house excepting thine own cottage, nor any mill; thou shalt not look into any well nor fountain; thou shalt eat only food prepared for thyself; thou shalt not drink out of any vessel saving thine own; thou shalt have thy well before thy cottage; thou shalt no longer take part in any trial at law; thou shalt no more enter the church when a service is going on; when thou speakest with any one go the side away from the wind; when asking alms sound thy clapper; thou shalt not go far from thy cottage without having put on thy covering; thou shalt not pass over any plank or bridge without having put on thy gloves; thou shalt go nowhere from whence thou canst not return to sleep in thy cottage without the permission of thy parish priest or of Monseigneur the ecclesiastical judge": *Ragueau*, see "Service."

³ "Roth.," 176; Capitulary of 789, 36; Italian Statutes; "Cout. d'Aoste," 6; *Giraud*, "Essai," II, 222 (Arles, 96), 251; "Jostice," p. 196; *Beaumanoir*, 56; "Hainaut," 135; "Summa Norm.," 25, 10; "R. h. Dr.," 1857, 559; "F. de Béarn," 55; "Cout. d'Anjou," ed. B.-B., "A," 78; "F," 835.

⁴ Capitulary of 757, 19 (I, 39); "Ass. de Jér.," "Livre au roi," 42; "F. de Morlaas," 357.

⁵ Dig. X, 4, 8; *Boutaric*, II, 8; "Siete Part.," IV, 2, 7, 17.

⁶ "Auct. vet. de benef.," I, 81 (loss of fiefs). *Contra*: "Livre au roi," 42. — Osias, king of Judea.

⁷ "Summa Norm.," 25, 10.

⁸ *Beaumanoir*, 56, 2.

⁹ *F. Michel*, "Hist. des races maudites," 1834; *De Rochas*, "Les parias

were affected by it, and those who were suspected of being lepers because of certain equivocal symptoms or because they were reputed to belong to the families of lepers,¹ remained until the end of the seventeenth century² under disabilities of the same nature as those which we have just been discussing, which were traces of the former condition of lepers.³ In the Pyrenees they were designated by the name of **outcasts** ("cagots"),⁴ in Brittany under that of "cacoux" or "caqueux," words which seem to be synonyms of "leper."

de France," 1876; *Hovelacque and Vinson*, "Et. de linguist.," p. 210; "Rev. des Deux-Mondes," 1878, 426; *Lagrèze*, "Navarre," I, 49; *Cadier*, see "Gr. Encycl."

¹ They were supposed to have physical defects (fetid breath, an evil odor, ears without lobes, little granules on their tongues similar to those by means of which leprous pigs are distinguished, the "carn milhargousa"). In the seventeenth century it became established that these presumptions had no foundation.

² Reforms: Parliament of Rennes, in 1681 (at the instigation of Hévin); Declaration of 1683 (Béarn). In Spanish Navarre, equality proclaimed from the beginning of the sixteenth century; however, for the filling of certain offices, for a long time the "limpieza de sangre," that is proof that one was neither descended from a Moor, nor from a Jew, nor from an outcast, nor from a heretic, was required.

³ Separate dwelling place, obligation to wear on their clothing a piece of red cloth cut into the shape of the foot of a goose or a duck, a separate place in church and the cemetery, prohibition of entering mills, of drinking at the fountains, exclusion from public office, exemption from tallage; they can only give testimony in court as an exception, they can only marry among themselves, etc.: "F. de Béarn," 65.

⁴ "Cagot," a Béarnese word, of unknown origin; the old explanation of it, "canis Gotus," is not a very probable one; the Breton "cacodd," leprous, has been suggested, but Brittany is very far away from Béarn. Other names: "gafet" or "gahet," from "gaf," hook, because leprosy makes the hands hooked; "capot," from the cape or hood which they wore; "chrestias," the poor of Christ; "ladre," see *ante*. In the "Siete Partidas," the "gafo" is a leper: *Lespy*, "Dict. Béarn.," see "Cagot."

TOPIC 3. LEGAL PERSONS

§ 588. Political Bodies.

§ 589. Corporations (Bodies and Communities, Persons in Mortmain).

§ 590. Foundations, "Piæ Causæ."

§ 588. **Political Bodies.** — The Roman law, to which our legal system¹ owes the idea of a collective being,² looked upon towns, guilds and corporations as persons ("personæ vice funguntur").³ Like natural persons, in fact, these fictitious persons⁴ had pos-

¹ On the classification of legal persons see *Savigny*, § 86 (of necessity and of their own free will). Analogies in the "Apparatus" (on the Decretals) of Innocent IV: *Ruffini*, *op. cit.* — Division into Corporations and Foundations: *Avril*, "Thèse," p. 10. — The Civilians contrast partnerships (either commercial or civil) formed with the sole object of gain, with associations which are not exclusively engaged in the acquiring of wealth for their members. — The authors who write on Public Law distinguish public persons, such as the State, the Communes and public establishments (or services detached from the State to carry on an existence of their own, for example the Institute of France, the Universities, the Faculties, etc.), from private persons (charitable and scientific societies, religious assemblages, professional syndicates; cf. *César-Bru*, 1891, and all establishments of public usefulness in general). This distinction was unknown to the Old Régime under which bodies and communities form an assemblage of persons which are at the same time public and private, all subject to the same system; it was also unknown to the Revolution, which made public establishments, that is to say special administrations, of those which it left in existence; it is only in the nineteenth century that establishments of public utility make their reappearance, by becoming detached from the administration and by acquiring a certain autonomy which makes them similar to the bodies and communities of former times.

² *Girard*, "Man. de Dr. Rom.," 3d. ed., p. 232; *Vauthier*, p. 8; *Gierke*, *op. cit.*, III, 246 (Innocent IV); 354 (Bartolus).

³ "Sodalitates," "corpora," "collegia" (for example, colleges of priests, funeral guilds): *Dig.*, 50, 16, 16; 46, 22; 3, 4, 1. The personality of the oldest ones seems to be accounted for by their family character (rather than by the personality of the god with whom they were connected and who was regarded as the owner of their possessions). Under the Republic and under the Empire, authorization from the State became indispensable for the formation of these associations, no doubt because they were degenerating into political clubs. In fact there were no doubt always some of them that were merely tolerated: *Epinay*, "Thèse," p. 35. — Partnerships ("sociétés") differed from associations: 1st. By reason of their object being gain, whereas the object of associations was a disinterested one. 2d. Because of their limited duration ("morte socii solvitur societas"). 3d. Because of their lack of civil personality (cf., however, early "consortium"). 4th. Because the authorization of the State was lacking in their case. At the same time there was a class of partnerships which, as an exception, were given a personality; perhaps with the object of being better able to render the public service with which they were charged, these were partnerships of toll collectors who farmed the collection of the revenues of the State, and who made tenders for the public works: *Girard*, p. 532; *Knierp*, "Soc. public," 1896.

⁴ The likening of them to persons only takes place "mutatis mutandis."

sessions and rights, which they enforced through the intervention of representatives (because they could not act themselves). The personality of the State seems to be beyond any doubt, although its political rôle tends to make one forget its private rôle. From a very early time it is seen to have possessions and rights of action, and its magistrates act in its name (for example, the acquiring of inheritances).¹ Around the State, towns and guilds are organized in corresponding groups.

The formation of the Christian **Church** had the result of establishing alongside of the political system of the State and its dependencies a corresponding religious system composed of the Church and its establishments. Detached from the State, owing to its origin, the Christian religion achieved personality for its communities, its dioceses, its monasteries, its charitable institutions, and its pious works. It gave corporate development a strong impulse and succeeded, at least in its own sphere, in making a principle of liberty prevail which had been unknown until that time. Its legal persons were modeled after the Roman type. Its symmetry would have been complete if the universal Church had been from the legal point of view what it was from the religious point of view, a single body.² A tendency in this direction has not been lacking; we have seen ["Public Law"] in what way and up to what point it has been realized. But for a long time the only thing that had to be considered with relation to the Church was the diocese;³ each diocese — that is to say, each church — had its own inheritance;⁴ this belongs neither to the priests individually nor to the bishop who is their head;⁵ it belongs to a legal being, that is the Church, and it is devoted to objects of a higher nature, in view of which the Church has been established; it is the fortune of the poor, the endowment of the clergy and of religion. This conception was transmitted to the

Thus collective beings do not marry, and have no family rights; but they do have an inheritance.

¹ *Vauthier*, 54; *Pernice*, "Labeo," I, 263; *Stobbe*, I, 382; *Saleilles*, "N. R. H.," 1888, 497 (the public domain at Rome).

² At least in Private Law. As to Public Ecclesiastical Law cf. *Paul*, I, "Cor.," xii, 12. The Church is the spiritual body of Christ.

³ *Imbart la Tour*, "Par. rurales," 1900; *Ruffini*, "Rapresent. giurid. d. parrochie," 1896.

⁴ *Loening*, "D. Kirchenr.," I, 221; *Gierke*, II, 903; *Bondroit*, "De capac. possid. Ecclesiæ," 1900; *Hübner*, "Der Eigenthümer des Kirchenguts," 1868.

⁵ Cf. episcopal and vicarial revenue. The corporation sole of the English law: an ecclesiastical office personified distinct from the incumbent: *Blackstone*, I, 10. The king and the crown constitute a lay corporation sole: *Pollock and Maitland*, *op. cit.*

Middle Ages and never ceased to be true in theory; but, as a matter of fact, it was often departed from. Thus the system of benefices made it necessary to consider the possessions of the Church as belonging to a certain extent to the clergy and the monks. Their rights only being for life, the canonists none the less upheld the old doctrine which defined the possessions of the Church and at the same time took into account their origin and their destination, "the vows of the faithful, the price of sins, and the inheritance of the poor." A matter which was more serious was that the civil authority was often substituted for the clergy in the management of its possessions; without going back to feudal times, to avowries, or to feudal tithes, in the monarchic period their works of charity were seen to pass more and more into the secular power; and it was the same with respect to the external assets of religion (manufactures).¹ In suppressing the clergy as a body, in transforming the possessions of the Church into national possessions,² in taking upon itself the support of the clergy and the expenses of the worship, the Revolution did nothing which was not logically in accord with the public law of the Old Régime. It acted especially from force of necessity, so as to cover the deficit and avoid the bankruptcy into which the State was being driven. But other considerations were mingled with these reasons of a financial nature, — a consciousness of the evil which existed in keeping outside of commerce, and so having them produce nothing, the considerable amount of possessions which were

¹ The ecclesiastical establishments of the Old Régime which were done away with by the Revolution made their reappearance after the Concordat and the Organic Articles: manufactures, episcopal, vicarial, capillary and seminary revenues: *Hennequin*, "Essai hist. s. les fabriques" ("Journ. des Cons. de Fabr.," 1834, I, 8); *Ladrat*, "R. gén. d'adm.," Sept., 1890.

² As to the secularization of ecclesiastical possessions see *Sagnac*, "Législ. civ. de la Révol.," p. 155. — *Gérin*, "Rech. hist. s. L'Ass. du clergé de 1682," 1869, p. 87, cites a formal address by Pussort before the assembly of the clergy in 1690: "in a case of pressing necessity the king is the owner of the property of all his subjects and especially of the property of the ecclesiastics." *Le Vayer*, "Autor. légít. des rois," p. 323; *Él. Mignot*, "Dr. de l'Etat sur les biens possédés par le clergé," 1755 (*Cerfvol*); "Dr. du souverain sur les biens-fonds du clergé et des moines," 1770. Cf. *Champion*, "Cahiers de 1789" ("Révolution Française," June 14, 1894); "Rev. des Deux-Mondes," 1886, 850 (*P. Leroy-Beaulieu*); *Bourgain*, "Biens ecclés. av. la Rév.," 1891; *Burée*, "Prop. de l'Eglise," 1898; *Le Carpentier*, "R. hist.," 1901, 71; *Léouzon-Leduc*, "Journ. des Econom.," August, 1881. — *Ficker*, "Eigenth. d. Reichs an Kirchengut" ("Akad. Wien," 72, 77); "Dig. Ital.," see "Asse eccles.," *Furgot*, "R. Q. hist.," XXIX, 428 (under Charles IX); *Marion*, "Machault d'Arnouville," 1891. — Cf. secularization which took place after the Reformation, for example *Stouff*, "Le pouvoir temporel et le régime municipal dans l'évêché de Bâle," I, 235; *P. Dubois*, "De recup. Terr. sanct.," 16, 30; 25, 42, etc.

in mortmain; the fear of seeing the Church profit by its position of a very great landed proprietor in order to dominate the State; and, finally, the thought that religion entered into the great public offices, and that its administration ought to be connected with that of the State.¹

Roman tradition with respect to civil personality thus persisted in the religious system of the Old Régime; it was maintained with more difficulty in the parallel political system. The State had its incarnation originally in the person of the king, which meant that it was not necessary to investigate whether it constituted a legal person or not. The possessions and the rights of the State were looked upon as the personal attribute of the king during the Frankish period as well as during the feudal period. But the monarchic law did a great deal towards making a distinction between the person of the king and that of the State; thus it is that the domain of the crown had a tendency to become separated from the private and personal domain of the sovereign. Thus did it pave the way for the Revolution, for which it was reserved to strip public functions of all their inheritable qualities.²

As far as **cities** and **communities of inhabitants**³ were concerned, their civil personality was not always so readily to be distinguished as one might suppose.⁴ While contrasting the community with its

¹ The modern tendencies towards the separation of the Church and the State were not set forth until the law of the 3d Vent., year III, which proclaimed the freedom of worship; it was by virtue of this Law that the Catholic form of worship made its reappearance; it was officially restored under the Consulate, but without becoming a State religion. From that time on, our law distinguishes between forms of worship not recognized by the State (which are subject to the general laws affecting associations, meetings, etc.) and forms of worship which are recognized by the State: catholicism (Concordat of the 26th Mess., year IX, and "Articles organiques" of the 8th Germ., year X, a unilateral act on the part of France which the Church submits to rather than accepts, *Hébrard*, "Art. organ." 1870), Lutheranism and Calvinism (re-organized under the authority of these same Articles), the Israelitish worship (Decree of May 30, 1806; of March 17, 1808): *Gazier*, "Et. s. l'hist. relig. de la Révol.," 1887; *Aulard*, "Le culte de la Raison," 1892. — As to the Concordat, besides the speech of Portalis, cf. *Boulay de la Merthe*, "Doc. s. la négoci. du Concordat," 1891; *Séché*, "Orig. du Conc.," 1894; *Card. Mathieu*, "Le Concordat," 1903.

² *Tacitus*, "Germ.," 10, 12. Germany: in the thirteenth century, the "Hausgut" is contrasted with the "Reichsgut": *Heusler*, § 63; *Stobbe*, I, 382, 392 (in 1125, the property of proscribed persons is rather "regiminis dicioni quam regis proprietati"); *Gierke*, II, 527; III, 62, 117; *Vauthier*, 304; *Pollock and Mailland*, I, 495, 509; *Viollot*, "Inst.," II, 250; *Monteil*, "Doman. publique," "Thèse," 1902. — *Choppin*, "Dom.," I, 6; *Domat*, "Loix civ.," I, prel., 3, 1; *Loyseau*, "Seigneuries," I, 23; II *et seq.* — On the Law of Nov. 22-Dec. 1, 1790, cf. *Monteil*, p. 159.

³ *Beaumanoir*, 4, 32; 43, 42; "Gr. Cout.," p. 389.

⁴ *Gierke*, III, 730; *Pertile*, III, 268.

members, it was asked if each one of the latter did not have an individual right to reparation for damage caused to the community, and if obligations which were incumbent upon the community could not be enforced against the possessions of each one of its members;¹ there was some doubt as to who represented the community at law, and as to who could take an oath for it. The Revolution by forbidding the partition of community possessions among the inhabitants² seemed to see in this a mere case of joint possession.³ In this way it gave evidence of its repugnance to corporate ownership. The possessions of the State and the possessions of the clergy were sold as national possessions; community possessions should also have disappeared by partition.

§ 589. **Corporations**⁴ (**Bodies and Communities, Persons in Mortmain**). — Family communities,⁵ which were the primitive

¹ Cf. Law of the 10th Vendém., year IV (responsibility of communes for crimes committed on their territory).

² *Bertrand*, "Dr. d'affouage," "Thèse," 1900; *Stobbe*, I, 446.

³ The wealthy bought for a very low price the share of the poor: *Taine*, "Révolution," III, 476; *Sagnac*, p. 151, 177 (analysis of the revolutionary law); "Code civ. interm.," Table, see "Communaux." As to the possessions of parishes and of communities, cf. *Merlet*, "Ass. de commun. d'habitants dans le comté de Dunois," 1880.

⁴ *Du Cange*, see "Corporatio": a term employed by the English jurists, cf. *Rastall*. The old French authors say "corps et communauté," "gens de mainmorte." According to a terminology which to-day is very widespread, they are called "universitates personarum" as contrasted with "universitates rerum" or foundations, from which it is not always easy to distinguish them: *Stobbe*, I, 384.

⁵ As to the origin and the various kinds of legal persons according to the German authors, cf. *Stobbe*, I, 404 (bibl.), 443; *Sohm*, "Deutsche Genossenschaft," 1889; *Heuser*, § 50 et seq.; *Gierke*, "D. Privatr.," § 58 et seq. According to the latter, there must have been known in the old Germanic law free associations ("Sippe," "Gaugenossenschaft," "Gemeinde," etc.), and groups composed of the lords (following, vassalage, etc.). But under the influence of the Roman law absolutism came to be introduced into public law and individualism into private law; there was a tendency to restrict the number of legal persons, to connect some of them with the State, and to do away with the others; the theory of "fictitious personality" must have arisen as a consequence of these tendencies. According to *Gierke*, who maintains that he relies on the old Germanic conception, the collective person, "Verbandsperson," is just as much a reality as the physical person, as the individual. He contrasts, in approximately these terms, the German "Genossenschaft" with the Roman "Universitas." In the latter, the individual disappears, being absorbed in the whole; the community is sacrificed to the unity; this absorption does not take place in the case of the Germanic corporation; it may be shown in the collective rights of its members; this plurality of rights which is developed at the expense of the rights of the individual makes the German corporation resemble a case of joint ownership ("communio"). But the German joint ownership, the "Gemeinschaft," owing to the principle of the "gesamnte Hand," which establishes therein a certain amount of unity, is similar to the "Körperschaft," so that the abyss which in the Roman law lies between the "communio" and the "universitas" is found to be filled up, in the Germanic law, with intermediate types. Without wishing to express an opinion as to the validity of this theory, and whether

type of civil persons, were formed spontaneously and to some extent organically, even under the system of the State; there was no question of the authorization or control of the latter. But the public authorities did not so readily leave untouched the formation of associations which were not of this character. They suppressed those which seemed to them suspicious; thus the Carolingians prohibited guilds. In this sense it is correct to say that no association could be formed without the consent — at least the implied consent — of the State. But this formula is not absolutely correct excepting in the new law; in the old times the greatest latitude was allowed, especially to religious communities;¹ they were scarcely liable to find any obstacle excepting on behalf of the Church. Rural communities were also very easily established, some existing perhaps from time immemorial, others more modern, having obtained the implied consent of the lord. No doubt this same latitude was allowed from the early part of the Middle Ages to associations for trade.² At that period these ecclesiastical

we should look upon it as the result of an incomplete analysis or a general summing up, we may say that it seems to be in accord with the current conceptions of the Middle Ages; the corporation is at one and the same time joint ownership and a legal person; those who are members enjoy for that reason personal advantages, for example by participating in the enjoyment of the common inheritance. In modern law Gierke distinguishes between three sorts of "Verbandspersonen" (legal persons), without counting the State ("fiscus"); (A) Corporations ("Körperschaften"); 1st. Communes: "Markgemeinde," "Gemeinde" at the present time ("allmends"), agricultural associations. 2d. Public "Genossenschaften," such as religious groups, trade bodies, etc., and private, such as the families of the higher nobility, associations of an economic nature, etc. (B) Establishments or foundations: 1st. "Anstalten" (public establishments). 2d. "Stiftungen" (private foundations). With the "Verbandsperson" he contrasts the "personenrechtliche Gemeinschaft," sometimes "zu gesammten Hand" (with united hands), for example, communities between brothers after the death of their father, "Ganerbschaften," and sometimes established by public authority.

¹ In the Middle Ages the word "Universitas" means a group, a collectivity of some kind, a commune, an association, a university. The Glossators do not seem to have a very concise idea of the legal personality, as their definition of the "Universitas" shows: "nihil aliud est nisi singuli homines qui ibi sunt," which was a hard thing to reconcile with the maxim: "quod universitatis est non est singulorum," or with that other one, "universi consentire non possunt." Cf. *Mestre*, p. 46 *et seq.* The Canonists were the first to give a current application of the term "persons" to collective groups: Innocent IV, in his "Apparatus" on the Decretals, 5, 52, 1, and 2, 14, 2. After them the Post-Glossators, and especially Bartolus, developed the theory of the legal personality.

² As to commercial partnerships, cf. *Saleilles*, "Hist. des sociétés en commandite," in the "Ann. de Dr. comm.," 1895. The Italians, Straccha, Scaccia, etc., recognized commercial partnerships as having a fictitious personality. Cf. on this point, discussions, Lyons and Caen, "Acad. sc. mor.," 1900, 471; *Négulesco*, "Thèse," 1900; *Avril*, p. 12; *Meynial*, "Sir.," 1892, I, 497; *Stobbe*, I, 389. The great commercial companies constituted true public establishments: see "Encycl."

or secular groups of people filled the part which has to-day devolved upon the State;¹ it is not surprising that the State in the course of developing the extent of its prerogatives should have included within them the sphere occupied by this group. Previous authorization, an administrative guardianship, under the monarchy, paved the way for the absorption of these bodies by the State and their conversion into the form of administrative organs.²

The system of freedom, under which people in mortmain became very numerous during the barbarian and feudal times, gave way in the monarchic period to a system which was very restrictive. Loysel, 400, sums it up in this rule: "One cannot assemble in order to create a body and a community without permission and letters of the king."³ The previous and express authorization of the State is the first requisite for the existence of legal per-

¹ This characteristic is shown us by *Bodin*, III, 7: "All bodies and guilds are instituted for religious purposes or for purposes of police" (and we know that "police," in a broad sense, is the same thing as administration). They are associations founded by individuals in view of the public interests; *Larivé*, "Des corps politiques," 1766, II, p. 12. According to *Domat*, "Dr. public," I, 15, 1, the body is established for a common benefit for those who are members, but also one *which is connected with the public welfare*. It is stated that these bodies render services to the State; this is so, for example with regard to the institutions of teaching, as the Universities, or of charity, as the alms-houses or "Maisons-Dieu," which at first were religious establishments and which had not yet entirely lost their ecclesiastical character in the eighteenth century (rights of the Bishops over the Universities, they are members by birth of the boards of the alms-houses, etc.). At the close of the Old Régime they are called public establishments. As to the king's rights with regard to the ecclesiastical institutions see, *Le Vayer*, "Autorité légit. des rois," p. 319 *et seq.* (political sovereign, protector, founder).

² Being given this characteristic, it is quite natural that there should have been, especially at the close of the Old Régime, establishments of the same nature created by the king, royal foundations (for example, the College of France, the Hospice of the Invalides, the Academies, etc.). On the trade bodies, cf. *Monin*, "Révol. Fr.," 1894, 327. On the order of barristers, cf. *Vasseur*, "Thèse," 1900.

³ This was the Roman rule: *Gaius*, Dig., 3, 5, 1; *Girard*, p. 234; Edict of Nov., 1629; Declaration of June 7, 1659; Edict of Dec., 1666 (*Le Vayer*, "Autor. légit. des rois," 1682, p. 279: no community can be established or build monasteries without the express permission of the king, for no bodies, communities or guilds may be formed without the consent of the political magistrate; every new establishment of monks is a novelty, according to the discipline of the Church, and it is one of the duties of its supporters to prevent innovations within the Church); and especially the Edict of Aug., 1749, Art. 1; *Arril*, p. 60 (citations), 72; *Blackstone*, I, 10. Associations which had not been authorized could be dissolved, that is to say their members could be compelled to separate; but they were tolerated if they appeared to be inoffensive: *Viollet*, p. 647. The members of these irregular communities were not looked upon any differently from ordinary individuals, they were not allowed to act in a collective name. — Furthermore, when the group had been in existence for a very long time, until the year 1749 the State did not require them to produce their title. It is thus perhaps that the toleration shown fraternities and freemasonry is to be accounted for: *Guyot*, see "Comédien"; Decree of June 14-17, 1791, Aug. 18, 1792.

sons.¹ Every association which had this authority "ipso facto" had a civil personality,² without a special grant being necessary; this personality was not a gift from the State, but a natural consequence of the existence of the association, and, if one may say so, its way of being and of living.³ The State could have

¹ As to this system of freedom, which dates from the time of the Lower Empire, *cf.* theses: *Plocque*, 1887; *Buretel de Chassey*, 1893, etc.; *Vauthier*, *op. cit.* — Power of receiving: *Gierke*, II, 903.

² The personality of bodies and communities has been accounted for by means of a fiction. This, in our opinion, is the Roman theory; it is to be found again in the writings of the Canonists, the Bartolists, the Civilians, the commercialists and of the School of Natural Law; it played an important part in the discussion on the secularizing of the possessions of the clergy in the Constituent Assembly. — The Germanists, Beseler and Gierke, have risen up in opposition to this traditional opinion; for them legal persons are not fictitious beings, but actual beings; in every association there exists a collective will, which is quite distinct from the individual wills and which is just as much a reality as that of an individual. Let us mention among other deductions which are drawn from these ideas, the following: (1) The law does not create legal persons, but merely recognizes them; the government cannot dissolve them by means of a mere provision of policy. (2) Once having been recognized in the country where they originated they can operate abroad. (3). When their dissolution takes place their possessions do not belong to the State as being goods without an owner, but form the object of a special succession which is related to the object for which they were destined (they can therefore once more be divided up among the members). These conclusions would not have been denied by the majority of our old authors, for they did not pretend that the law created legal persons "ex nihilo," but merely that they had to have the authorization of the law in order to operate, which amounts to the same thing as saying the State has a right to forbid them; now nobody denies that the State has this right. It is quite certain that the fiction of the personality does not account for everything; but fictions are not created with the object of accounting for things; they are formulæ devised by the jurists, and as it were a sort of convenient coinage which is in circulation in the law. A thing which proves in favor of this fiction is the fact that no one has succeeded in replacing it with anything else. If we should be asked, why treat an association or an establishment in the same way as a man, we would reply that this question comes rather within the sphere of politics or of political economy than within that of jurisprudence; the personification was at a certain period the best way in which certain physical needs could be satisfied. We therefore do not go so far as the Germanist system; but we recognize the new school as in two ways deserving of merit; in the first place, its liberal tendencies, and then also the bringing into prominence of an important fact, the free and spontaneous formation of legal persons in the Middle Ages. — According to others, for example, *Planiol*, "Dr. civil," I, 262, the personality (whether fictitious or real) is a myth; under the name of civil persons one should include masses of possessions, without any individual owner, devoted to some collective use; *cf.* *Brinz*, "Pand.," and his theory of the "Zweckvermögen." These ideas are foreign to the old law. One can say the same thing with regard to other theories, a very concise outline of which will be found in *Mestre*, *op. cit.* As to associations without any civil personality, *cf.* *Stobbe* § 61. [See now the elaborate and masterly critique of the history and theory in Saleilles' "La Personalité Juridique," 1909. — TRANSL.]

³ The idea of distinguishing the grant from the civil personality and the authorization to associate is a modern one. Mühlenthal (on the occasion of the Stadel trial) and Savigny (who incorrectly translates "corpus" as civil person, Dig., 3, 4, 1), have caused this idea to prevail in Germany; following

taken away the legal personality of an association, or, without going so far as this, could have restricted its capacity; but it was not customary to proceed in this way. The association was purely and simply suppressed.¹ It is thus that legal persons ordinarily die, by means of a withdrawal of authority; they can also disappear for lack of an object² when the end for which they have been established has ceased to exist,³ or when all the members of the partnership have died.⁴ But these hypotheses are obviously of an exceptional character; it is in the very nature of bodies and communities to last forever, and one of the greatest advantages which they offer is the very fact that they last far beyond the limits of human life, for their existence is independent of that of their actual members.

The constitution of the community is the result of custom or is contained in written regulations. During the monarchic period these regulations had to be presented to the Parliaments or to the other royal departments, with the object of obtaining their approval. It was for the magistrates to see that nothing had been slipped in which was contrary to "the laws, to public liberty and the interests of other people."⁵ The community acted through

them Zacharie introduced it into France. — One is justified in saying that this distinction was as it were prepared for by the provisions of the Edict of 1749, by virtue of which a community which was already in existence and which had been authorized needed a further authorization in order to acquire possessions in certain cases. But as a general thing, in the old French law as in the Roman law, merely owing to the fact that a corporation had a legal existence, it was invested with a civil personality; the authorization was not a granting of the personality.

¹ "Ord.," I, 510: the king forbade the "scolares et doctores" of the "studium" of Orléans to form a "Universitas"; they would be subject to the laws "tanquam singulares."

² Religious orders which disappeared for lack of an object, for example the ransoming of captives, the care of lepers, etc.

³ In 1620 the Abbey of Tournus became secularized with the consent of all its members in order to be changed into a collegiate church: *Juénin*, "Hist. de l'abb. de Tournus," 1733, cited by *Charmonl*, "Année sociolog.," 1900, p. 96 (causes of the extinction of corporate ownership).

⁴ Is the presence of a single member sufficient to maintain the association? Controversy. Cf. *Stobbe*, I, 436. Can all the members by agreeing to do so dissolve the body? *Ibid.*, *Gierke*, "D. Privatr.," § 70.

⁵ The principle of the peculiarity by virtue of which legal persons must keep within their legal powers, was devised by modern judicial law; it was unknown to the old law; thus charitable foundations were applied by literary establishments (the Montyon prize at the French Academy), manufactories received gifts and legacies for the poor or made in the interests of education, the revenues of the charity schools established for the benefit of poor children were administered by church wardens: *Jousse*, "Gouv. des fabriques," 283. But we must take into account the fact that education, charity and worship, were in former times within the scope of the objects of ecclesiastical establishments.

the organs which it gave itself.¹ For its ordinary management it had one or several agents, a "syndic," who was elected and whose powers varied. In contracting and in pleading he bound the community within the limits of his powers; his act was looked upon as the act of the community; it was at his domicile that writs against the community were served.² The general meeting of the members formed the higher power;³ majority decided,⁴ excepting in that which concerned the formation or the dissolution of the community. Ordinary members had individual rights; for example, that of taking part in the general meetings, or even, in case the community were dissolved, of taking a portion of the community assets ("jura singulorum").⁵

The estate of the community belonged to the body itself, and not to each one of its members, as would have been the case with a thing which was jointly possessed. That which was due to the body or by the body was not due to any one of its members, nor by one of them; they could be creditors or debtors of the community and plead against it just as though they had been strangers to it. Bodies and communities enjoyed privileges and were under various disabilities.⁶ They were treated like minors;

¹ Distinction between the organ and the representative: *Gierke*, "D. Privatr.," I, 472.

² Actions against bodies and communities: Ordinance of 1670, 21; Declaration of Oct. 2d, 1703 (permission of the manager).

³ *Odofredus* on l. 9, 1, and on l. 7, D., 4, 2, relates an important decision by Johannes Bassianus, with regard to a revolt of peasants against the Archbishop of Ravenna: should the "Universitas" be punished or the rebels "ut singuli"? Bassianus answered that a distinction was to be drawn according as each one had acted either on his own account or on the other hand collectively, under instructions, and sent out at the sound of the bell, with the council at their head; if this were so then the "Universitas" ought to be punished. This doctrine soon became classic.

⁴ *Gierke*, II, 480; III, 322, 393, etc. (the majority).

⁵ In such a case as this one wonders to whom the possessions reverted. The opinion which was generally accepted in former times, was that they belonged to the State as being goods without an owner: *Gierke*, III, 238. The modern theories are greatly opposed to one another: *Gierke*, "D. Privatr.," I, 565.

⁶ Could legal persons commit crimes, or be excommunicated? Cf. as to this Family joint and several responsibility. Innocent IV, in 1245, forbade the excommunication of a "Universitas" (c. 3, "in Sexto," 5, 11; in fact, the "Universitas" is but a fiction, it can neither wish nor act). This reason had not prevented the Church from placing nations and provinces under an interdict, any more than it had prevented the statutes and the civil laws from decreeing penalties against towns. Cf. on this question, *Bartolus*, on l. 16, § 10, D., 48, 19; *Gierke*, "D. Privatr.," I, 528; *Mestre*, *op. cit.*; *Pertile*, III, 271. The Post-Glossators admit the possibility of punishing communities. In 1331 the Parliament of Paris condemned the town of Toulouse to the loss of its right of being a body and a community, together with a confiscation of its inheritance, because of the case of a student, Aimery Bé-

they had a right to the same privileges; in return for this they were subjected to a very strict administrative guardianship, whose form varied, but whose principle was always the same, beginning in this way to be connected with the State.¹ They could not alienate their immovables excepting by virtue of a decree of a judge,² nor could they acquire money invested in an annuity, under penalty of confiscation, as a consequence of royal decrees during the monarchic period. Under the feudal system the lords compelled them to give up within a year the fiefs and copyholds which they had acquired;³ we have seen by what processes this prohibition was evaded and how there arose from this the theory of amortization.⁴ The celebrated Edict of August, 1749,⁵ made them incapable of receiving inheritances, rent-charges on specific lands, or rights in land. Their disability was absolute with respect to testamentary gifts. On the other hand, gifts "inter vivos," or acquisitions for a consideration, could be authorized for just and necessary causes, — that is to say, as an exception;⁶ they were only allowed freely to acquire mova-

renger, condemned to death by the Capitouls in violation of the privileges conferred upon members of the universities: Ordinance of 1670, 21, 1.

¹ For example, rescission of unfair contracts, turning over of actions dealing with land to the Public Ministry, prescription of forty years, etc.: *Pertile*, III, 272. These privileges have disappeared from modern law, which is disposed to lavish upon corporations disabilities rather than favors.

² Edict of Dec., 1606, Art. 15; *G. Forget*, "Personnes," "Choses ecclés.," 1611, p. 60.

³ The disability of acquisition of persons in mortmain is not owing to the fact that they are for the most part religious establishments; it exists in the same way for all "corpora mortua." If the first laws on amortizement were directed against religious communities, and if at all times anxiety has been displayed as to the accumulation of immovable possessions in their hands, this has been owing to their great prosperity; lay communities, on the other hand, have often found themselves in embarrassing circumstances.

⁴ Before the Edict of 1749, the lords, in their own interests, compelled the communities to give up within a year any inheritances which they might have acquired, but the king's attorney could do the same thing in the interests of the public, says *Pothier*, no. 216, because the possessions of communities were taken out of trade. Cf. on this *Lamoignon's* "Arr.," 16. In the States General of 1614 the Third Estate expressed the wish that persons in mortmain should not be able to acquire immovables: *Picot*, "Hist. des Et. gén.," III, 482. Cf. II, 246; *Mourmant*, "Thèse," 23.

⁵ *Tardif*, "R. de lég.," II, 492; *P. Bernard*, "R. h. Dr.," X, 37; *Mourmant*, "Thèse," 1900 (precedents for the Edict of 1749); other theses: *Coulondre*, 1886; *Pitois*, 1890; *A. Lot*, 1895; *Epinay*, 1896; *Garein*, "La Mainmorte 1749 à 1789," 1903, etc. — Other countries also have their legislation on possessions in mortmain: *Adami*, "Legg. s. l. manimorte," 1834; *Kahl*, "Deutsche Amortisationsgesetze," 1880; *Gierke*, "D. Privatr.," I, 516; *Pollock*, "Land Laws," 91; *Pollock and Maitland*, I, 314, 639.

⁶ Letters patent registered in Parliament and only granted after an investigation, for just and necessary cause: Civil Code, 910, 937. — Letters patent were not necessary for mere pious or charitable foundations, such

bles and rent-charges on the king or other communities. In this manner progress was made towards the Revolutionary legislation. The latter, which was frankly hostile to all corporate ownership, converted into national possessions the possessions of religious¹ or secular communities, such as those of the secular clergy.² At the same time, it changed into administrative services that which it left in existence of the organizations of the Old Régime; the change was hardly noticeable, because they had already been submitted to the administrative guardianship and were half incorporated in the State. In this way was ruined, after political feudalism, that which has been called "corporate feudalism";³ thus perished "the spirit of the corporation, which was so dangerous," says Condorcet, "but which was so natural at

as masses or obituaries, the sustenance of students or the poor, etc.; it was sufficient if they were ratified by Parliament.

¹ On the suppression of religious communities and the Decree of Feb. 13-19, 1790, *cf. Avril*, p. 134 (bibl. and discussion): the real idea of the Constituent Assembly was to reform the regular clergy rather than to destroy them; it proceeded in the same manner with regard to the secular clergy.

² The antipathy felt by the Revolution towards corporations is still shown in the Civil Code from the lack of a special title on legal persons. The more recent Codes, such as the German Code, do not show this hiatus. *Cf.* law on associations, of July 1, 1901.

³ There are no longer any classes or orders of corporations, but a gigantic administration which has inherited their privileges and which fulfills their functions. During the debate upon the question of the possessions of the Church, Thourret declared amidst the plaudits of the Constituent Assembly, that: "Bodies are but instruments created by the law in order that some public good may be derived therefrom; what does the workman do when his tool is not suited for the work for which he had intended it? He breaks it; he changes it." From a historical point of view there is nothing more inaccurate than this pretended creation of fictitious bodies. The spirit of the Revolution is very clearly shown in the Decree of Aug. 18, 1792, which abolished religious and lay corporations; even those devoted to the hospital service and to the relief of the sick. "Considering," says the preamble, "that a State which is truly free should not allow in its midst any corporation, not even those which, devoted to the public education, have deserved well at the hands of the fatherland." With these ideas as a basis, worship became a public service, the Church a special administration with its budget; the manufactories, seminaries and religious chapters re-established by the Concordat, are administrative persons; all other ecclesiastical establishments (especially the religious communities) were done away with by Article 11 of the "Articles organiques." Relief, the services of the almshouses, education also, have a tendency towards being changed into services of the State. *Cf.* the Constitution of year III, Art. 300. The Decree of August 8, 1793, had done away with the Academies and literary societies patented or endowed by the State. On the 15th of September, 1793, the Convention also did away with the Faculty of Law and other Faculties; although this decree was suspended the day following that on which it had been enacted, the Universities ceased to exist: *Liard*, "L'enseign. supér. en France," I, p. 217. The Law of 23 Mess., year II, united with the national property and debts the assets and liabilities of the charitable institutions. Details as to the carrying out of this scheme in *Avril*, "Thèse," p. 113 *et seq.* *Cf.* Italian Law of the 17th July, 1890, on "opere pie."

a time when everything was privileged.”¹ It is true that it only perished to be born again. Modern law did not feel the same distrust of it as did the Revolution.²

§ 590. **Foundations** “*Piæ Causæ*,” works of piety or of public utility (such as an almshouse, masses, etc.)³ for which are appropriated a group of properties (“*universitas rerum*”). Foundations are presented under two principal forms: sometimes it is a service imposed upon a legal person already in existence, as when a dying man disposes of his property for the benefit of a church or a monastery, charging them to pray for the repose of his soul; sometimes it is a gift for the benefit of an organization to be created; thus an individual establishes and endows a charity school by will. In the first case the foundation is effected through an intermediary;⁴ and it is natural that the intermediary chosen should be a legal person, — that is to say, a person who does not die, — for the foundation is in its very nature perpetual. In the second case the founder has himself been able to organize his work, and thus to allow it to continue after his death (or even during his lifetime);⁵ if he has not done so, the Church or the State can serve as intermediaries.⁶ The persons who carry out the wishes of the founder, or the managers provided for it,⁷

¹ “Rapport sur l’organ. de l’instr. publ.,” in the “Procès-verb. du Comité d’instr. publ. de l’Assemblée législ.,” published by *Guillaume*, p. 188. Moreover Condorcet did not claim that a monopoly of education should exist for the benefit of the State.

² Cf. as to Germany, *Gierke*, “D. Priv.,” I, 488. The modern English system: corporations are formed without any intervention on the part of the administration, upon condition of complying with a few very simple formalities, such as the registration of their by-laws.

³ German law: “*Stiftung*” (private foundation) and “*Anstalt*” (public establishment).

⁴ In this case the foundation is in the form of a charge; the ownership of the possessions is in the intermediary, but it is limited by the object for which these possessions are intended. Cf. foundations carried out by persons in being, for example the will of Nicole: *Denisart*, see “*fidéicommiss*”; *Lambert*, “*Stipul. pour autrui*.”

⁵ Examples in the past: will of the Countess Mahaut (“*Cartul. de l’hôp. Saint-Jean d’Arras*,” p. 27), of Giraud Aymeric at Marseilles, etc. More recently, the Staedel foundation at Frankfort (1828), the Bluntsehli foundation (competition in international law): *Savigny*, “*Stiftung*,” etc. German law places every facility at the disposal of the founders, whereas French legislation seems to undertake to discourage them; a *direct* foundation, by last will cannot be made under it. The old French law, on the other hand, held them to be lawful: *Furgole*, “*Test.*,” 6, 1, 37, and 84: validity of gifts for the foundation of a college, etc.; they contain the implied condition: “Provided the college, the almshouse, etc., be founded, and authorized.” The Edict of 1749 forbade the creating of foundations by last will.

⁶ Cf. under the Lower Empire rights of the Bishop, and even of ordinary individuals: C. J., 1, 2, 15; 1, 3, 38. See *ante*, Testamentary Executors.

⁷ *Domat*, “*Dr. publ.*,” I, 18, states that the founders of an almshouse

are not the owners of the possessions which have been appropriated for the foundation;¹ these possessions are destined for a certain purpose and cannot be used for anything else; if they belong to anyone,² it is said, in the earlier instances, that they belong to the saint under the patronage of whom the organization is placed;³ it is upon his shrine that the founder places the charter containing the expression of his will. This mystical person acts by means of miracles and creates for himself rights upon the gratitude of the faithful; it is not astonishing that he should be looked upon as the owner. After the barbarian period and following the Roman renaissance we see rather a sort of moral entity, but as he was more abstract than that of bodies and communities,⁴ our old authors scarcely mention foundations among legal persons; however, their properties were true estates in mortmain. When they came to an end, — which rarely happened, because foundations are ordinarily perpetual, — the lands were freed, but remained in the hands of the organization which already possessed them, or, if this were not so, passed to the State as possessions without an owner.⁵

Foundations were not unknown in heathen antiquity;⁶ thus

could establish within it an administration which suited themselves; this is no longer possible to-day, an administrative commission being appointed in conformity with the law and bound to follow the rules laid down by the law in their management.

¹ Nor do these possessions belong to the beneficiaries (which is obvious in a case where they are animals, such as the bears of Berne). Cf., however, *G. de Lapradelle*, p. 418. The texts are not very definite; thus it is not a rare thing for legacies to be left to the poor. Thomas de Vio looked upon the "universitas pauperum" as the legal object of the "Mont-de-Piété."

² The ownership was given to the king or the lord who was the protector of the establishment, church or almshouse. See a criticism of this opinion (which is the one held by Ficker) in *Heusler*, § 64 *et seq.*; *Senn*, "Avoueries ecclés.," 1903.

³ This idea is once more found in very old times: *Cicero*, "in Cæcil.," 17: "se et omnia sua Veneris esse."

⁴ Since the time of Savigny and those who followed him, a distinction is drawn between two classes of legal persons, associations or "universitates personarum" and foundations or "universitates rerum." Cf. theory of *Brinz*, "Pandekt.," § 61, according to which there are no legal persons, but inheritances created in view of a certain object ("Zweckvermögen"). Was the duality of legal persons admitted by our old authors? It is certain that the Edict of 1749 contrasts foundations with bodies and communities. Cf. *G. de Lapradelle*, pp. 406, 412 *et seq.* *Domat*, "Dr. publ.," I, 18, considers a hospital a sort of community; *Pothier*, "Don. entre vifs," I, 4.

⁵ Is the State held bound to use the property of the foundation for some similar purpose? No, if it takes it as being goods without an owner; yes, if one consider the State as the ultimate grantee of this property in the intent of the founder: *Gierke*, "D. Privatr.," I, 659.

⁶ *Beauchet*, "Hist. du dr. privé Athén.," III, 706. Foundations by *Pliny*, "Ep.," VII, 18; by *Trajan*, *Pernice*, "Labeo," III, 150. On the law of the

Theophrastus appropriates his gardens for a school of philosophy, and Pliny the younger creates foundations for sustenance at Como, his native place. But they increased so greatly under the influence of Christianity, became so extensive and took on so characteristic a physiognomy, that it is not incorrect to look upon them as a Christian institution. Under the Lower Empire and during the first part of our old law their development was favored through a system of freedom.¹ The Church encouraged them; people were often satisfied with its implied approval. At the same time, the classical canon law demanded the authorization of the bishop for their validity.² If for a long time they depended upon ecclesiastical authority, the civil powers tended more and more to place their hands upon them.³ The same evolution took place: from the old system of implied approval they passed in 1749 to that of an expressed authorization. It is the charter that establishes the foundation and that organizes its administration for the future; if this were lacking, formerly the Church intervened, and later on the State. The State also intervened in the matter of the control and supervision of foundations, whereas the Church alone had been charged with this care in the past.⁴ The

Lower Empire, C. J., 1, 2, and 1, 3; "Novella," VII, 120, 123, 131. Gifts for the benefit of the poor were also declared to be valid during this period.

¹ During the Frankish period foundations were frequent. Sometimes the founder makes a gift to the Virgin or to a saint (*Thévenin*, "Textes," p. 254; Italy, "patrimonium Crucifixi," *Pertile*, III, 268; England, *Pollock and Mailland*, I, 481; cf. ancient Customs, *Guiraud*, "Prop. en Grèce," p. 238), and sometimes he makes a gift for the benefit of an abbey, or a church (*Par-dessus*, "Dipl." I, 81, 138, etc.; *Loening*, "Deutsch. Kirchenr.," I, 250; II, 37 et seq.; *Gierke*, II, 962; III, 198 et seq.). The monastery of Lorsch was founded by Count Cancor and his mother, and delivered by them to the Bishop of Metz, whom they charged to deliver it to another person whom he should choose. The Capitularies seem to recognize the independence of foundations of almshouses ("xenodochia"): "Capit.," I, 189, 194, 200, etc. *G. de Lapradelle*, p. 41, maintains, on the other hand, that they all belong to some one, a church, a monastery or the king: *Windscheid*, "Pand.," 57. At the beginning of the feudal period their independent existence is the result of gifts made for their benefit ("hospitali lego," etc): *Richard*, "Cartul. de l'hôp. Saint-Jean d'Arras," 1888, p. xxvii.

² Dig. X, 3, 36, 4; *Tiraqueau*, "De privil. pie causa," 5, 4. In the same way in order to create a monastery it is necessary to have the authority of the pope and of the bishop, besides letters patent from the king registered in Parliament.

³ Edict of 1543 conferring upon the royal judges the surveillance over foundations having a charitable object (it had been complained that the regular clergy which had the administration of them were making use of their revenues for their own benefit). (cf. Edicts of 1629, 1639, 1659, 1666 and 1749. In England, from the sixteenth century on, the king, who is the visitant of all foundations, has them inspected by commissioners of charity.)

⁴ Its rôle also became more important in charitable matters. One sees an example of this in the development of the part played by the bureaux of charity. They were formed under the Revolution to distribute to the poor,

Church often took these responsibilities easily, paying little heed to the intentions of the founders;¹ this was a good pretext for royal authority, which was always eager to extend itself, and it looked into and ratified the titles of the foundations, the result being a very restrictive legislation,² almost entirely summed up in the Edict of 1749, Arts. 2 and 5.³ The Revolutionary legislation did not show itself any more favorable to foundations than it had to corporations. The Law of May 6, 1791, Art. 25, abolished them entirely, taking as its basis the ideas advanced by Turgot in his article in the *Encyclopedia*: "If every man who has lived had a tomb for himself, and there remained no more land to be cultivated, it would indeed be necessary to destroy these useless monuments and scatter the ashes of the dead. Thus there comes a time when a foundation can no longer keep its character; otherwise, lands would no longer belong to the living, but to the dead."⁴

funds accruing from a tax upon public entertainments (poor tax): Law of 7 Frim., year V. The Order of 27 Prair., year IX, gave them the property which had been devoted to charitable foundations. It is perhaps using this as a basis that the charity bureaus have been made the necessary representatives of the poor, the only ones which are qualified to receive and manage gifts made to the poor.

¹ Appeals against the abuse of power, protests of the juriconsults: *Chopin*, "De sacra politia," I, 4, 20; *Féret*, "Abus," I, p. 206, ed. 1736. By the Edict of Jan., 1780, the State made itself the cashier of Establishments in mortmain; they must pay over to it all sums arising from the sale of immovables or from gifts yielding interest at the rate of 5 per cent. This law illustrates the fact that there might be occasion to sell the real estate of the almshouses. "When the guardian contemplates converting the inheritance of his wards into personal property, he is quite ready to appropriate it for himself at the first opportunity."

² In former times, on the other hand, the "causa pia" enjoyed numerous favors in the same way as the Church, the Treasurer and minors did (allowed to dispense with the forms required for wills, an implied mortgage over the possessions of the administrators, preferred liens on those of its debtors, etc.); Dig. X, 3, 26, 10. Tiraqueau tells us of no less than 167 preferred liens for its benefit: *Stobbe*, I, 517; *Gierke*, III, 760.

³ Edict of Aug., 1749, Art. 5: ratification of the deeds granting foundations by the Parliaments, whereas the establishment of bodies and communities could only take place by virtue of letters patent of the king; Art. 2: prohibition of testamentary foundations with the object of creating bodies and communities or for the benefit of persons charged with their creation. Cf. Spanish Placards in Flanders: *Patou*, on "Lille," I, 200; *Ferrière*, on "Paris," 13, 2, 56.

⁴ The Decree of Nov. 4, 1789, which placed all the possessions of the Church at the disposal of the nation, did not take into account foundations. Cf. Decree of Nov. 18, 1789; of Oct. 23, 1790; of May 6, 1791; the Decrees of 23 Mess., year II, and 13 Brum., year II, added the possessions of the almshouses and foundations to those already belonging to the nation. The Decree of 16 Vent., year III (Feb. 21, 1795), Art. 9, held that "no perpetual gift or gift for life can be made." — Afterwards there was a reaction; thus the Law of 9 Fruct., year III, suspended the sale of possessions of the almshouses; the Law of 28 Germ., year IV, and 16 Vend., year V, restored their possessions to the civic almshouses, etc.; Concordat, Art. 15, etc. These provisions inaugurated the new law.

The liberal tendencies of the English legislation are in contrast with this restrictive law; since the reign of Elizabeth foundations can be established with the greatest facility, and they have increased to such a point as often to relieve the State of its duty of education; thus the great universities and their colleges are kept up with the income of private foundations; the Catholic Church has no other income.¹

¹ The new German Civil Code, II, 2, sanctions the principle of the freedom of foundations, but the State must authorize their operation. *Cf.* the Swiss Federal Code of Obligations, Art. 716.

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MAP OF
CUSTOMARY LAW
— IN —
OLD FRANCE

EXPLANATION

- Langue d'oïl (Germanic)*
- Langue d'oc (Romanic)*
- Boundary of the jurisdiction of a Parliament (Supreme Court)*
- Boundary of a provincial or regional Custom*
- *Towns where Parliaments were held*



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